Americas Act of Patriotism

The Challenge of Balancing Freedom and Security

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Projektarbete 10 poäng i årskurs 3 från Utbildningsprogrammet för Samhälls- och kulturanalys

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Americas Act of Patriotism – The Challenge of Balancing Freedom and Security

Abstract
In the debate generated by the authorization and reauthorization of the Patriot act we can find a wide range of opinions and ideas concerning the balance of freedom and security, and how that might affect the society. The government (the creators of the law) advocates the necessity of the Patriot act and its structural changes to secure the freedoms of USA. While opposing views suggest that these changes affect the balance of freedom and security in such a way that it might affect the way of life and be a threat to the civil liberties of the citizens. The aim of this thesis is to investigate how the debate reflects how the Patriot act may have affected the balance between the various practices of freedoms and national security in USA.

This thesis investigates three aspects of the debate that concerns the Patriot act. The rhetoric’s used in the debate by both sides show some difference in the rationales of the debating sides. Some controversial aspects of the law undermine the safeguards that are suppose to protect the civil liberties and freedoms when their definitions are opened up for a wide arrange of interpretations. The third part of the thesis investigates the big brother mentality that is being fostered and culture of preparedness of all the nation's dimensions and systems that is asked for in order to adapt to these systematic changes of their society that the law provides.

The investigation of the debate conclude that state apparatus takes on a role of coordinative micromanaging, which together with the culture of preparedness fosters the nation to always be on its toes. As a result of these changes the practices of freedom and the democratic values they nourish are being destabilized and undermined in the climate of fear that is being established.

Keywords
Freedom, Security, Civil liberties, The Patriot act
Förord

There are a few people I would like to thank for their support, ideas and help. Many Thanks to Dave, who helped me correcting the text and the spelling errors, Emma Fälth has been a invaluable during the process of writing by providing ideas and critique when it was most needed. I would also like to thank Anders Härnbro who has been apart of the creation of this thesis from the start.
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Introduction

Great harm has been done to us. We have suffered great loss. And in our grief and anger we have found our mission and our moment. Freedom and fear are at war. The advance of human freedom -- the great achievement of our time, and the great hope of every time -- now depends on us […] I will not forget this wound to our country or those who inflicted it. I will not yield; I will not rest; I will not relent in waging this struggle for freedom and security for the American people.¹

These are the words of George W. Bush, President of the United States, which he spoke during an address to a joint session of Congress and the American people, September 20, 2001. Only nine days before planes had crashed into the Twin Towers In New York and the Pentagon In Washington on a day that sent shockwaves throughout the nation and around the globe. America was struck by fear, confusion and a state of emergency was declared.² The events that took place on the eleventh of September 2001 have become recognized and referred to as nine-eleven. In the aftermath of these events the USA enacted new laws and structural changes in an effort to protect the nation and prevent terrorism.

One of the more influential laws that were passed is the U.S.A. PATRIOT act, which is an abbreviation for: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism. The Patriot act is an extensive law that provides a whole range of new provisions for the state apparatus. These provisions or tools are established through many modifications, or amendments, to older laws, which may result in a significant change to the whole system of the guidelines in these laws.³ The first authorization of the Patriot act was passed without being carefully scrutinized by the congress or senate and the years that followed sparked new life in the debate of privacy, civil liberties, freedom and security. The Reauthorization of the Patriot act in 2006 happened however after an extended deliberation in the congress and senate.⁴

My interest for the Patriot act derives from a debate concerning a suggestion for a Swedish law with similar but less extensive provisions that was on the agenda recently.⁵ The purpose of the Swedish law has been thoroughly questioned and a debate concerning the integrity of the

⁵ http://www.regeringen.se/sb/d/619/a/75587, 2007-04-13, 09:30
citizens and Orwellian surveillance measures has consequently emerged. Although the authorization of the Swedish law was postponed for a year, it and the debate have many similarities with the Patriot act, which is what motivated me to write this thesis. By looking at the debate and procedures that have occurred in USA since nine-eleven it allows us to get an indication of what kind of consequences that can come out of the Swedish law if it gets authorized.

Purpose
In the debate generated by the authorization and reauthorization of the Patriot act we can find a wide range of opinions and ideas concerning the balance of freedom and security, and how that might affect the society. The government (the creators of the law) advocates the necessity of the Patriot act and its structural changes to secure the freedoms of USA. While opposing views suggest that these changes affect the balance of freedom and security in such a way that it might affect the way of life and be a threat to the civil liberties of the citizens. The aim of this thesis is to investigate how the debate reflects how the Patriot act may have affected the balance between the various practices of freedoms and national security in USA. The following are some of the questions that will be the guidelines of this thesis and that I will try to find answers for:

How do the different sides of the debate regard the balance of freedom and national security?

In what way has the balance between freedom and national security been changed according to the debate?

How are the subjects of necessity, efficiency and proportionality of the Patriot act reflected in the debate?

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Methodology

The following parts of this chapter will give the reader further details about how the practical work of this thesis have been conducted. The expressed purpose has the function to focus this thesis in a way that makes it more understandable for the reader on what the scope of interest is. In order to further focus the material and the scope of interest, I have created a foundation of methodology. By using different methodological tools from different disciplines I will make the methodology suit both the material and purpose of this thesis by using an integrated perspective of discourse analysis and rhetorical analysis. In the different parts that follow I will clarify various methodological tools and material I am using and in what way they are being used.

An integrated approach

An important aspect of the scope of interest will be how the debate reflects the Patriot act and how the language of the debate reflects the practices that stand in relation to the context encircled by the introduction and purpose. By using the different analytical tools from disciplines within discourse analysis as well as rhetorical analysis, I can create an integrated methodological framework that will work as a basis for the analysis.  

Discourse analysis comprises of a variety of different disciplines that all describes how to analyze text material. A more common approach of looking at and defining discourse in the different disciplines is that different discourses are certain ways of representing the world. These ways are also represented from certain perspectives and it is through texts and language, the discourses of these perspectives are articulated. Language, or rather the variations of language, is the element that links the discourses and social life together.

To clarify how the discourse analysis can be used as a framework for the methodology I have chosen to use a three-dimensional model of discourse by Norman Fairclough that will be a part of the basis for the framework, (see Picture 1). The three dimensions described are Social practices, Discourse practices and Text, which all have an influence on each other. The social practice dimension could in this thesis be represented by the USA’s struggle for inner stability which includes the actual acts of surveillance and the acts of law enforcement that are the consequence of the Patriot act. In the dimension of discourse practice we find different social relations where the text production and text consumption occur, for instance the dialog of debating between sides. The text dimension then becomes a part of the discourse practice through communicative actions and the use of language is an essential element of these actions. Text is an overall term for written text, speech, pictures or even a mix between the visual and spoken language. I will focus

7 Winther, Jörgensen, Marianne, Phillips Louise, Translated by Torhell, Sven-Erik, Diskursanalys som teori och metod, Studentlitteratur, Lund (2000), Chapter 5, p 131-154
8 Winther, Jörgensen, Marianne, Phillips Louise, Translated by Torhell, Sven-Erik, Diskursanalys som teori och metod, Studentlitteratur, Lund (2000), Chapter 1, p 7-18
on written texts and statements and this is what I will refer to when I write text in the analysis. It is through these three dimensions that social and cultural (re)production and change happens. As the arrows in the model suggest the (re)production and change works as a dynamic process in which the discourse practices and texts contributes to shape and reproduce the social practices. At the same time the discourse practices and texts reflects the social practices. The framework does not aim to separate the practice and the structure of the discourse, but rather consider them as parts of a system of practices as Fairclough’s model suggests.⁹

In this thesis there is a specific subject that is of interest, but to fully understand this subject it is necessary to consider what Norman Fairclough describes as the *order of discourses*. This refers to an ambiguous combination of discourses and ways of using language within a social practice or structure. By doing this I can encircle a variety of discourses within the debate about the Patriot act that is relevant to the scope of interest of analysis and at the same time consider how they are related to the various contexts of the different dimensions.¹¹ The main subject for this thesis evolves around what I call the freedom-security figure. This figure should be considered as the combination of various discourses such as, governmentality, security and freedom, which will be further described in the section *Theories as analytical tools.*

The three-dimensional model and the order of discourse make out the basis for the framework and help encircle an area of investigation, which together with the purpose will make out the heart of this thesis. Some more tools are still needed though and these tools will help me in how I should analyze the actual language of the texts. Fairclough’s description of intertextuality as “[a]ny given type of discourse practice is generated out of combinations of others and is defined by its relationship to others”¹² is useful for this reason. However it needs some complements from the discipline *Discourse theory* to further explain the smaller elements of the

