

Jon B. Gould
George Mason University

Playing with Fire: The Civil Liberties Implications of September 11th

The aftermath of September 11th has seen a worrisome rise in invasive surveillance measures. Both adopted by statute and initiated by agencies, these provisions provide unprecedented powers for government agents to investigate suspects and search individuals, whether they are directly involved in terrorism or not. The prevailing wisdom has been that the American people will accept these restrictions as the natural cost of heightened security, and initial evidence suggests the public has been willing to tolerate greater limits on civil liberties. However, over time such support will erode, leaving in place permanent restrictions on civil liberties that not only will concern Americans, but also may turn them against government officials and civic participation. Thus, contrary to many interpretations of September 11th, this article argues that the policy response has only sown the seeds for greater detachment from and dissatisfaction with government as the public becomes increasingly separated from the workings and operations of public policy.

The Legislative Response

The horrors of September 11th have been covered extensively by the popular media, both by same-day reporting of the attacks and lengthier analyses of the long-term effects on victims' families. In response to the terrorist threat—one that, interestingly, was interpreted as rising after the initial attacks¹—Congress passed and President Bush signed the USA PATRIOT Act. Described by Attorney General John Ashcroft as a “package of ‘tools’ urgently needed to combat terrorism” (McGee 2001), the legislation raises domestic intelligence gathering to an unprecedented level. Among its several provisions, the act stipulates that:

- The standards for wiretapping may be lowered. Whereas previously, the FBI could obtain a court order only if its “primary purpose” was to gather intelligence through wiretapping, the new law permits wiretaps if “a significant purpose” involves intelligence gathering. As a result, people merely suspected of working with terrorists or spies may be wiretapped.
- The FBI may share sensitive grand jury and wiretap information with intelligence agencies without judicial review or any safeguards limiting its future use, so long as the information concerns foreign intelligence or international terrorism.

- Law enforcement may access an individual’s internet communications if officials can certify to a court that the information is relevant to an ongoing criminal investigation. This standard is much lower than the showing of probable cause required for most search warrants.
- Financial institutions will be required to closely monitor daily financial transactions and share information with government intelligence services. The law also allows law enforcement agencies secret access to an individual’s credit report without judicial review.
- A new crime of domestic terrorism is created, covering conduct that “involves acts dangerous to human life.” Presumably, members of Operation Rescue or Greenpeace would be covered under this definition, permitting the FBI to wiretap the homes of individuals who provide lodging or other assistance to activists.
- Non-citizens facing deportation may be held indefinitely on the attorney general’s certification that an individual endangers national security.

Jon B. Gould is an assistant professor of public and international affairs and a visiting assistant professor of law at George Mason University, where he is the assistant director of the Administration of Justice Program. Professor Gould has written on the First Amendment, hate speech, racial and sexual discrimination, the Fourth Amendment, and justice administration. Email: jbgould@gmu.edu.

Even before this act was adopted, the federal government had stepped up security and surveillance, detaining roughly 1,200 people in the weeks following September 11th, proposing military tribunals for captured insurgents, and interviewing nearly 5,000 visa holders. On the home front, security was increased at public buildings and gatherings and, of course, at airports. Most of the public is now aware that a trip through airport security may involve some manner of disrobing.

Balancing Civil Liberties

The first response to these heightened measures has been largely supportive. As Chief Justice William Rehnquist suggests in his book *All the Laws but One: Civil Liberties in Wartime*, national emergencies shift the balance between freedom and order toward order—"in favor of the government's ability to deal with the conditions that threaten the national well-being" (1998, 222). Initial public polling bears out that view. In February 2002, 62 percent of respondents in a Greenberg poll agreed that "Americans will have to accept new restrictions on their civil liberties if we are to win the war on terrorism." During the same period, only 12 percent of respondents in a *Newsweek* poll feared the Bush administration's response to terrorism was "going too far in restricting civil liberties," a finding virtually unchanged from a similar poll conducted in November 2001. When asked about specific strategies to root out terrorists, 78 percent of respondents in a September 2001 NBC/*Wall Street Journal* poll said they would be willing to accept surveillance of internet communications, and 63 percent of participants in a similar Harris Poll said they would favor expanded camera surveillance on streets and in public places.

