



Individual Liberty in Post-9/11 America A Talk with Susan Herman

I. The PATRIOT Act

- A. USA PATRIOT Act of 2001
 - 1. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001.
 - 2. Passed in response to the terrorist attacks on September 11, 2001.
 - 3. Granted expanded surveillance capabilities to the government.
- B. Section 215 of PATRIOT Act¹
 - 1. Authorizes government to obtain “any tangible thing” that is “relevant to” a terrorism investigation.
 - 2. This is often implemented by the issuing of a National Security Letter.
 - 3. Limits to Section 215’s authorization of bulk metadata collection were introduced in 2015’s USA FREEDOM Act. Regardless, Section 215 expired on June 1, 2015, rendering such limits inapplicable.

II. Material Support Laws

- A. Antiterrorism and Effective Death Penalty Act (AEDPA; 1996)²
 - 1. Amended 18 U.S.C. 2339A and instituted 18 U.S.C. 2339B, which are the parts of the U.S. code dealing with material support for designated terrorist organizations or terrorism.
 - 2. Criminalizes providing material support to terrorist organizations and gives the Secretary of State vast discretion to designate “foreign terrorist organizations” (FTOs).
 - 3. Individuals can be prosecuted for giving to an FTO even if not intending to contribute to the FTO’s illicit activities – or if the designation is unjustified.
 - 4. The term “material support or resources” is defined broadly, and includes not only property or money, but personnel and transportation, expert advice or assistance, and financial services.
- B. *Holder v. Humanitarian Law Project*³
 - 1. Plaintiffs were supporters of the Kurdistan Workers Party and the Liberation Tigers of Tamil Eelam. They sought an injunction to prevent the government from enforcing certain sections of the AEDPA that criminalized providing material support to foreign terrorist organizations.
 - 2. The Supreme Court held that such prohibitions are constitutional and do not violate the 1st Amendment’s protections for free speech.
- C. Material support prosecutions
 - 1. *U.S. v. Taleb-Jedi*⁴

¹ [Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism \(USA PATRIOT\) Act of 2001, 50 U.S.C. § 1701 \(2000 & Supp. V 2005\).](#)

² [28 U.S.C. § 2254 \(1996\).](#)

³ *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010): <http://www.supremecourt.gov/opinions/09pdf/08-1498.pdf>

⁴ *U.S. v. Taleb-Jedi*, 566 F. Supp. 2d 157 (E.D.N.Y. 2008):

https://scholar.google.com/scholar_case?case=5495355982939959607&hl=en&as_sdt=6&as_vis=1&oi=scholar



- a. Ms. Taleb-Jedi is an Iranian national granted asylum in the United States. She had supported the Mujahedin-e Khalq (MEK), an Iranian political organization, by teaching English and serving on a leadership council – activities protected under the 1st Amendment. The group was later designated an FTO (1997).
- b. Ms. Taleb-Jedi was prosecuted in the mid-2000s for having provided “material support” to the MEK, even though she had worked with the group prior to its FTO designation.

III. National Security Letters (NSLs)

- A. Orders issued by the FBI that compel service providers to disclose customer records. No judicial approval is required, so long as the request is relevant to a terrorism investigation.
- B. The investigation is accompanied by a gag order; individuals compelled to disclose information may not reveal any details, including that the government has contacted them. As of *John Doe v. Mukasey* (2008), the gag order no longer precludes seeking legal counsel. This revision was formalized with the USA PATRIOT Improvement and Reauthorization Act of 2005.
- C. Selected Relevant Cases
 1. *Doe v. Gonzales*, 449 F.3d 415 (Ed Cir. 2006); also known as *Library Connection v. Gonzales*
 - a. The FBI used National Security Letters (NSL) to demand patron records from the Library Connection, a consortium of 26 Connecticut libraries. The Library Connection sued over the NSL’s gag order with the intent to testify in the PATRIOT Act reauthorization debate and disclose that the FBI had used an NSL to demand library records. In April 2006, the government dropped its battle to keep the gag intact and withdrew its demand for records.
 2. *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008); originally *Doe v. Ashcroft*
 - a. An internet service provider, Nick Merrill (originally cited as John Doe), was served with an NSL for consumer records. He brought a suit challenging the constitutionality of the gag order prohibiting access to legal counsel.
 - b. The Second Circuit upheld in part the Southern District’s ruling. It held that the government bears the burden of justifying its gag orders on NSL recipients.

