How the USA Patriot Act Defends Democracy

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On January 20, 2004, during the State of the Union address, President Bush called for key sections of the USA Patriot Act to be renewed by Congress in 2005. When the president mentioned that provisions of the Patriot Act would expire at the end of 2005, there was applause from some Democrats. Then, when he called on Congress to extend the life of the Patriot Act, Republicans clapped enthusiastically. The different responses of the members of Congress to the prospect of reauthorizing the Patriot Act illustrate the extent to which the debate over counter-terrorism legislation has become politicized. Despite the Act's near-unanimous passage through Congress, it has become one of the most vilified pieces of legislation in living memory. The debate over the reauthorization of the Act is dominated by hyperventilating rhetoric and political gamesmanship. The chorus of discontents criticizing the Patriot Act and other responses to the continuing terrorism threat has surged to a fevered pitch that is both unfortunate and unhelpful. What we need now is for our nation to engage in a constructive conversation about the success of our terrorism prevention efforts. We need to discuss what governmental powers are necessary to make us safe, and what safeguards against misuse of those powers are essential to keep us free. The national debate will be constructive if we can lower the heat and turn up the light.

The fundamental question facing Americans today is not the false trade-off between security and liberty, but rather how we can use security to protect liberty. Any debate over security and liberty must start with the recognition that the primary threat to America's freedom comes from al-Qaeda and others who seek to kill Americans, not from the men and women of law enforcement who protect us from danger. That the American homeland has not suffered another terrorist attack since September 11, 2001, is a testament to the remarkable

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3. President Bush said: "Key provisions of the Patriot Act are set to expire next year. (Applause.) The terrorist threat will not expire on that schedule. (Applause.) Our law enforcement needs this vital legislation to protect our citizens. You need to renew the Patriot Act. (Applause.)" Bush, supra note 1.


efforts of law enforcement, intelligence, and homeland security personnel. Their sheer hard work, dedication, and increased coordination have been greatly aided by the tools, resources and guidance that Congress provided in the USA Patriot Act.

Our counterterrorism measures have not just been defensive; we have taken the offensive. According to the Department of Justice, the U.S. government has disrupted over 150 terrorist threats and cells and incapacitated over 3,000 al-Qaeda operatives worldwide. The U.S. Department of Justice has indicted on criminal charges 364 persons linked to terrorism, of whom 193 have entered guilty pleas or been convicted. In addition, the U.S. government has initiated 70 investigations into terrorism financing, freezing $133 million in terrorist assets, and has obtained 23 convictions or guilty pleas.6

Counterterrorism since 9/11 has not just been about law enforcement but also law enhancement. Many of the successes of the police and FBI would not have been possible without the Patriot Act. The Department of Justice wrote to the House of Representatives' Judiciary Committee on May 13, 2003, that the government's success in preventing another catastrophic attack on the American homeland "would have been much more difficult, if not impossibly so, without the Patriot Act."7

I. THE DEBATE OVER THE PATRIOT ACT

What is odd about the current clamor over the Patriot Act is that this legislation resulted from considerable informed debate. Contrary to popular myth, the Patriot Act was not rushed onto the statute books. During the six weeks of deliberations that led to the passage of the Act, the drafters heard from, and heeded the advice of, a coalition of concerned voices urging caution and care in crafting the blueprint for America's security. That discussion was productive, and the Patriot Act benefited from these expressions of concern.

More recently, however, the quality of the debate has deteriorated. The shouting voices are ignoring questions that are critical to both security and liberty. Lost among the understandable fears about what the government could be doing are questions about what the government actually is doing. There is insufficient consideration of additional measures that the government could take to protect security and simultaneously safeguard liberty. Overheated rhetoric over minor legal alterations has overshadowed profoundly important questions about fundamental changes in law and policy.