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discourses. The term *signifier* is used to describe these smaller elements of the discourses and they can be both fixed and unfixed. The unfixed signifying elements, or floating signifiers, refers to signifying elements that move between the discourses and get different meaning within the different discourses. The articulation of the signifiers is a key factor in how the meaning of the signifier is changes.\footnote{Torfing, Jacob, *New Theories of Discourse; Laclau, Mouffe and Zizek*, Oxford, Blackwell (1999), p 62ff} Jacob Torfing draws upon ideas from Ernesto Laclau and Chantal Mouffe when he describes hegemonic articulation:

\[\ldots\] if we put all this together we can define hegemony as the expansion of a discourse, or a set of discourses, into a dominant horizon of social orientation and action by means of articulating unfixed elements into partially fixed moments in a context crisscrossed by antagonistic forces.\footnote{Torfing, Jacob, *New Theories of Discourse; Laclau, Mouffe and Zizek*, Oxford, Blackwell (1999), p 101}

I see this as a way of further describe the three dimensions in a more explicit way and it clarifies the balance of the freedom-security figure, both within the separate discourses and between them. The various processes of the figure can be examined by considering how the different discourses are articulated together in a text, and related to each other as well as external factors.\footnote{Foucault, Michael, in, *The Foucault Effect; Studies in Governmentality; With two lectures by and an interview with Michael Foucault*, The University of Chicago Press, Chicago, (1991) p 58; Foucault uses the words *Intradiscursive, Interdiscursive* and *extradiscursive dependencies* to describe these relations.} The *interdiscursivity* process of hegemonic articulations is however the key aspect when examining the balance of the freedom-security figure.\footnote{Fairclough, Norman, *Discourse and Social Change*, Cambridge, Polity Press. (1992), p 42ff}

The balance of the freedom-security figure lead us into the field of rhetoric and I will for this thesis consider three aspects from the discipline of rhetorical analysis that will help me interpret the articulations of the discourses. *Logos* is the logical aspect, which speaks to the audience’s reason and critical judgment through arguments and suggestions of ideas. By trying to convince through facts and reason you also trust that the audience has the knowledge and know-how to understand and interpret the message. *Pathos* on the other hand plays on emotions, for instance fear and hope, to motivate and convince an audience. By analyzing the *Ethos* aspects of the texts I can see how the persons or organizations that have produced the texts portray their identity, especially in the way they deliver the different messages in the texts. The ethos aspect also entails how the credibility and authority of the texts are being used.\footnote{Karlberg, Maria, Mral, Birgitte, *Heder och Påverkan; Att Analysera Modern Retorik*, Natur och Kultur, Stockholm, (2003), p. 31ff}

This thesis will however focus the message itself and not concentrate on the relation between the audience and the persons behind the messages. The articulations in the texts I am examining all draw, in various ways, upon the rhetorical aspects and especially logos and pathos as the foundation of their arguments. The ethos can be used to connect the texts to the context. The
texts reflect the society and by looking at the different rhetorical aspects of the articulations some of the interpretations of the society can be distinguished.¹⁸

**Theories and the freedom-security figure**

To get a better understanding of the balance of the freedom-security figure I have identified four key overall theoretical themes that are related to each other and some external discourses as well. They all include various arguments and suggestions of ideas that can be related to the freedom-security figure. The themes of *Freedom* and *National security* will present some basic notions about the two main terms of this thesis. The two other themes are *Governmentality* and *State of exception*, which includes theories with an aptitude to aid the analysis and widening the context of this thesis’ presentation. This section has two functions; first it is a way to give the reader a brief theoretical background of the balance of the freedom-security figure, second it is to reflect on how the different themes can aid the analytical work of this thesis.

**Governmentality**

Governmentality could also be described as the mentality or rationality of governing which point to how think about how to govern ourselves as well as others. The context, which Michael Foucault referred this term, was the growing territorial states that later evolved into what we know as western democratic societies. Foucault describes governmentality as:

> The ensemble formed by the institutions, procedures, analyses and reflections, the calculations and tactics that will allow the exercise of this very specific albeit complex form of power, which has as its target population, as its principal form of knowledge political economy, and as its essential technical means apparatuses of security.²⁰

The state apparatus with its different institutions govern the nation after a certain governmentality that also reflect the members think about governing and being governed in relation to functions of the nation of which they are members. Hence governmentality is at once both internal and external to the state apparatus. The various practices and mechanisms, such as the practices of freedoms or the regulations of security, could be seen as an outcome of how governmentality has been continually defined and redefined by its members and state apparatus. This dynamic relation between the members and the state apparatus use of regulative mechanisms is what limits the nation but at the same time it is “what has permitted it to

survive”\textsuperscript{20}. This is described as a paradoxical phenomenon, which suggests that the nation “can only be understood in its survival and its limits on the basis of the general tactics of Governmentality.”\textsuperscript{21} The tactics or limitations used to govern and secure the nation could also be seen as the managing of risks, where risk is “[…] a way of representing events in a certain form so they might be made governable in particular ways, with particular techniques and for particular goals.”\textsuperscript{22} The member aspect of the dynamic relation points to the notion of patriotism that in the light of these theories should be considered as a function of the nation’s governmentality and the various practices of it. Patriotism in this context then refers to a loyalty towards the identity of the nation and the governmentality of it, or in other words the way of life within it.

**Freedom**

Freedom, often connected to civil liberties, is an articulation of a wide variety of values, philosophical, ideological perspectives of how persons are related to the society. Nikolas Rose argues that “Human beings can relate to themselves only as subjects of freedom, that is to say, in certain social and cultural conditions”\textsuperscript{23}. The problem here is just the magnitude of the definition of freedom. Rose elaborates and connects the notion of freedom to context of a modern democratic society: “As the twenty-first century begins, the ethics of freedom have come to underpin our conceptions of how we should be ruled, how our practices of everyday life should be organized, how we should understand ourselves and our predicament.”\textsuperscript{24} Freedom can then only be fully understood when it is put in relation to the lack of freedom as well as the notion of authoritative powers. Thus, freedom can then also be seen as an artefact of government and as various operational practices within a society. This is an application of freedom that makes recognizes the normative and philosophical aspects as well as the dynamics of the practices.\textsuperscript{25}

**National Security**

The ambiguity of the national security theme makes it, just as freedom, difficult understand by its lonesome. The theme has two important parts, national that point towards its understanding in

\textsuperscript{20} Foucault, Michael, in, The Foucault Effect; Studies in Governmentality; With two lectures by and an interview with Michael Foucault, The University of Chicago Press, Chicago, (1991), p. 103

\textsuperscript{21} Foucault, Michael, in, The Foucault Effect; Studies in Governmentality; With two lectures by and an interview with Michael Foucault, The University of Chicago Press, Chicago, (1991), p. 103

\textsuperscript{22} Dean Mitchell, Governmentality; The Power and Rule in Modern Society, SAGE, London, (1999), p 177

\textsuperscript{23} Rose Nikolas, Powers of Freedom; Reframing Political Thought, Cambridge University Press, Cambridge, (1999), p 42

\textsuperscript{24} Rose Nikolas, Powers of Freedom; Reframing Political Thought, Cambridge University Press, Cambridge, (1999), p 61

\textsuperscript{25} Rose Nikolas, Powers of Freedom; Reframing Political Thought, Cambridge University Press, Cambridge, (1999), p 65
the context of a nation, and security that intents points toward the safeguarding from dangers, threats and/or risks. Michel Walzer argues about membership and equality in democratic societies:

> Membership is important because of what the members of a political community owe to one another and to no one else, or to no one else in the same degree. And the first thing they owe is the communal provision of security and welfare. [...] If we did not provide for one another, if we recognized no distinction between members and strangers, we would have no reason to form and maintain political communities.²⁶

Here we see two distinctions of security that are of importance, one that intend for the citizens or members of a certain state to benefit of the collective security and welfare a state can bring, and the distinction that separates members from non-members (strangers). The second distinction suggests that citizenship, according to first distinction, will be valued higher than non-citizenship in relation to the theme of national security.²⁷

Broader definitions of national security can also incorporate economic, social, and environmental mechanisms that are used to secure the nation. When the definitions of the various dangers, threats and/or risks increase and accumulate the security mechanisms that to regulate and manage they also increase and expand to meet the new dangers, threats and/or risks. Or as Rose suggest that the managing of the risks involve “a whole array of control agencies – police, social workers, doctors, psychiatrists, mental health professionals.”²⁸ Of which I should add the different government intelligence agencies and federal law enforcement agencies that are of importance for this thesis.²⁹