To read these responses as offering the federal government carte blanche to search and pry, however, misreads the public's calculus of civil liberties. At the same time respondents are expressing support for expanded surveillance measures, they also have reservations about the potential creep of government snooping. When asked whether they believed the "U.S. government might go too far in restricting civil liberties," 62 percent of respondents in a March 2002 *Time/CNN* poll expressed concerns, a result that is in line with the 58 percent of respondents who, in a November 2001 *Investor's Daily* poll, said they were concerned about sacrificing "certain civil liberties in light of recently passed anti-terrorism laws."

Still, the issue runs deeper than these potentially conflicting results. Historically, the American public has expressed generic support for civil liberties principles while at the same time backing restrictions against a clearly identified or understood "other"—particularly a group that is reviled. As Chong explains, the public views civil liberties

by balancing on one hand "considerations of [legal] principles and rights" and on the other hand "considerations about the people or groups that are involved in the issue, including considerations about how the issue might affect oneself" (Chong 1993, 870; McClosky and Brill 1983). For this reason, vast majorities in the Harris Poll can simultaneously name individual freedom as "a major contributor to making America great," while at the same time recommending the Ku Klux Klan be placed under electronic surveillance. Respondents balance their attachment to civil liberties against the risk of—or their animosity toward—an "out group."

A similar point is true in the area of criminal procedure, where Americans seem willing to countenance surveillance and searches so long as police activity is directed against individuals presumed to be criminals. Over 80 percent of Americans support the "frisking" of individuals who appear "suspicious," and large majorities would allow police officers to search a car for drugs or stolen goods following a stop (Lock 1999). Perhaps the public is balancing the perceived intrusion of the search against the likelihood of uncovering criminal activity, but the more likely answer is that Americans are willing to accept restrictions that do not "directly affect them or the groups to which they belong" (Chong 1993, 887). This is the classic example of the respondent who does not care what the police do to suspected drug dealers—because he is not one—but who opposes home searches because he might have something embarrassing that would be found (*ibid.*).

There is much in the survey data to support this notion. Americans largely accept dogs sniffing their luggage, but they are resistant to police rummaging through their garbage (Lock 1999). Similarly, they oppose warrantless searches of homes (although there are legal grounds to do so), as well as the government's opening of mail (McClosky and Brill 1983). The common denominator is heightened concern when the search or surveillance hits close to home—that is, when individuals fear they may actually be the target of law enforcement. Among other things, this dynamic explains the curious results found in both Canada and the United Kingdom, where elites, who generally are seen as the "carriers of the democratic creed," were much more supportive than the general public of electronic wiretapping (Fletcher 1989, 227; Sullivan and Barnum 1987). Although researchers speculated that the elites' support may be premised on their understanding of the legal safeguards built into wiretapping (Fletcher 1989), the better explanation is that elites, because they have greater social power, need not fear the exercise of government power. By contrast, the general public worries that elites will authorize the surveillance of *them* (Sullivan and Barnum 1987).

Closer to home, recent surveys identify concerns about the very kinds of surveillance now permitted by Congress.

A month before September 11th, over 80 percent of respondents in a Harris Poll said it was extremely important that no one be allowed to watch or listen to them without their permission. Their responses echo previous surveys of internet users, who, by large margins, want to control the information that is collected about them. Although the questions were asked in the context of commercial tracking, the answers paint a consumer—and citizen—base that value its privacy.