The debate over Section 215 of the Patriot Act, the so-called "library records" provision, illustrates how awry the direction of the debate has gone. Critics have railed against the provision as allowing a return to J. Edgar Hoover's monitoring of private citizens' reading habits. The American Civil Liberties Union

(ACLU) has sued the government, claiming that the provision, through its mere existence, foments a chilling fear among Muslim organizations and activists. Others, more fancifully, have claimed that Section 215 allows the government to act as Big Brother, snooping on innocent citizens in a manner reminiscent of George Orwell's 1984.

These fears are real and sincere, but they are also historically and legally unfounded. Not only does the Patriot Act end the anomaly that allows such records to be routinely seen by investigators in cases not involving terrorism, the legislation actually provides more protections than is usually the case when records are subject to subpoena. For some years grand juries have issued subpoenas to businesses to hand over records relevant to criminal inquiries. Section 215 of the Patriot Act gives courts the same power to issue similar orders to businesses, from chemical makers to explosives dealers, for national security investigations. Section 215 is not aimed at bookstores or libraries. Like its criminal grand jury equivalent, Section 215 orders are written with business records in mind but could, if necessary, be applied to reading materials acquired by a terrorist suspect.

Contrary to what the critics claim, Section 215 is narrow in scope. The FBI cannot use it to investigate garden-variety crimes, nor even domestic terrorism. Instead, Section 215 can be used only to "obtain foreign intelligence information not concerning a United States person," or to "protect against international terrorism or clandestine intelligence activities." The records of everyday Americans, and even not-so-everyday criminals, are simply beyond the reach of Section 215.

The fact that Section 215 applies uniquely to national security investigations means that the orders are confidential. Such secrecy raises legitimate concerns—worries that Congress anticipated by embedding significant checks into the process of issuing a Section 215 warrant. First, a federal judge alone can issue and supervise a Section 215 order. By contrast, grand jury subpoenas for records are routinely issued by the court clerk. Second, the government has to

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11. Id.
12. USA PATRIOT Act § 215(a)(1) ("The Director of the Federal Bureau of Investigation ... 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.").
13. USA PATRIOT Act § 215(b)(2).
report to Congress every six months as to the number of times and the manner in which the provision has been used.\textsuperscript{15} On October 17, 2002, the House Judiciary Committee issued a press release stating that its review of that information "has not given rise to any concern that the authority is being misused or abused."\textsuperscript{16} Moreover, in September 2003, the Attorney General made public the previously classified information that Section 215 has not been used once since its passage.\textsuperscript{17}

It may well be that the clamor over Section 215 reflects a different concern, closely related to the cherished American tradition of free speech. Some seem to fear that government investigators can use ordinary criminal investigative tools to easily obtain records from purveyors of First Amendment activities, such as libraries and bookstores.\textsuperscript{18} Again, the fundamental concern is as understandable as the specific fear related to Section 215 is unjustified. The prohibition in Section 215 that investigations "not be conducted of a United States person solely upon the basis of activities protected by the first amendment of the Constitution of the United States"\textsuperscript{19} addresses this problem directly and makes the Patriot Act more protective of civil liberties than ordinary criminal procedure.

Arguably this limitation should be extended to other investigative tools. The Attorney General's guidelines governing criminal and terrorist investigations already require that "such investigations not be based solely on activities protected by the First Amendment or on the lawful exercise of any other rights secured by the Constitution or laws of the United States."\textsuperscript{20} Congress might wish to consider whether to codify this requirement in law, but that is an entirely different debate to the alleged erosion of liberty by Section 215 and the utility of this highly restricted power.

A good example of how the Patriot Act incorporates key protections is Section 213, which deals with notices for search warrants. During the debate over the Patriot Act, the House of Representatives took the alarming decision to approve the Otter amendment,\textsuperscript{21} an appropriations rider that would have prohibited investigators from asking a court to delay notice to a suspect of a search

\begin{itemize}
\item \textsuperscript{15} USA PATRIOT Act § 502(b).
\item \textsuperscript{17} E.g., Dan Eggen, Patriot Monitoring Claims Dismissed; Government Has Not Tracked Bookstore or Library Activity, Ashcroft Says, WASH. POST, Sept. 19, 2003, at A2.
\item \textsuperscript{18} E.g., Martin, supra note 9.
\item \textsuperscript{19} USA PATRIOT Act § 215(a)(2)(B).
\item \textsuperscript{21} See 149 CONG. REC. H7299 (daily ed. July 22, 2003) (roll call vote 408).
\end{itemize}
warrant.\textsuperscript{22} Had the Otter amendment become law, it would have been a momentous error that would have crippled federal investigations. The amendment would have taken away an investigative tool that had existed before the Patriot Act, a tool that over the years has saved lives and preserved evidence.

