

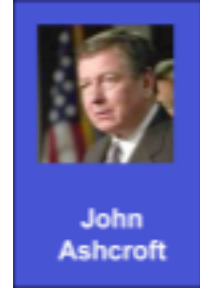
The Patriot Act and the Mayberry Machiavellis

By
Richard J. Poje

The Patriot Act has been described as an "insult to Americans." It's been compared to Hitler's *Ermächtigungsgesetz* ("Enabling Act")¹. The Patriot Act "parallels McCarthyism" according



to an ACLU spokesman: it "utterly relinquishes any semblance of due process, violates the first, fourth, fifth, sixth, and ninth amendments...this law is dangerous. It's a travesty." Even librarians are upset with the Patriot Act, arguing its "Sneak and Peek" provisions violate constitutional guarantees of privacy and create more work for librarians.



It's important to note that George W. Bush and John Ashcroft were not the only national leaders who attempted the defenestration of the Bill of Rights. Nor will they be the first to suffer the wrath (or the praise) of the electorate for having done so. From John Adams to Bill Clinton, from the 1st Congress to the 107th, our Federal government had paid homage to the Constitution while searching for ways to subvert it, especially in times of hot and cold war. Some administrations were good at it, others not so good.

To put the current administration in perspective, and keep the Patriot Act from becoming George W. Bush's *Ermächtigungsgesetz*, we need to examine how past generations' committed constitutional mischief, how Americans reacted and how they acted to set the ship of state back on the course our founding fathers had envisioned in crafting the Constitution.



In 1798, John Adams and his Federalist pals passed the "Alien and Sedition Acts" intended to keep America free from "alien interests" and quell political opposition from the Democratic-Republicans, led by Thomas Jefferson². The Sedition Act declared that treasonable activity, including the publication of "any false, scandalous and malicious writing" was a misdemeanor, punishable by fine and imprisonment. As a result of this legislation twenty-five men, most of them editors of Republican newspapers, were arrested and their newspapers forced to shut down. The election of Jefferson triggered repeal of those acts, denied John Adams his second term as President, and neutered the Federalist

Party as a national force.

During his second term, Andrew Jackson vetoed the recharter of the Bank of the United States on constitutional grounds, resulting in the financial panic of 1837. The electorate gave Old Hickory an enormous victory in 1832 (plus Van Buren's victory in 1836); they were rewarded with worthless bank deposits, bankruptcies, and seizures of property between 1837-1840. Payback occurred in 1841 when the Whigs led by William H. Harrison took the Presidency, Vice Presidency and both Houses of the Congress.



When the War Between the States commenced, Abraham Lincoln suspended the right of Habeas Corpus (a constitutional guarantee against illegal imprisonment). In 1861, Lincoln

had suspended civil law in territories where resistance to the North's military power could be a problem. In 1862, when "copperhead democrats" ("peace democrats") began criticizing Lincoln's violation of the Constitution, the President suspended Habeas Corpus throughout the nation and had democrats arrested under military authority because he felt that the state courts in the north would not convict war protesters. He proclaimed that all persons who discouraged enlistments or engaged in "disloyal practices" would come under martial law.



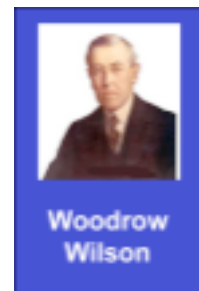
Among the 13,000 people arrested was a Maryland secessionist, John Merryman. Immediately, Roger Taney, Chief Justice of the Supreme Court, issued a writ of Habeas Corpus commanding the military bring Merryman to him. The military refused to follow the writ. Justice Taney in *ex-parte Merryman* ruled the suspension of Habeas Corpus was unconstitutional because the writ "cannot be suspended without an act of congress." Lincoln and the military ignored Taney; but a year after Appomattox, in 1866, the Supreme Court officially restored Habeas Corpus in *ex-parte Milligan*, ruling the military trials in areas where the civil courts were capable of functioning were illegal.

In the 20th century, Woodrow Wilson, FDR, Harry Truman, Bill Clinton, not to mention Richard Nixon and a gaggle of legislators, took their shots at the Bill of Rights.

In 1917, Congress passed the "Alien and Sedition Act" wherein males older than 14 who were still "natives, citizens, denizens or subjects" of the German Empire became "alien enemies."³ In 1918, females were included. "Alien enemies" were a high priority item on President Wilson's agenda; he issued twelve regulations for their treatment. "Alien enemies" were prohibited from owning firearms, aircraft, or wireless apparatus; they could not publish an attack upon any branch of the government.

Fear of "alien enemies" led to the "Palmer raids" named for Wilson's Attorney General ⁴. 5,000 residents were arrested without warrants during 1918-1920. Many were deported, especially people who had immigrated from the Soviet Union or other eastern European countries. When deportees called on the courts to protect them, The Supreme Court failed to uphold the rights of the *American citizens* arrested in the raids. Chief Justice Oliver Wendell Holmes Jr. justified the repression in a famous decision in which he stated that when the exercise of free speech constituted a "clear and present danger" to America — "danger" as defined by only the government — the authorities could legitimately suspend the First Amendment.