Of course, at a time of national emergency, Americans are likely to give government officials increased leeway in surveillance, but in some sense that is the point: Americans' attachment to civil liberties is a balancing test that, if mishandled operationally or politically by government officials, will only backfire. In this respect, I believe there are six factors that help to explain when the public will countenance restrictions—even against themselves—to uncover those individuals who pose a threat. None of these factors is either mutually exclusive or a sufficient condition, but together they provide a checklist of concerns that public administrators ought to consider carefully.

1. When the search or surveillance is not intrusive or the least restrictive method possible.

For several years now, airline personnel have asked travelers whether they packed their bags themselves. Presumably this is a personal question, but it is accepted largely because the method is not intrusive. Were the Federal Aviation Administration to order so, a ticket agent could satisfy himself of the answer by prying open a passenger's suitcase and checking the contents against the passenger's memory, but, quite understandably, government officials recognize both the flying public and the airlines are much more likely to accept a simple question. So, too, courthouses and other public buildings use metal detectors to scan for weapons rather than strip searching each individual who enters. Although there are individuals who approach such machines with dread (consider the example of Congressman Dingell, whose artificial hip set off a detector), most of us tolerate the detectors because we recognize they are the least invasive method available to check for weapons.

2. When the perceived threat is great.

There is a long history in this country of restrictions on liberty during times of war or national emergency. Abraham Lincoln suspended habeas corpus during the Civil War; newspapers were censored during World War I; Japanese Americans were sent to concentration camps during World War II; and the CIA opened mail destined for the USSR during the Cold War. When a national emergency exists, the public is likely to "rally 'round the flag" to support the country or the president and accept such

restrictions (Bowen 1989). To reach this point, though, the public must come to see current events as constituting an emergency, a process that relies heavily on news coverage—and with it, the ability of public officials to frame issues as involving national security and not other concerns (Nelson, Clawson, and Oxley 1997). In the post-World War II era, rally effects can be short lived, averaging just under a year (Parker 1995).

3. When those responsible for the search or surveillance are seen as competent.

Interestingly, Attorney General John Ashcroft did not support some of the same measures that are now in the USA PATRIOT Act when he served in the U.S. Senate, in part because he did not trust the Clinton administration to exercise the new powers properly.² Similarly, in reforming airport security, Congress and the Department of Transportation worried whether airline passengers would accept heightened security measures if those provisions continued to fall under the control of private, low-cost bidders, some of whom employ minimum-wage employees. In addition to providing better oversight, the federalization of airport security was considered necessary to reassure the flying public that screening is being handled competently.

4. When the method employed is considered effective.

People accept metal detectors at courthouses, not only because the intrusion is relatively minor, but also because they believe the systems are capable of identifying—and then stopping—armed individuals set on harm. We will remain content with such measures until the first suspect brings a plastic explosive into court and detonates himself, at which point there undoubtedly will be calls for more sensitive screening to catch explosive materials. At the same time, the public will reject heightened security if its effectiveness does not overcome the level of intrusiveness involved. For example, drivers may tolerate random sobriety checkpoints so long as drunk drivers do not shift their travels to unchecked roads. To accept stops, searches, or surveillance, the public seeks assurance that the invasive methods will be effective.

5. When limiting the search or surveillance to more relevant suspects might smack of illegal discrimination.

Given the demographics of the September 11th hijackers, some might call for intensive screening of young, Middle Eastern men who seek to board an aircraft. Certainly, past experience suggests this profile is more likely to yield a terrorist than, say, an 88-year-old white grandmother from Iowa. But while some criticize current measures that randomly—

and thus, equally—search airline passengers at the gate, even more worry that targeted searches would inevitably lead to ethnic or racial profiling. Indeed, one of the surprising findings following September 11th was that 68 percent of respondents in a *Newsweek* poll said it would be a mistake to “put Arabs and Arab-Americans in this country under special surveillance.”