### State of exception

This theme is based on Giorgio Agamben’s exposé of the *State of exception*. He theorizes the notion in historical and philosophical contexts and presents his reflections on how it is part of the reality of the societies throughout the world today. Agamben writes that “[t]he essential task of the theory of the state of exception is simply not to clarify whether it has juridical nature or not, but to define the meaning, place, and modes of its relation to the law.”³⁰ It is through this relation to the law that the state of exception can be understood as the application of a certain norm. For example, when the necessity for undemocratic norms is put into practice as a necessity

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to save the democracy we have a state of exception.\textsuperscript{31} However “The state of exception is not a dictatorship […] but a space devoid of law, a zone of anomie in which all legal determinations – and above all the very distinction between public and private – are deactivated.”\textsuperscript{32} He also suggests that the theory that the idea of “the state of exception as the exercise of a state’s right to its own defense or as the restoration”\textsuperscript{33} are false. If we put this into the context of governmentality it can be seen as a tactic to secure the power of a state or government. For example as Agamben suggests in his conclusion: “What the ‘ark’ of power contains at its center is the state of exception – but this is essentially an empty space, in which human action with no relation to law stands before a norm with no relation to life.”\textsuperscript{34} This does not mean that the apparatus of a nation is ineffective in preserving the systems or regulative mechanisms of the society, instead the society may very well survive and continue to function, something the history has can substantiate.\textsuperscript{35}

The state of exception should in this thesis be considered as an element of the freedom-security figure that reflects that affects the systems of governmentality and the balance between of the various systems in relation to authority and control. Thus it is a notion that aids to understand the balance of the freedom-security figure as it elucidates how a shift in the balance can occur.

The freedom-security figure

The freedom-security should be seen in relation to the system of a democratic society, which in the case of this thesis is the society of USA. However this may present a problem of viewing the society as an entity with one clearly defined system. This problem can be limited if we instead think of the society as a complex system of systems, which all dynamically influence each other through various practices, ideals and norms. I also perceive the different themes, as clusters of systems, of for instance different freedoms, or different securities, that all operate within and in relation to the overall system of society.\textsuperscript{36}

The exercises of freedoms and the exercise of securities define and redefine, shape and re-shape continual and dynamically to each other and to the system of society. They can also better

\textsuperscript{32} Agamben, Giorgio, \textit{State of exception}, The University of Chicago Press, Chicago, (1995), p 50; Anomie can be described as social instability caused by erosion of standards and values or a condition of society characterized by a breakdown of social norms and values.
\textsuperscript{36} Foucault, Michael, in, \textit{The Foucault Effect; Studies in Governmentality; With two lectures by and an interview with Michael Foucault}, The University of Chicago Press, Chicago, (1991), p 53ff
be understood through each other and in relation to the various systems of the society and this is the reason I have chosen these themes as well as looking at structure of freedom-security as a balance of the various systems.  

**Material, limitations and previous research**

Above I described the encirclement of the scope of interest in relation to the framework of the integrated method, and how the theories are being used as analytical tools of which the analysis will resonate with. The third factor of methodological encirclement for this thesis will be to identify empirical material that will limit the area of investigation to the extent that it is realistic to work with, and put this thesis in a context of the actual society and its practices. The empirical material from the debate will be the fundament of this thesis. In the antagonistic struggle of the debate we can find many perspectives and suggestions about the Patriot act but this thesis will focus mainly on two oppositional sides. One side argues in support of the law and the expanded security measures provided by it as a necessity for freedom, and the other side argues against the law and sees the expansions of the security measures as a bereavement of important democratic freedoms. These polarizing sides are represented by two primary sources of information. The first source is the government, which mainly consists of the white house and the justice department and other various institutions of the state apparatus. The government will represent the side that supports the Patriot act. The second primary source is the organization of the American Civil Liberties Union (ACLU). This is a non-partisan organization that considers itself as the nation’s premier guardian of liberty and it is, “working daily in courts, legislatures and communities to defend and preserve the individual rights and freedoms guaranteed by the Constitution and laws of the United States”. ACLU could be considered to be in opposition to the government, in the Patriot act debate, and by comparing these two sides to each other I can elucidate the antagonistic struggle concerning the balance of the freedom-security figure.

Various reports, official articles and statements will represent the texts of the primary sources. These are found mainly through their respective Internet pages. These texts have also led me to additional sources of information and these secondary sources are used to aid the understanding of the primary material which many time use a bureaucratic language that may be difficult to

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38 http://www.whitehouse.gov/, 2007-04-01, 17:50
40 http://www.aclu.org/about/index.html, 2006/02/03, 19:21
understand. The Patriot act\footnote{the Patriot act, found under Text of the law at http://www.lifeandliberty.gov/index.html; or at http://fl1.findlaw.com/news.findlaw.com/cnn/docs/terrorism/hr3162.pdf 2007-04-08, 14:36} is used as a secondary source to that extent that it clarifies the two sides’ different arguments that almost all the time refer back to the law and some examples from the law are used to elucidate certain aspects of the debate. Some documents are also used to compare and see what kind of changes that has been made in the law after the reauthorization of the Patriot act and how the relate to how the debating sides portray these changes.\footnote{http://fpc.state.gov/documents/organization/51133.pdf; as well as, http://www.fas.org/sgp/crs/intel/RL33210.pdf, 2007-04-01, 19:17}

\section*{Previous research}

Before I started encircling and collecting specific material relevant to the scope of interest, I studied some previous research that would give me some background information that could indicate various subjects of the debate that would be interesting and relevant to examine. The extensive work of Kam C. Wong examines the making of the Patriot act and reflects on some unanswered questions concerning the consequences of the Patriot act.\footnote{Wong, C. Kam, The making of the USA Patriot Act I: The legislative process and dynamics, International Journal of the Sociology of Law, Volume 34, Issue 3, September 2006, Pages 179-219; Wong, C. Kam, The making of the USA PATRIOT Act II: Public sentiments, legislative climate, political gamesmanship, media patriotism, International Journal of the Sociology of Law Volume 34, Issue 2, June 2006, Pages 105-140; Wong, C. Kam, The USA PATRIOT Act: Some unanswered questions, International Journal of the Sociology of Law, Volume 34, Issue 1, March 2006, Pages 1-41} Alan Rubel’s article \textit{Privacy and the USA Patriot Act: Rights, the Value of rights and Autonomy}, and Priscilla M. Regan’s article, \textit{Old issues, new context: Privacy, information collection, and homeland security} has also been an inspiration to new ideas and perspectives of this thesis.\footnote{Rubel, Alan, \textit{Privacy and the USA Patriot Act: Rights, the Value of Rights, and Autonomy}, Law and Philosophy, Volume 26, Issue 2, March 2007, Pages 119-159; Regan, M. Priscilla, \textit{Old issues, new context: Privacy, information collection, and homeland security}, Government Information Quarterly Volume 21, Issue 4, 2004, Pages 481-497} These texts have has mainly been inspirational sources of information and I have tried not to use them in the analysis in order to reach my own and separate conclusions. I have also tried to investigate a scope of interest, more explicitly the balance of freedom and security, that I find is absent in the previous research.

\section*{Critical assessment of the methodology}

This triangular approach of working with the subject and producing my own analytical text has the purpose to resonate my own ideas and interpretations between the method, theories and of course the empirical material that the debate has generated. The integrated method of discourse analysis and rhetoric analysis does not have the clear cut unambiguous boundaries that Fairclough’s model suggests. Similar to the theories should the framework be seen as an
ambiguous dynamic system of systems that (re)produce and (re)define the practices. The framework gives the methodological approach its perspective as it elucidates the correlation between the texts and operational practices. One problem of working with this kind of material and method is that it is not one, or a few persons that affect the (re)definition and (re)production processes instead it is a “[...] polymorphous interweaving of correlations” that is at the heart of the process. This can be seen as both the strength and the limitation of the methodology since by understanding the originator of particular texts one can also draw other and perhaps more substantiated conclusions. At the same time it can also be easier to relate the material to a wider context. Although some persons could be seen as more influential to the processes than others, I also try to not single out specific persons to much. Instead I try to look at it as the cluster of persons behind the material when analyzing the freedom-security balance. Since the persons referred to speak for the two organizations, they also represent the message or the rationale of these organizations.