The Palmer raids continued into 1920. As anti-war scientists and protesters, union members, and socialist leaders continued to be arrested without warrants and held without trial, opposition began to organize. In 1920 the American Civil Liberties Union was formed to protest the violation of constitutional rights such as arrest without warrant, unreasonable search and seizure, the denial of due process, and police brutality ⁵. Finally, A. Mitchell Palmer embarrassed himself and the Wilson administration by predicting a May Day (1920) communist revolution in the U.S, which, of course, did not happen, and the Republicans replaced the Democrats in the 1920 election ⁶.



World War II saw FDR interning Japanese-Americans (citizens of the U.S.A.) in fear they would become the "alien enemies" of the 1940's; and Congress passed "The Alien Registration Act of 1940" (aka the Smith Act) which has

nothing to do with registering aliens and a lot to do with people who "knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States...or whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, shall be fined under this title or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction."

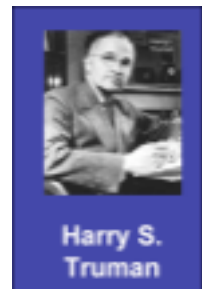


Signed into law by FDR, the Smith Act was the first statute since the Alien and Sedition Acts of 1798 to make mere advocacy of ideas a federal crime. FBI director J. Edgar Hoover suggested to President Harry Truman in 1948 that the Smith Act be used against the Communist Party and its sympathizers. Truman embraced the idea as a means to outflank Republican rivals who were accusing the Democrats of being "soft" on communism.

Eleven defendants accused that "they conspired ... to organize as the Communist Party and willfully to advocate and teach the principles of Marxism-Leninism" which the government alleged to mean "overthrowing and destroying the government of the United States by force and violence" They were also accused of conspiring to "publish and circulate ... books, articles, magazines, written or printed matter advocating the principles of Marxism-Leninism" The defendants appealed their cases but in 1951 the Supreme Court upheld the convictions by a vote of six to two. Other "Smith Act" trials continued until 1957 when the Warren court declared the "alien enemies" clauses unconstitutional.

The 1950's brought the Rosenberg trials, McCarthy committee hearings and the blacklisting of writers, actors, artists, and other notables via the House Un-American Activities Committee (HUAC). The Senate censured Sen. McCarthy in 1957; the HUAC was phased out in the '70s but did not play a significant role since the 1950's; sadly, the Rosenbergs died in the electric chair, but their case was revisited and rethought in the 1980's.

The '60s brought us the Chicago 7, the Age of Aquarius, the Bay of Pigs, the Vietnam War, and the Kennedy/King assassinations, all of which were newsworthy but lacked the constitutional implications of the Smith Act or what Lincoln did with Habeas Corpus. Aside from Watergate and a host of other "gates", the 70's and 80's were likewise about things that lacked constitutional implications.



It wasn't until 1990's when the Murrah Federal Building in Oklahoma City was bombed, the first attack was made on the World Trade Center and there were bombings at U.S. embassies in Lebanon, Saudi Arabia, Kenya and Tanzania that the government started to worry about homeland security.

The Alien Terrorist Removal Act and the 1996 Anti-Terrorism and Effective Death Penalty Act were passed by

Congress and signed by President Clinton. The acts were crafted to help sever international mists from their sources of financial and material support. They enlarge the proscriptions against assisting in the commission of various terrorist crimes. They authorize the regulation of fundraising by foreign organizations associated with terrorist activities and adjust the Foreign Assistance Act to help isolate countries that support terrorists. They also limit Habeas Corpus, adjust the restrictions on possession and use of materials capable of producing catastrophic damage, allow victims of terrorism to sue for damages. Many of the provisions of the Alien Terrorist Removal Act and the 1996 Anti-Terrorism and Effective Death Penalty Act were ruled unconstitutional by the courts but were snuck into the Patriot Act.

The point is this...

The Constitution of the United States has not suffered from the presidencies of Adams, Lincoln, Wilson and FDR; and concern that it will suffer from a George W. Bush presidency is a narcissistic view of history from both the observers and the observed points of view. Our Constitution has faced more threatening challenges than the Patriot Act and presidency of George W. Bush and survived them in style.

From the Alien and Sedition Acts of 1798 to the Patriot Act assaults on the Bill of Rights had similar characteristics: (1) they were all products of xenophobic or economic fear; (2) they were triggered by a noxious event – like the XYZ affair in 1798, the Civil War in 1861, the “Red Scare” in 1918-1920, the great depression and 9/11; (3) they were welcomed by the citizenry but the honeymoon was brief; (4) they (and their promoters) lost currency when the fear factor subsided and the electorate was able to study the facts over time.

Twenty first-term Presidents got kicked out of the White House, and as often as not their parties lost control of the Congress; six second-term Presidents paid for betraying the citizenry's trust in other ways, by losing control of the legislature or the embarrassment of a presidential resignation / impeachment.