6. When individuals are unaware that the search or surveillance is taking place.

When is a search not intrusive? Potentially when the target is unaware of it. Of course, this is a bit tongue-in-cheek, for liberties are never more at risk than when government agents can intrude without any outside check on their activities. But the public cannot object to surveillance about which it is unaware. This is what makes post-September 11th security so interesting, for the public may object to intrusive searches of which it is aware, but even greater surveillance may take place outside of its purview. On one hand, the USA PATRIOT Act has given the FBI and the intelligence community greater latitude to conduct surveillance without the public’s knowledge—searches that, even if more intrusive, will likely persist without objection unless agents trip up and their activities are exposed. On the other hand, the public has begun to experience stepped-up security when entering public buildings, traveling by air, or attending notable public events. Such increasingly intrusive searches are probably the closest that members of the general public have come to the types of intrusions or surveillance that they have approved (at least tacitly) in other areas of American life, particularly in the criminal justice arena. As “average citizens” begin to taste the invasiveness of pat-down searches, of airport screeners with dirty plastic gloves “unzipping toiletries bag [and] picking through shoes and dirty laundry” (Hilkevitch 2002), of the newly proposed low-level x-ray scan of passengers (Branom 2002), they may very well rebel against the application of heightened security to “innocent individuals”—presumably themselves.

The Aftermath of September 11th—An Increasingly Civil Libertarian Public

The challenge for government officials in the wake of September 11th is that the public will become less supportive of extreme security measures as the perception of a terrorist threat drops. Unless the war in Afghanistan is expanded, or until another terrorist attack is leveled on U.S. soil, the immediate memories of September 11th’s horrors will fade, to be replaced by an increasing sense of normalcy. News coverage will shift from a frame of warfare to geopolitics, and, in turn, Americans will rebalance the calculus between heightened surveillance and their own

civil liberties. To the extent that major airports continue to grind to a halt from false alarms,³ the flying public—and the rest of the American public who learn about such mistakes from the media—will begin to doubt the competence of federal agents whose new responsibilities extend to airport security. With these doubts will come an unwillingness to submit to heightened security.

Most important, enterprising reporters undoubtedly will uncover cases in which surveillance measures intended for would-be terrorists extend outward and inadvertently ensnare an innocent, sympathetic individual. Maybe it will be the young mother whose credit dries up after her bank mistakenly turns her name over to intelligence authorities for unusual account activity; perhaps it will be the grandmother, whose interest in Islamic history leads federal agents to track her internet usage; or maybe it will be the young father on a green card who faces wiretapping, indefinite detention, and eventual deportation because he attended a meeting to plan protests against the International Monetary Fund. There assuredly will be mistakes in the application of new surveillance powers—there almost always are—and the media will be ready to cover the stories. To the extent that the immediate threat of terrorism has begun to recede, these stories will touch an American people tiring of added restrictions on their behavior.

This is not to say that September 11th will turn this country into a land of civil libertarians: Ultimately, Americans are willing to accept restrictions on “others,” particularly if the targets are considered threatening. Nonetheless, as government surveillance moves out of the criminal justice arena and Americans begin to see that they, too, may be targeted or searched, we may well experience a renewed debate about the power of government and the wisdom of narrowing civil liberties protection in the name of generic security. In essence, government may actually have created its own backlash in its heightened response to September 11th.⁴

Widening the Distance between Citizens and Government

That the USA PATRIOT Act may have raised civil libertarian sentiments is only one part of the equation. The stepped-up security following September 11th has widened the distance between citizen and government, potentially dampening citizen participation in government and with it reducing citizens’ trust in public institutions and officials. The dynamic here is analogous to the creation of social capital. According to Paxton (1999), social capital is created when individuals share intensive associations and high levels of trust. Given a confluence between interpersonal connections and goodwill, the social capacity for action is increased, in turn facilitating the production of social good.

The same is true for political capital. When citizens feel connected to their government or government officials, when they trust these institutions or leaders, citizens are more likely to participate in the governing function, and officials are allowed greater latitude and goodwill to take decisive action to address social problems. By the same token, when citizens feel disconnected from their government, they are far less likely to participate in any type of political activity—including voting—and diminished trust, in turn, strikes a blow at the underlying legitimacy of government institutions and public officials (Lipset and Schneider 1987).