The multifaceted approach I use may cause a problem of defining a limited and workable scope of interest within the material of the debate. By choosing some specific theories to work with I am able to aim the analysis of this thesis towards a certain area of discussion. I can therefore also present a text that gives a particular perspective to the balancing problem of the freedom-security figure. I am not claiming that the theories I am using are absolutely true but even so, they are reasonable and also applicable to the empirical material and method. This study is a result of many subjective choices and that are all put together to form a certain way of working with a certain material from a certain point of view. For good and bad this will show in the text as my experiences and interpretations will resonate with the chosen methodology and vice versa. This is one approach to presenting a thesis of such a complex and substantial subject as this is. I hope and wish that this thesis elucidate the problematical subject regarding the balance of freedom and national security.

Analysis

In this chapter I will present the analysis of the debate, which is divided into three main sections. The first sections will present the governments’ and ACLU:’s overall opinions about the Patriot act and reflect on the use of rhetoric in the debate. The second section will present some of the more controversial aspects of the law and how those affect the debate. Thirdly I will reason on the essential problems of the freedom-security balance that is reflected in the debate.

46 Foucault, Michael, in, The Foucault Effect; Studies in Governmentality; With two lectures by and an interview with Michael Foucault, The University of Chicago Press, Chicago, (1991), p 58

47 Karlberg, Maria, Mral, Birgitte, Heder och Påverkan; Att Analysera Modern Retorik, Natur och Kultur, Stockholm, (2003), p 12ff

48 Winther, Jörgensen, Marianne, Phillips Louise, Translated by Torhell, Sven-Erik, Diskursanalys som teori och metod, Studentlitteratur, Lund (2000), p 131ff
Overall opinions on the Patriot act

The overall opinions refer to how the government and ACLU argue about the patriot act and its provisions and effects. To better illustrate the difference in these opinions I shall first present them separately and then do a rhetorical comparison where I also present my own reflections on the arguments. The timeline of the different quotes ranges from the year 2001 up to shortly after the reauthorization in 2006 and I present them in that order to show how the debate has evolved.

Government

After nine-eleven the justice department, along with the entire administration, made change in the priorities of their agenda. Shortly after the law was passed in 2001 the Justice Department released a short summary of the Patriot act in which it is written:

The Department of Justice's first priority is to prevent future terrorist attacks. Since its passage following the September 11, 2001 attacks, the Patriot Act has played a key part - and often the leading role - in a number of successful operations to protect innocent Americans from the deadly plans of terrorists dedicated to destroying America and our way of life. […] The 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 have substantially enhanced our ability to prevent, investigate, and prosecute acts of terror.49

As the title of the law says, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism50, the main focus of these new reforms and provisions the Patriot act brings is to provide the security and surveillance agencies with new tools; Tools which they can use to prevent new attacks and detect new threats before they can do any harm to the citizens. The law also provides increased the penalties for those who commit terrorist crimes to discourage these crimes. The expressed overall aim of the law is to both provide security and protect the liberties of the citizens.51

The debate that was the prelude of the reauthorization of resulted in various changes of the law. About “30 new significant civil liberties provisions”52 are mentioned as well as an important organizational change that creates a new assistant attorney general that is responsible for the national security and: “This will allow the Justice Department to bring its national security,

counterterrorism, counterintelligence, and foreign intelligence surveillance operations under a single authority”.  In his speech on the reauthorization ceremony in March 9, 2006, President Bush said:

The law allows our intelligence and law enforcement officials to continue to share information. It allows them to continue to use tools against terrorists that they used against -- that they use against drug dealers and other criminals. It will improve our nation’s security while we safeguard the civil liberties of our people.  

Bush also describes how the Patriot act tore down the bureaucratic wall that used to separate the law enforcement and the intelligence agencies and hindered them from sharing information and working together.  

In 2006 the government published the report, 9/11 Five Years Later: Successes and Challenges, in which they summarize how effective the Patriot act, and some other structural changes, has been. This five year review is straightforward in its language and in one chapter there are descriptions on how to “institutionalize the War on Terror” with the expanded security measures and structural changes. The report also describes how the different governmental agencies are brought together under one, what could be called, umbrella organization, in an effort to increase the efficiency of the security measures. The structural changes are also described as necessary in order to improve the security measures and as the report portray it: “To enhance America’s security, we transformed the way the Government does business.” These structural changes and transformations of the surveillance agencies go by the name, Domestic Institutional reform. Serving as a multi-agency center the umbrella organization is:

[… ] responsible for developing, implementing, and assessing the effectiveness of national plans that coordinate and apply all instruments of national power – diplomatic, intelligence, military, economic, financial, law enforcement and homeland security – toward the counterterrorism goals and objectives described in this report. 

The war on terrorism is high priority for the government and as by looking at the statements made by the Justice department it could even be the priority that comes before anything else.

56 9/11 Five Years Later: Successes and Challenges, September 2006,
57 9/11 Five Years Later: Successes and Challenges, September 2006,
58 9/11 Five Years Later: Successes and Challenges, September 2006,
The report further describes the changes, which the President and the justice department referred to, made towards breaking down the wall and open the up to sharing information. This has formed a “knowledge bank for the counterterrorism community, making information available to the intelligence, law enforcement, homeland security, diplomatic, and military communities across the United States Government”.  

ACLU

One year after the authorization of Patriot act the ACLU published the report *Civil Liberties After 9-11: The ACLU Defends Freedom*. The report investigates the effects the law had on the society since 2001. To make the reasoning more recognizable the report draws on parallels of the persecutions of communists during cold war when “Americans were asked to give up some freedoms for the sake of law and order — only to discover, to their horror, that such sacrifices aren’t easy to undo.” Anthony D. Romero, the executive director of ACLU suggests that the history repeats itself and that the expanded security measures of after nine-eleven:

> [... focus suspicion on groups or individuals, based on religion or national origin alone; [...] demand virtually unchecked authority to snoop and spy on law-abiding Americans not suspected of any crime; and shut down dissent and due process with strategies ranging from secret hearings and detentions to open disregard of the courts.]

All these changes are allegedly needed for the war on terrorism, which points a finger at the governments’ claim for the necessity of the law. However these expanded security measures cause domestic changes of individual rights which ACLU find disturbing. Romero also argues that:

> The trouble with the government’s no-holds-barred strategy is that it entails an unnecessary trade-off between freedom and safety, as if by giving up the blessings of liberty we could save lives. [...] Increased security is essential, but it is possible to be both safe and free. Government can thoroughly investigate, prevent and prosecute terrorism while preserving our most fundamental rights and liberties. To deprive Americans of fundamental rights and permanently change our way of life makes us less secure.

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In this argument, ACLU both agree and disagree with the government since they recognize the war on terror and the need for expanded national security but not the proportionality of the measures provided by the law. It is the trade-off Romero writes about that will continue to be a main concern for the ACLU and the protection of individual rights as “[n]othing is more precious in a democracy than freedom of speech and free access to information without government intrusion.”

In another report published in 2003 the hindsight of the events triggered by nine-eleven are expressed by Laura W. Murphy who argues that:

> The threat to our liberty is great. The government has used the terrorist attacks to gain permanent new powers that go far beyond fighting and protecting us from terrorism, powers that allow it to invade the privacy of U.S. citizens who are not accused of breaking any laws, routinely deny due process of law and use overbroad powers in routine criminal investigations.

This argument suggests that the government has portrayed the “faulty reasoning that freedom need suffer in the interest of safety and national security” and that the changes made in the expanded national security are ineffective in fighting terrorism and infringe on the citizens core rights.