When the Federalist party, via the Alien and Sedition Acts, tried to stuff centralized government down the people's throats, it was replaced by the Democratic-Republican party (Jefferson); when the Democratic-Republican party got in the way of western expansion in the 1820's, it was replaced by Jackson's Democratic party; when the Democratic party screwed up the economy (the panic of 1837) it was replaced by the Whig party; when the Whig party could not resolve the problem of slavery it was replaced by the Republican party.

When Woodrow Wilson's Democratic party tried to sell The League of Nations to an isolationist American public, the electorate opted (in 1920) for Warren G. Harding's Republican party which was replaced by FDR's Democrats (in 1932) when the only thing the Republicans came up with to handle to great depression was the Smoot-Hawley Tariff and “a chicken in every pot.”

Call it “the balance of powers” or the “wisdom” of the electorate, it prevents the three areas of the Federal government from seizing advantage. When Thomas Jefferson said “... to secure these rights, governments are instituted among men, deriving their just power from the consent of the governed—that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it” he was talking about making our Republic reflect what the people intended it to be.

The Patriot Act had many predecessors in American history, some were sincere attempts to protect the population and reflect what Americans want our government to be; some were the stupid moves by equally stupid politicians.

The important thing is to be independently vigilant, to guard against venality and stupidity and protect the Constitution from further defenestration. We need to challenge the government, as we did in the 1960's with Vietnam. We need to use the ballot box, the press or whatever form of protest that makes the point in a democratic way, "that government of the people, by the people, for the people shall not perish from the earth." and that if government becomes destructive of these ends, it is the right of the people to alter or to abolish it. Sometimes it happens overnight, like the Nixon resignation; sometimes it takes a while, like the removal of Herbert Hoover or the reversal of the Smith Act.

Footnotes

1. The full name of the Enabling Act was *Gesetz zur Behebung der Not von Volk und Reich* (Law to remedy the need of the people and the country). It was passed by the *Reichstag* on March 23, 1933. The second major step after the Reichstag Fire Decree through which the Nazis legally established Nazi Germany by providing the government with legislative powers, effectively handing dictatorial powers to Adolf Hitler).
2. Jefferson's Kentucky Resolutions and Madison's Virginia Resolutions both written in 1798 were complaints about the Alien and Sedition Acts and many historians believe that Jefferson and Madison created the arguments for "nullification" that led to the Civil War.
3. The 1917 Alien and Sedition Acts should not be confused with the 1798 Acts of the same name.
4. A Mitchell Palmer, "The Case Against the 'Reds'" *Part III Peacemaking, 1919-1920, Radicalism and the Red Scare, World War I At Home: Readings on American Life, 1914-1920*. John Wiley and Sons, Inc.: New York, pp. 185-189. "It has always been plain to me that when American citizens unite upon any national issue they are generally right, but it is sometimes difficult to make the issue clear to them. If the Department of Justice could succeed in attracting the attention of our optimistic citizens to the issue of internal revolution in this country, we felt sure there would be no revolution. The Government was in jeopardy; our private information of what was being done by the organization known as the Communist Party of America, with headquarters in Chicago, of what was being done by the Communist Internationale under their manifesto planned at Moscow last March by Trotsky, Lenin and others addressed "To the Proletariats of All Countries," of what strides the Communist Labor Party was making, removed all doubt. In this conclusion we did not ignore the definite standards of personal liberty, of free speech, which is the very temperament and heart of the people. The evidence was examined with the utmost care, with a personal leaning toward freedom of thought and word on all questions." J. Edgar Hoover was Attorney General Palmer's assistant in carrying out the Palmer raids.
5. The ACLU was founded by Roger Baldwin in 1920: It has been accused in the 1920-1930 period of being a "communist front" organization.
6. The Democratic Convention in 1920 was the longest in record. James M. Cox, governor of Ohio was nominated as Presidential candidate and Franklin D. Roosevelt was named Vice-presidential candidate.

About the Author



Dick Poje formed his own firm, R. J. Poje and Company in 2000 to provide consulting services in the areas of strategy development and technology integration. Previously, he had been a Partner and Director of Treasury Strategies, Inc. since 1985. Dick has been active as an entrepreneur and management consultant in the treasury and payment communities for 35 years.

A co-founder of Phoenix-Hecht and its Chief Executive Officer for many years, Mr. Poje

brings a unique, entrepreneurial perspective to client engagements. He advises senior managers of client organizations on strategic matters related to cash and treasury management and the payments system. He assists financial services firms in the formation of strategic alliances in various product areas, advises the Federal Reserve on its continuing role in the payment system and works with a number of private and public sector clients in re-engineering treasury and related operations.

Mr. Poje is a frequent contributor to industry publications and a respected commentator on developments in treasury management and the payment system. His article, "Avoiding the Pitfalls of Electronic Commerce," appeared in the January 1998 issue of the TMA Journal. In 1997 he co-authored "Electronic Commerce and Financial EDI: An Examination of Innovation in the Electronic Payments Arena". His article, "A Blueprint for Leadership: the Federal Reserve in the U.S. Payment System" was published last year in the American Banker. His most recent work, "The Death and Birth of Wholesale Lockbox" was published this April in AFP Exchange, and his three-part article, "Treasury - IT integration in Plain English" in the AFP Newsletter.

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