To be sure, the immediate effects of September 11th were to “rally ‘round the flag” and the U.S. government. In the first six months following the attack, Americans reflected overwhelming support for national leaders and government policy, a level not seen in more than 30 years (Moore 2002). But it is worth asking whether such approval reflects support for government in general or for the war on terrorism, particularly since pollsters have not always used the correct question design to estimate the public’s trust in government (*ibid.*).⁵

Apart from these issues of measurement, though, there is a larger concern lurking, for the very security measures installed following the September 11th attacks present the grave risk of further separating Americans from government. Whether the barriers are concrete or merely symbolic, government sends an important message to citizens about their role in democratic self-rule when many of the institutions of government are closed to public access, when individuals must undergo intensive screening to enter public facilities or to interact personally with government officials. The message—that the public should be content to delegate government functions to those inside—is only intensified when ever-increasing security measures limit the number of people who have “passed” and thus are privileged to participate in certain government functions while leaving others to sit outside policy deliberations because they are not deemed sufficiently “secure.”

Americans may tolerate these distinctions for a while, seeing them as a necessary price to ensure the continued, safe working of American institutions of government. But ultimately, government, and indeed democratic citizenry, accepts a steep risk in accentuating the differences between those on the inside who run government and those on the outside who are subject to it. For years, scholars have noted that political participation turns partly on an individual’s belief that his voice can be heard (Verba and Nie 1987). Indeed, trust in government depends on the citizenry’s view that public institutions and government officials are accountable and attentive (Weatherford 1992). Yet, when the public is urged to remain silently supportive of an antiterrorism campaign that may extend indefinitely, when citi-

zens are told they will be ministered to, not participate in the ministering of government, when resources are redirected to defense and surveillance and away from direct government services, those on the outside of government may ultimately extend less goodwill to public officials as they feel increasingly more distanced from government’s operations.

This change is not likely in the midst of an immediate military campaign, for public institutions and leaders are viewed more positively in times of crisis. But as time passes and war passions wane and as government returns to its more traditional functions, it will face a citizenry that not only retains reservoirs of doubt about government—in particular, the federal government—but also it has added fuel to the fire by adopting security measures that further distance the public. Having enjoyed popular support during a time of national emergency, public officials may face a sinkhole that few would have predicted from the attack, a public that ultimately will be less supportive of government functions from which it has been kept at arms length.

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Notes

1. Presumably the threat was there all along, just inadequately detected. In times of emergency, the presumption seems to be that further attacks must be coming, if only because we could not predict the ones that just hit.
2. In a 1997 op-ed in the *Washington Times*, Ashcroft said, "The Clinton administration's paranoid and prurient interest in [monitoring] international e-mail is a wholly unhealthy precedent especially given this administration's track record on FBI files and IRS snooping. Every medium by which people communicate can be subject to exploitation by those with illegal or immoral intentions. Nevertheless, this is no reason to hand Big Brother the keys to unlock our e-mail diaries, open our ATM records or translate our international communications" (A15).
3. The FAA reported that, between February 17 and March 11, 2002, 22 airport terminals had been evacuated nationwide because of "security breaches" (AP 2002). In many of these cases, agents either failed to screen *any* passengers or were unable to stop an individual whom the x-ray detectors had identified as suspicious.
4. For this reason, Congress may have limited the USA PATRIOT Act to 2005 unless reauthorized. Any backlash, however, would likely start before then.
5. Examining an ABC News poll from January of this year. 69 percent of respondents said they trusted the federal government to handle issues of national security and terrorism at least "most of the time." By contrast, only 39 percent of respondents trusted the federal government to handle social issues. The latter numbers are similar to responses from a 2000 National Public Radio poll testing generic trust in government. Then, 5 percent of respondents "just about always" trusted the "federal government to do what is right," with 24 percent saying they agreed "most of the time."

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