Numerous of similar publications have been released since the authorization in 2001 and when the Patriot act got reauthorized, it was after a prolonged debate of how to improve the law. ACLU urged the congress to make more improvements since the suggested changes where not enough. However the changes and improvements ACLU wanted where not implemented, and the reaction from them was to continue the struggle against the law. On their website ACLU writes:

> Congress failed to include the commonsense reforms to the Patriot act that would target our precious anti-terrorism resources on suspected foreign terrorists rather than invading the privacy of innocent people through fishing expeditions into their financial, medical, library and

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64 Laura W. Murphy, Director, ACLU Washington Legislative Office in, A New Era of Discrimination: Why African Americans Should Be Alarmed About the Ashcroft Terrorism Laws (9/24/2003), p 5, [http://www.aclu.org/safefree/relatedinformation_1_publications.html](http://www.aclu.org/safefree/relatedinformation_1_publications.html)

65 Laura W. Murphy, Director, ACLU Washington Legislative Office in, A New Era of Discrimination: Why African Americans Should Be Alarmed About the Ashcroft Terrorism Laws (9/24/2003), p 6, [http://www.aclu.org/safefree/relatedinformation_1_publications.html](http://www.aclu.org/safefree/relatedinformation_1_publications.html)

66 Laura W. Murphy, Director, ACLU Washington Legislative Office in, A New Era of Discrimination: Why African Americans Should Be Alarmed About the Ashcroft Terrorism Laws (9/24/2003), [http://www.aclu.org/safefree/relatedinformation_1_publications.html](http://www.aclu.org/safefree/relatedinformation_1_publications.html)

Internet records. […] The amended Patriot Act continues to fail to adequately protect the privacy rights of innocent, ordinary people in this country. […] The Patriot Act debate is far. 68

The last words indicate that even though the reauthorizing of the Patriot act was a setback, the ACLU struggles on to encourage the debate about civil liberties and national security.

Rhetoric’s to convince

These quotations and examples are just a few examples extracted from a number of the reports and statements I have found. I do find them representative for the different sides and they illustrate the key aspects of the debate for this discussion. The debate evolves around the freedom-security figure and there are three basic uncertainties, that of efficiency, of necessity and of proportionality that show the significant differences of the two sides. These three are the subjects that constitute the heart of the debate.

An ethos aspect of the debate is that both sides use the authority of their organizations and name to convince which shows when as the language in the reports many times is well coordinated and several key phrases come back. The language does not change too much over time even though the debate goes on during five years and even after the reauthorization. For example, there are some key phrases being reused several times in several different reports and sources. The government suggests that the patriot act safeguards the nation and the tools provided by it are essential in the war on terror. The maxim of ACLU is instead that it is possible to be both safe and free. A significant differentiation between them is that ACLU sees the structural changes and transformations the government is implementing as a threat to the way of life in USA and they are therefore not proportional to the need for expanded security.

When reading all the material I get the impression that there has been a significant change of the governments’ governmentality which not necessary reflect the consensus of the society and definitely not of ACLU. The rationale of this shift in governmentality can best be described by a quote from a congress member made during the reauthorization debate: “The patriot act has made it much more difficult for America’s enemies to live openly among us as they plot to murder innocent Americans.” 69 Although the White House and the Justice Department do not use these exact words, the underlying meaning of their own words can be understood in the same way. I also distinguish a tendency to lay emphasis on the ideological qualities freedom while security is defined more clearly as a system of government practices.

While the government seems determined to convince of the legitimacy of their claims with pathos-arguments that almost always is the primary comments being made. The war on terrorism or the events of nine-eleven are events that speak to the American collective state of mind by

68 http://action.aclu.org/reformthepatriotact/whereitstands.html 2007-04-06, 14:77
being recognizable to so many people. A message that is being repeated is that the citizens should not feel entirely safe but trust the government to solve this with the expanded security the law brings as they are very effective, which is a way to foster a climate of fear. The pathos therefore leads up to the logos arguments, which presents itself in various statistics and numbers. The proportionality of the security measures is more or less neglected in comparison to the efficiency and necessity of them.\textsuperscript{70}

The ACLU arguments often refer to historical events that have a similarity to the events playing out because of the Patriot act. The shift in the government’s governmentality in itself is suggested to be a threat to democracy and freedom but also a step backwards in the democratic struggles the nation has endured. The arguments urges to the citizens commonsense and uses words like encroachments on the civil liberties, to symbolize what people actually will loose to the provisions of the law. The striking resemblance of recent and historical events shows itself in the similarity of the arguments and language used. The logos arguments lead up to the pathos arguments and the rationale of the ACLU is to not make the same mistakes today as in past history. That rationale also tells us that striving for an open and tolerant climate as well as enhancing the rule of law can achieve a secure nation. ACLU emphasizes the notion of freedom as operational practices, often expressed as civil liberties, where they also lay a certain emphasis on the individual aspect of freedom.\textsuperscript{71}

To better understand the rationales of the both sides and how the law, the debate, in short how the language can affect the practices of freedom in the society, I need to look closer at some of the controversial aspects of the law.

\textbf{Controversial aspects of the Patriot act}

This has turned out to be a battle of words between ACLU and government where both are digging their trenches around some key arguments as shown above. Interesting is that both sides has written comparison texts in which they review each other’s arguments around the more controversial aspects of the Patriot act. I shall present a few definition problems concerning these controversial aspects, which exemplify the freedom-security rationale of both ACLU and the Government more explicitly.

\textbf{Tearing down the wall}

By tearing down the bureaucratic wall among the law enforcement agencies and surveillance agencies the progress of evolving the government into a \textit{big government} has gained momentum.

\textsuperscript{70} Based on various testimonies prior to the reauthorization, \url{http://www.lifeandliberty.gov/subs/r_testimony.htm} 2007-04-08, 14:36

\textsuperscript{71} Statements from, \url{http://action.aclu.org/reformthepatriotact/whereitstands.html}; as well as various publications found at, \url{http://www.aclu.org/safefree/resources/17343res20031114.html}, 2007-04-08, 14:58
The control of these agencies becomes more and more situated under a few authorities, this lead to a more effective organizational structure but which also brings questions to how effective the judicial control of the big government can be. As the previous quotes by the government states, it makes it easier to share and control information, and there are safeguards put in place to protect the civil liberties of the American people.

In several testimonies previous to the reauthorization, representatives of the different agencies and Justice Department argued that there have not been any violations to civil liberties due to Patriot act.\textsuperscript{72} In 2007 the Inspector General of the Justice department released a report that brings up another perspective on the efficiency of the new security measures. In this case it is the National Security Letters (NSL), which is a provision of the law that authorizes the FBI without a preceding court approval to demand records of persons. The NSL provision has a gag order attached to it, which makes it forbidden for the ones getting the NSL to tell anyone about it. Three, for this thesis, important problems concerning the NSL were brought up in that report. First, that the management of the FBI has had a difficult time handling the new structure of the organization which led to that a lot the surveillance material from persons not being accused of anything has being stored in databases. Since the provision allows to the FBI to demand any tangible things, which includes just about all personal information, the result was that substantial amounts of information has been collected and stored. Second, the judicial control has been found to be flawed in many cases, where surveillance has been conducted on false premises and on persons not suspected of any crime. Thirdly the report confirms only one conviction, based on the NSL provision, to be related to terrorism. These problems could be considered as serious violations to the integrity of these persons and it shows how the human factor of the surveillance agencies limits the effectiveness of the safeguards and protections of the provisions. But also how the intelligence investigations have very few boundaries that protect against these kinds of violations.\textsuperscript{73}

This brings us to the particular safeguard that is supposed to be the limitation of violations to the surveillance provisions. This safeguard is a formulation that can be found in similar forms attached to most of the provisions in the law.

\[ [...] \text{may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.}\textsuperscript{74} \]

\textsuperscript{72} http://www.lifeandliberty.gov/subs/r_testimony.htm , 2007-04-08


This safeguard is claimed to be a protection for citizens of USA against the misuse of surveillance provisions, and mainly as a protection against the use of surveillance provisions that are meant to be used towards foreign agents. However there are some flaws in the formulation as Laura W. Murphy of the ACLU writes:

Nowhere does this statute indicate that United States citizens cannot be targeted. In fact, the statute makes it clear that an 'investigation of a United States person' can be conducted, so long as it is not based solely on activity protected by the First Amendment. (Of course, even this limit apparently applies only where the investigation is of a United States person, not where the investigation is of a foreign national but the records or other tangible things that the government seeks are of United States persons). The statute defines 'United States persons' to include both citizens and permanent residents.\(^75\)

This flaw she points out is quite significant because the safeguard claimed to protect the civil liberties instead opens up the possibilities of using national security provisions provided by the Patriot act as the blurs the guidelines on who can be subjected to surveillance measures. The development towards a big government combined with this definition problem is one of the focus points of the debate.