IV. Travel - No-Fly Lists and Subways

- A. No Fly Lists were implemented post-9/11. They are created and screened by the Terrorist Screening Center (TSC), under the FBI.
 1. Individuals placed on the No Fly List are not allowed to board a commercial aircraft that departs from or arrives in the U.S. It also prohibits an airplane carrying an individual on the No Fly List from transiting U.S. airspace.
 2. Individuals on the No Fly List are not allowed to challenge their inclusion in federal district court. Generally, TSA will not publicly disclose information about the No Fly List, and individuals cannot subpoena the government for relevant documents.
- B. *Scherfen v. United States Department of Homeland Security*⁵

⁵ *Scherfen v. United States Department of Homeland Security*, No. 3:CV-08-1554 (M.D. Pa. Feb. 2, 2010): https://scholar.google.com/scholar_case?case=8812235422038738612&q=scherfen+v.+united+states+department+of+homeland+security&hl=en&as_sdt=6,33&as_vis=1



1. Erich Scherfen, a commercial airline pilot, and his wife were placed on the No Fly List seemingly because of their Muslim faith. His employer placed him on administrative leave for being a positive match on a TSA list. He was suspended without pay and faced termination. They filed suit to contest their continued designation on the list.
 2. Scherfen was reinstated at his job after he received a letter stating that he could return to work. The letter did not indicate a watch list or that he had been taken off the list.
- C. *Latif v. Holder*⁶
1. Latif and other military veterans were placed on the No Fly List for reasons unknown.
 2. The District Court ordered the government to inform them why they were on the No Fly List and give them the opportunity to challenge the inclusion.
 3. The government informed some of the clients that they were not on the list in 2014 but did not fully inform the plaintiffs why they were placed on the list.
- D. In April 2015, the government announced that it would no longer refuse to confirm or deny that individuals have been placed on the No Fly List and that those individuals would have opportunities to challenge their inclusion.
1. Individuals may apply for redress through the DHS Traveler Redress Inquiry Program – the DHS will provide a response which will identify the specific criterion under which the individual was placed on the No Fly List and include an unclassified summary of information supporting the No Fly List status.⁷
- E. *Sultan v. Kelly*, 1:09-cv-00698-RJD-RER (E.D.N.Y.)
1. Jangir Sultan filed suit against the NYPD and New York City in 2009. Sultan, a Brooklyn born man of Kashmiri descent, said he was stopped around various subway stations 21 times over 3 years. He claimed that New York City’s subway bag search program encouraged racial profiling by police officers because the officers do not need to report any demographic data on selected individuals and they have discretion on how many and who they can search.
 2. The parties reached a settlement in 2009.

V. Additional Changes Post-9/11

- A. USA FREEDOM Act (2015)
1. Uniting and Strengthening America by Fulfilling Rights and Ending Eavesdropping, Dragnet-collection and Online Monitoring (USA FREEDOM) Act
 2. A modified renewal of several sections of the PATRIOT Act. Introduced reforms to the mass surveillance authorized by the PATRIOT Act.
- B. Mass surveillance cases
1. *Clapper v. Amnesty International* (2013)
 - a. Challenge to warrantless wiretapping policies authorized by President Bush. Was dismissed by Supreme Court
 2. *Wikimedia v. NSA* (ongoing, 2015)
 - a. Building on *Clapper*, challenges legality of NSA’s “upstream” surveillance policies

⁶ *Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014)https://scholar.google.com/scholar_case?case=12737530808425897564&q=latif+v.+holder&hl=en&as_sdt=6,33&as_vis=1

⁷ Federation of American Scientists, *No Fly List: Govt Offers New Redress Procedures*, April 15, 2015: <https://fas.org/blogs/secrecy/2015/04/no-fly-redress/>



b. PRISM

- i. Government surveillance and data collection program. Edward Snowden leaked its existence to the public in 2013.

C. State secrets privilege

1. During the Bush administration, in particular, this privilege was invoked to encourage judges to dismiss cases outright. Reforms to this practice were made in 2009.
2. The Department of Justice announced that it would invoke the privilege in court only when genuine and significant harm to national defense or foreign relations is at stake and only to the extent necessary to safeguard those interests.
3. It is unclear if this has resulted in a reduction in number of dismissed cases. “The Holder state secrets policy itself is not substantively different from his predecessors’ policy and, given that the whole point of these privilege claims is to prevent issues from being openly discussed, we are unlikely ever to be able to evaluate whether Holder’s application of that policy will indeed be different.”⁸

⁸ [S.N. HERMAN, TAKING LIBERTIES: THE WAR ON TERROR AND THE EROSION OF AMERICAN DEMOCRACY 8 \(2011\).](#)