"Neither prisoners nor persons accused, but simply ‘detainees’"\(^76\)

Above I showed how the use of US person in the law opens up the interpretations of the tools to be used toward citizens of US, permanent residents of the US and foreign persons, which basically is all persons. The second problem is connected to the differentiation of a regular person’s status and that of terrorist detainees and how the use of national security provisions provided by the Patriot act, blurs the distinction of what could be called conventional crimes, and terrorist acts. Terrorism is such a word that has collected so many new meanings and significations during the recent years and contemporary terrorism will always be compared to the events of nine-eleven. The word has a strong pathos-quality that plays on people’s imaginations of what kind of risks and threats could turn into reality, especially in the aftermath of nine-eleven. This is also why it is such a difficult and ambiguous word to use in a text of law and where the definition of it depends on what the interpreter attaches it to, which opens up the word for a wide range of interpretations.\(^77\)

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\(^75\) Murphy, W, Laura, in, Seeking Truth From Justice: PATRIOT Propaganda - The Justice Department’s Campaign to Mislead The Public About the USA PATRIOT Act, p 3 (7/14/2003), 2007-04-08. http://www.aclu.org/safefree/resources/16825pub20030709.html


\(^77\) See, Sec. 411. Definitions relating to terrorism, p 345 (75/132)ff, in the Patriot act, found under Text of the law at http://www.lifeandliberty.gov/index.html , 2007-04-08, 14:36
One section of the law, mandatory detention of terrorist aliens, describes how the persons being considered as terrorists can be held in custody for seven days before being accused of any crime. If the Justice Department deems the person to dangerous the detention can expand up to six months, which the person can appeal.\textsuperscript{78} Agamben reflects on the significance of using such provisions in the law:

> What is new about President Bush's order is that it radically erases any legal status of the individual, thus producing a legally unnameable and unclassifiable being. Neither prisoners nor persons accused, but simply 'detainees', they are the object of pure de facto rule, of detention that is indefinite not only in the temporal sense but in its very nature as well.\textsuperscript{79}

This detainee definition problem is another factor that destabilize the civil liberty safeguards in the law, and therefore also the rule of law. Rose writes that “We are governed as much through subjectification as through objectification\textsuperscript{80} and by objectifying alleged terrorists with the indefinite definition of detainee, the value of national security is unreasonably overestimated and excessive in relation to the value of freedom. The government apparatus has the responsibility to secure and protect both the security and the freedom of the people within its nation and the people has a responsibility towards the nation, no matter if they are members, residents, immigrants or visitors. The degree of responsibility differs but the responsibility to follow the rule of law remains the same for all. However as the detainee definition problem shows, the freedom aspects as well as the civil liberties safeguards that are related to it are here put in second place to the national security. If we combine this with the US person definition problem, the differentiation of citizen, permanent resident, immigrant and alien becomes blurred in the eyes of the law and thus limiting protection of civil liberties and the safeguards of the provisions provided by the law. Walzer writes that “If accused men and women are to receive their rightful share of justice, they must first have a rightful share of legal aid [and] If justice is to be provided at all, it must be provided equally for all accused citizens without regard to their wealth (or race, religion, political partnership, and so on).”\textsuperscript{81} I agree with this idea but I also argue that this notion of equality of justice must be extended to all persons affected by the law and not exclude some persons from it on the basis of some ambiguous articulations.

\textsuperscript{78} See, Sec. 412. Mandatory detention of suspected terrorists; Habeas corpus; Judicial overview, p 350 (80/132)ff, in the Patriot act, found under Text of the law at \url{http://www.lifeandliberty.gov/index.html} , 2007-04-08, 14:40
\textsuperscript{80} Rose Nikolas, Powers of Freedom; Reframing Political Thought, Cambridge University Press, Cambridge, (1999), p 96
\textsuperscript{81} Walzer, Michael, Spheres of Justice; A Defence of Pluralism and Equality, Martin Robertson & company Ltd, Oxford, (1983), p 85
The significance of definitions

The patriot act consists of many articulations of legal technicalities that for a layman are vague, at best. It is very easy to get lost in the language used in the law and it is open for various interpretations that expand the areas of application of the surveillance and law enforcement tools it provides, and to some extent circumvent the safeguards. Formulations like United state person, not solely on the first amendment rights and terrorism are perfect examples on how on formulations can be interpreted in various ways and thus being essentially ambiguous. ACLU does not share the governments’ view on these definition problems and this elucidates the difference between the two rationales. ACLU requests more explicit definitions and clearer guidelines to limit the provisions of the law and safeguard the civil liberties.82 The government, on the other hand, recognizes the exciting safeguards as sufficient, even though there have been internal reports that recognizes various violations of civil liberties in relation to the provisions of the law.83

In an important text like a law, which will to different extents affect the whole spectrum of the systems in the society, the significance of the definitions are crucial in achieving a balance between freedom and security. Next section will dig deeper into how the ripple effects of these definition problems can be reflected within the debate.

A Big Brother Mentality

The rhetoric’s of the debate and the crucial problems of the law are not enough to relate the debate to the bigger picture of social and discursive practices. A law is a good example on how written text can affect these discursive and social practices but the text of the law is also affected by the discursive and social practices constituting the society. The debate reflects how the discursive and social practices of freedom-security figure are continually defined and redefined in relation to the law but also how this affects the balance of the freedom-security figure. The president portrays the context if which these changes should be considered when he says: “America remains a nation at war”84. This also symbolizes the how the Government chooses to rationalize the necessity of the changes in the nation. The balancing act of securing both America as a nation and the freedoms that are practiced within in the context of this rationalization has proven to be

difficult. A closer look at the reasoning of efficiency, necessity and proportionality will clarify some of additional problems of the freedom-security balance.

Safeguarding democracy

The goal of the two debating sides is the same as they both seek to safeguard America as a nation and the people within the nation. I have suggested before that the heart of the debate lays in the different perspectives of the balance of freedom and security where ACLU argues that the way of life in USA, or rather that quality of it, is threatened because of the changes the government has implemented. Inherent to this is also the problem of balance between idealism and realism. President Bush said, “This is the great ideological struggle of the 21st century -- and it is the calling of our generation.” 85 This statement reflects a notion that should be understood in the relation of the governments’ intentions to institutionalize the war on Terror as an approach and method of national security. 86 The idealism could be seen as the source of the rationalization for the realistic changes. In report by the government, which summarizes their national security strategy in the war on terror, they describe how the changes of the governmentality are to be established in all of the society’s systems.

The paradigm for combating terrorism now involves the application of all elements of our national power and influence. Not only do we employ military power, we use diplomatic, financial, intelligence, and law enforcement activities to protect the Homeland and extend our defenses, disrupt terrorist operations, and deprive our enemies of what they need to operate and survive. We have broken old orthodoxies that once confined our counterterrorism efforts primarily to the criminal justice domain.87

The quote reflects the governments’ perspective on how the extensive change of governmentality, should be seen as a necessity for the efficiency of the Patriot act and its provisions in the war on terrorism. This new form of extensive surveillance by systematic prediction builds on the development of the state apparatus to take “[...] on a less a directive and distributive role, and more a coordinative arbitratory and preventive one.”88 However “[w]hat the new preventive policies primarily address is no longer individuals but factors, statistical correlations of heterogeneous elements.”89 This systematic prevention and prediction may be efficient in many ways but it also has a tendency to only see statistical numbers and presupposed

89 Robert Castells in, The Foucault Effect; Studies in Governmentality; With two lectures by and an interview with Michael Foucault, The University of Chicago Press, Chicago, (1991), p 288
categories and overlook the important aspects in its governing such as the multifaceted
differences of the individuals.

ACLU criticises the methods and tactics of the government in an extensive report to the UN
as a reaction to one of the governments’ own reports on the subject of civil and political rights.

[...] secrecy has become the hallmark of the government's conduct in the criminal justice
arena. [...] The U.S. government has seriously eroded the right to privacy by expanding its
surveillance of ordinary Americans in name of protecting national security. Dissent is now
treated as unpatriotic.90

It is not a mistake that the law is named *The Patriot act*, and the rhetorical effect it has is quite
effective, because the ones questioning the law and its provisions may very well be rendered as
unpatriotic and thus a threat to the United States and its freedom. This brings us to the problem
of association, or rather the freedom of association. ACLU writes:

Because of the U.S. government's overbroad and unlawful monitoring and surveillance
policies, and infiltration of groups without any suspicion of criminal activity, particularly of
Arabs, Muslims and South Asians, these groups are now fearful of congregating as they used to
do.91

The religious link in the war on terror should not be overestimated but it also shouldn’t be
overlooked. The ideological struggle Bush mentions signifies a more polarized approach to a
pluralistic society and since there are no clear *battlefield* or boundaries for this war it occupy every
system of the society. As the government proclaimed, the war shall be fought in every system of
the society and this makes it inevitable that the polarization, fear and doubt spreads through the
society with an effect of inhibiting the practices of freedom and the transparency of which a
democratic nation thrives at.92

**Freedom under discipline**

The welfare nation relies on both its members and its state apparatus to provide the security and
the freedoms in needs to evolve. When looking at freedom as an artefact of government and thus
making it tangible to reflect that practices of the society we can also distinguish the need for
discipline of the people and a the relation this has to “[...] the techniques of discipline,

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http://www.aclu.org/intlhumanrights/gen/25924pub20060620.html , p 8 (10/118) and 9 (10/118)

http://www.aclu.org/intlhumanrights/gen/25924pub20060620.html , p 12 (14/118)

surveillance and bureaucracy needed to foster this welfare of the population.”

The systems of Security are directly linked to the discipline of its members and how they act within the society in relation to its governmentality. To put the notion of discipline into a historical perspective I will borrow some words from the late President John, F Kennedy who 1961 made a speech on *Secrets societies and the freedom of the press* during a time when USA was facing the Cold War. In this speech he reflects on problems of freedom and national security and the balance between them:

> In time of ‘clear and present danger,’ the courts have held that even the privileged rights of the First Amendment must yield to the public’s need for national security. Today no war has been declared—and however fierce the struggle may be, it may never be declared in the traditional fashion. Our way of life is under attack. Those who make themselves our enemy are advancing around the globe. The survival of our friends is in danger. And yet no war has been declared, no borders have been crossed by marching troops, no missiles have been fired.

He describes the reality of the Cold war and asks the press to reflect on their responsibilities of discipline towards the security of the nation, but more importantly he also recognizes balance of the freedom and security and the dangers of encroaching on the civil liberties as a necessary and effective way of enhancing national security:

> I have no intention of establishing a new Office of War Information to govern the flow of news. I am not suggesting any new forms of censorship or any new types of security classifications. I have no easy answer to the dilemma that I have posed, and would not seek to impose it if I had one.

I am using this historical perspective on discipline to elucidate the contrasts of how the arguments concerning the balance of freedom and security differ in our time. It also mirrors in many ways how ACLU argues in the debate. A contrast to this line of argument is found in the *National strategy for combating terrorism* where the government describes their perspective on how the discipline of the nation should be constituted in the society through a *culture of preparedness*. This culture of preparedness builds on four main principles:

> […] a shared acknowledgement of the certainty of future catastrophes and that creating a prepared Nation will be a continuing challenge; the importance of initiative and accountability at all levels of society; the role of citizen and community preparedness; and finally, the roles of each level of government and the private sector in creating a prepared Nation. Built upon a

95 http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/JFK/003POF03NewspaperPublishers04271961.htm , 2007-04-09, 23.37
96 http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/JFK/003POF03NewspaperPublishers04271961.htm , 2007-04-09, 23.37
The change of the governmentality should according to the government be established in all of the society’s dimensions, from a national dimension to a domestic dimension. The Patriot act and its provisions should be seen in the light of these arguments regarding discipline and culture of preparedness. These arguments show how the war on terror is used as a justification for the change of the governmentality towards what can be called a big brother mentality. A big brother mentality which probably is best portrayed by the “Homeland security advisory system”\(^98\) that indicate the threat levels the nation is subjected to at all times and thus fostering the culture of preparedness. The big brother mentality as a governmentality should also be understood in the light of how the systems of freedom and security can be considered as a relation of symbiotic balance, or as Friedrich Hayek suggests:

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\text{[...]} \text{Freedom was possible by the gradual evolution of the discipline of civilization which is at the same time the discipline of freedom. It protects him by impersonal abstract rules against arbitrary violence of others and enables each individual to try to build for himself a protected domain with which nobody else is allowed to interfere and within which he can use his own knowledge for his own purposes. We owe our freedom to the restraints of freedom} \]
\(^99\)

The rationalization of necessity is used to establish the changes of big brother mentality and as the quote suggest this might be an efficient way of both secure and foster the freedom of the society. But when rationalizing to the change of all the dimensions of the nation as a necessity to effectively wage the war on terror the laws’ a question of proportionality must be asked. Something the ACLU points out in their report to the UN, when they suggest that violations to the respect of the rights of the criminally accused, the right to privacy, the freedom of thought and the guarantee of equality before the law accumulates as a consequence to the passing the Patriot act. These arguments of infringements on fundamental civil liberties questions the proportionality of the Patriot act and thus also efficiency of it.\(^100\) The need for change is indeed necessary; but a change that recognizes the strengths of the practices of freedom instead of overestimating the provisions of national security in evolving as a democratic nation.


The paradox of the governmentality, freedom and security

This brings us to the paradox of governmentality, which builds on the reasoning presented above. The paradox suggests that the systems that limit a society and its practices also is what allows it to evolve and change as a nation of welfare. The Patriot act is a difficult document to understand and therefore it is also difficult to distinguish by looking at the articulations of the text alone how the sweeping changes of a whole society becomes a part of the practices of the society. This is why the law must be understood in the light of the society’s system of systems and especially by relating it to the balance of the freedom-security figure. There are four main systems of control within the modern welfare nation, economy, security, law and the culture of discipline that are of importance to this argumentation. It is the limitations set by these we practice our freedoms and liberties, hence are the practices and limitations of the freedoms in a modern welfare nation always linked to the practices and limitations of the other systems.\(^\text{101}\) By elucidating the freedom-security balance in relation to these systems we can distinguish the paradoxical elements of the governmentality in relation to the Patriot act. The shift towards a controllable and preventive governmentality can essentially be explained in comparison to the notion of risk. Dean writes, “What is important about risk is not the risk itself. Rather it is: the forms of knowledge that make it thinkable […].”\(^\text{102}\) One could say that the \textit{unthinkable} happened nine-eleven and these events opened up the notion risk for a wide range of new thinkable scenarios. The rationale of the government fosters on a climate of fear and a kind of reasoning that value the rationalizations of necessity and efficiency over the rationalization of proportionality. The declaration that the war on terrorism has an indefinite outlook also makes the risk of terror acts to have an indefinite outlook as well. Building on Deans’ thoughts of risk, the unavoidable attachment to the events of nine-eleven has etched itself into the collective mind of the nation, which makes the unthinkable very much thinkable. The culture of preparedness comes from a climate of fear and is fostered with the systematic prevention and managing of risk by the control of a big government that does not trust the people to be their own guardians of freedom; all in the name of necessity based on the idea of the war on terrorism.\(^\text{103}\)

The debate between the government and ACLU shows that the war on terror is used to promote the necessity of changes and expansion of securities at the bereavement of civil liberties that the patriot act brings. This could be seen as a \textit{state of exception} where the consequences are instability of the democratic society and an erosion of the standards and values of openness, transparency and pluralism within the society.\(^\text{104}\) The government’s inclination to expand the security and control measures as a necessity in the war on terror to secure the nations’ freedom paradoxically limits the possibilities of the democratic practices as well as the improvement and expansion of a societal governmentality where freedom and security is proportionally balanced.

\(^\text{101}\) Dean Mitchell, Governmentality; The Power and Rule in Modern Society, SAGE, London, (1999), p 113ff
\(^\text{102}\) Dean Mitchell, Governmentality; The Power and Rule in Modern Society, SAGE, London, (1999), p 178
\(^\text{103}\) Dean Mitchell, Governmentality; The Power and Rule in Modern Society, SAGE, London, (1999), p 178ff
Conclusion

The Patriot Act was created as an effort to secure the freedoms of a nation by uniting and strengthening the society of America. This also reflects the main concerns of the debate as the difference of opinion lays in how the uniting and strengthening should be achieved but also how this affect the balance of freedom and security. Freedom and security should be considered by the means of other significant factors such as the notions of patriotism and the war on terrorism. The shift towards a more Orwellian mentality of governing has been possible because of the climate and politics of fear that was invigorated by the events of nine-eleven. How the debate reflects the effects of the change of government mentality can be explained by breaking it down into three key sections, the significance of the rhetoric's, the definition problems of the law and the reasoning of necessity, efficiency and proportionality.

The significance of the rhetoric’s used is important because they reflect how the perspectives of the society and the circumstances relating to the Patriot act are interpreted. This also gives us an understanding for the law itself. The difference of the debate can be illustrated by looking closer at the rationales of the ACLU and the government.

The rationale of the government suggest that the effective way of securing the freedoms of the country is to expand the security measures, the tools and means the law enforcement and surveillance agencies can use. Safeguards limit these tools in the law and they are meant to protect the practices of freedoms and civil liberties of the nation. To make these tools more effective the bureaucratic wall that before separated the security-, law enforcement- and surveillance-agencies has been tore down and thus creating a big government. The big government is a description how the governing of the nation happens through a big state apparatus, which can control and manage the various systems of the society and therefore also secure the nation.

The Rationale of ACLU suggests that it is necessary to secure USA against future terrorism but the new tools provided to the security-, law enforcement- and surveillance-agencies are not limited enough by the safeguards it has, and thus undermining the transparency of the rule of law. The lack of commonsense safeguards results in secrecy and suspicion towards certain groups of the society and an unnecessary trade-off between freedom and safety. The concentration of the authority powers also undermines the checks and balances of the government that are there to protect from the corruption and exploitation of these powers. The way of life in USA is therefore threatened by the Patriot act and the shift in the balance of freedom and security.

Both sides recognize the necessity to secure the nation to prevent similar events like those of nine-eleven to happen again but the government defines the notion of the war on terrorism as an indefinite ideological struggle, and use it as a premise for the changes and expanded security measures. The name of the law reflects the demand for patriotism of the time and it has been used as very effective rhetorical tool in the aftermath of nine-eleven by playing on the citizen’s
loyalty toward the nation. But the Patriot act would never have been passed as undisputed, as it was if it would not have been climate of fear in the nation and influence that the notion of patriotism has in USA. The war on terror has also been a rhetorical tool of the government to justify its actions and the changes implemented as a result to the law and its provisions, and to some extent it could be seen as political suicide in USA not to recognize the war on terror. ACLU does not fully dispute the war on terror and mostly argue against the specific articulations of the law and not explicitly against the war on terror. Even though it might be politically conceived as treacherous to criticise the war on terror it must be done, because implementing changes solely based on an ambiguous idealistic idea that is indefinite both by application and by nature is a dangerous course to take.

There are a few key aspects of the controversial elements in the text of the Patriot act that fuels the debate and have a significant effect on the balance of freedom and security. The law tears down the bureaucratic wall that used to separate the criminal investigations and the foreign intelligence investigations a consequence of this is that the tools and provisions formerly used solely on foreign agents now could be used in criminal investigations. A safeguard is articulated in the law in order to protect the civil liberties from this expansion of surveillance and information sharing of the authoritative agencies. This safeguard has a significant flaw in its definition, as surveillance and intelligence investigations can be conducted of US persons as long as they are not conducted solely on activity protected by the freedom of religion, speech, assembly, or petition. In addition to this, the definition of US persons includes both citizens and permanent residents and thus allowing surveillance and intelligence investigations that formerly was limited to foreign agents to be used on all people within the nation.

The use of the words terrorist and terrorism in most of the articulations in the law presents an additional flaw of the safeguards as the meaning of the words are essentially ambiguous and very difficult define in an explicit way. When being accused of terror acts a person looses many of the regular rights that the rule of law provides in order as a necessity to protect the national security and therefore gets a status as a legally unnameable and unclassifiable being and that can be held in detention which is indefinite in both a temporal sense and in its disposition. The judicial and the authoritative powers that oversee this are limited to a few persons within the state apparatus.

The ambiguity of these definition problems and key elements are an important factor because it reflects how difficult the balance of freedom and security is to articulate, especially when it is articulated in a law. The laws are the fundament of the rule of law, which distinguishes the limitations of the societal system of systems in its articulations. When the guidelines for these systems are open for too many interpretations because of ambiguous articulations, the widened spectrum of interpretation also affect the balance between them. This is particularly relevant to the balance of freedom and security as it fuels the inconsistency of governmentality in the different dimensions, from a nation dimension to a domestic dimension, of the society and thus also undermining the fundament that secures the nation. Even though the limitations allows for the survival of the nation and governmentality, one could say that in this case the balance of
between freedom and security is biased towards the use of the society’s limitations rather than the use of the practices of freedoms.

The notion of the war on terrorism has been used as premise of necessity to implement changes that would affect the balance of freedom and security. In the efforts of improving the efficiency of the security-, law enforcement- and surveillance-agencies by creating a big government, the government has also destabilized the safeguards that are suppose to protect the civil liberties, privacy and practices of freedom. The reasoning of the government is not proportional to the sweeping and extensive changes that have been implemented. When ACLU argues that this is a threat to way of life and they are questioning the rationalizations made by the government when suggesting that the changes will disrupt the balance of freedom and security in a way that is neither, proportional to the needs or as efficient in protecting and uniting America as it is claimed to be. I agree with this notion and I believe that the debate reflects a black or white outlook on the world of the government, which I cannot relate to entirely. You are either with us or against us is a way of reasoning that breeds polarizations and marks a very distinct line between them and us. But the uncertainty of who falls in under the definition of them, results in a mild paranoia which grows in conjunction with the need for a big government that exercises systematic managing of its constituents. At the same time a discipline and culture of preparedness of all the nation’s dimensions and systems is asked for in order to adapt to these systematic changes of their society. The state apparatus takes on a role of coordinative micromanaging, which together with the culture of preparedness fosters the nation to always be on its toes. As a result of these changes the practices of freedom and the democratic values they nourish are being destabilized and undermined in the climate of fear that is being established.

“The tragedy of our day is the climate of fear in which we live, and fear breeds repression. Too often sinister threats to the Bill of Rights, to freedom of the mind, are concealed under the patriotic cloak of anti-communism.”105 Today this patriotic cloak is the one of anti-terrorism, and I believe that secrecy, polarization and disbelief has been imposed on the American people in the name of patriotism and as necessary limitations of the society and the freedoms practiced within it. This has been a step backwards for USA as a democratic nation and it will take a long while to restore the important but fragile balance of freedom and security; but it is not a mistake that cannot be fixed through the realization of the necessity of transparency, pluralism and openness as the cornerstones of a democratic governmentality.

References

Books


Foucault, Michael, Edited by Burchell, Graham, Gordon, Collin and Miller, Peter, *The Foucault Effect; Studies in Governmentality; With two lectures by and an interview with Michael Foucault*, The University of Chicago Press, Chicago, (1991)


Articles and reports
*A shadow report by the American Civil Liberties Union prepared for the United Nations Human Rights Committee on the occasion of its review of The United States of America’s Second and Third Periodic Report to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, Dimming the Beacon of Freedom: U.S. Violations of the International Covenant on Civil & Political Rights, June 20, 2006;*

[http://www.aclu.org/intlhumanrights/gen/25924pub20060620.html](http://www.aclu.org/intlhumanrights/gen/25924pub20060620.html)
ACLU Letter to Congress Urging a "No" Vote On S. 2271, amendments to the Patriot Act Improvement and Reauthorization Act, February 28, 2006;
http://www.aclu.org/safefree/general/24316leg20060228.html

Anthony D. Romero, Civil Liberties After 9-11: The ACLU Defends Freedom, September 20, 2002,
http://www.aclu.org/safefree/resources/17119pub20020920.html

Doyle, Charles, Senior SpecialistAmerican Law Division, USA PATRIOT Act Reauthorization in Brief; CRS Report for Congress, August 10, 2005;
http://fpc.state.gov/documents/organization/51133.pdf

Freedom Under Fire: Dissent in Post-9/11 America, August 12, 2003;
http://www.aclu.org/safefree/general/17259pub20030508.html


Murphy, W, Laura Director, ACLU Washington Legislative Office, A New Era of Discrimination: Why African Americans Should Be Alarmed About the Ashcroft Terrorism Laws, September 24, 2003;
http://www.aclu.org/safefree/relatedinformation_1_publications.html

Murphy, W, Laura, in, Seeking Truth From Justice: PATRIOT Propaganda - The Justice Department's Campaign to Mislead The Public About the USA PATRIOT Act, July 9, 2003;
http://www.aclu.org/safefree/resources/16825pub20030709.html

National Strategy for Combating Terrorism, June 29, 2006;

Office of the Inspector General, Supplemental Report on September 11, Detainees’ Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York, December 2003;


Report from the field: The USA Patriot at work, July, 2004
http://www.lifeandliberty.gov/docs/071304_report_from_the_field.pdf


Internet pages

http://www.aclu.org/

http://action.aclu.org/reformthepatriotaclt/safe.html

http://www.aclu.org/safefree/resources/17343res20031114.html

http://constitutioncenter.org/constitution/constitution.pdf

http://www.dhs.gov

http://www.jfklibrary.org/

http://www.lifeandliberty.gov/

http://montanapeaceseekers.org

http://www.regeringen.se

http://www.stoppa-storebror.se/

http://www.usatoday.com

http://www.whitehouse.gov/