Inherent in a federal judge's power to issue a search warrant is the authority to supervise the terms of its use. Judges can delay any notice of the execution of a search warrant for the obvious reason that some criminals, if notified early, will destroy evidence, kill witnesses or simply flee. This judicial authority is so firmly established that the Supreme Court in 1979 labeled as "frivolous" an argument that notice of a search warrant had to be immediate.\textsuperscript{23} Even the generally permissive U.S. Court of Appeals for the Ninth Circuit has consistently recognized that notice of a warrant may be delayed for a reasonable period of time.

The problem has been that while a judge's right to delay notice of a warrant is acknowledged, different judges have exercised their discretion to delay notice in very different ways. As a result, there is a mix of inconsistent rules and practices across the United States. The Congress solved this problem in Section 213 of the Patriot Act by adopting a uniform standard. Under Section 213, a judge can delay notice for a reasonable period upon being shown a "reasonable cause" by investigators that immediate notification might have an adverse result, such as endangering the life or physical safety of an individual, flight from prosecution, evidence tampering, witness intimidation, or seriously jeopardizing an investigation.\textsuperscript{24}

While the Patriot Act finally sets a uniform standard for delaying warrants, thereby evening out the highly individual decisions of the judiciary, it continues to make these delays subject to judicial approval.\textsuperscript{25} Furthermore, the Act demands that approval only be granted in specified situations.\textsuperscript{26} The uniform "reasonable cause" standard is similar to the Supreme Court's reasonableness test for deciding the circumstances surrounding the service of a warrant. For example, the Supreme Court, in December 2003, unanimously approved as reasonable police entry into a drug house fifteen seconds after announcing their presence.\textsuperscript{27} Again, the criticism that the Patriot Act extends government powers

\footnotesize{\textsuperscript{22} 149 Cong. Rec. H7289 (daily ed. July 22, 2003). Specifically, the amendment provided: "None of the funds made available in this act may be used to seek a delay under Section 3103a(b) of title 18 United States Code." \textit{Id.}}

\footnotesize{\textsuperscript{23} Dalia v. United States, 441 U.S. 238, 247 (1979).}

\footnotesize{\textsuperscript{24} USA PATRIOT Act § 213(b).}

\footnotesize{\textsuperscript{25} \textit{Id.}}

\footnotesize{\textsuperscript{26} \textit{Id.} ("(1) the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result (as defined in section 2705); (2) the warrant prohibits the seizure of any tangible property, any wire or electronic communication (as defined in section 2510), or, except as expressly provided in chapter 121, any stored wire or electronic information, except where the court finds reasonable necessity for the seizure; and (3) the warrant provides for the giving of such notice within a reasonable period of its execution, which period may thereafter be extended by the court for good cause shown.").}

\footnotesize{\textsuperscript{27} United States v. Banks, 540 U.S. 31 (2003).}
is shown to be inconsistent with the facts of legal practice. The reasonable cause standard in the Act, which requires the government to show "good reason" to delay notice of a warrant, is arguably more restrictive than the prevailing standard that existed before the Patriot Act, when such delays were granted entirely at judicial discretion.

One of the most serious criticisms after 9/11 was that U.S. intelligence agencies failed to pool their knowledge and cooperate with each other to prevent the attacks. The Patriot Act addressed this issue while being sensitive to concerns about the capabilities that these agencies have for monitoring the population. Section 218 of the Patriot Act amended the Foreign Intelligence Surveillance Act (FISA)\(^\text{28}\) to facilitate increased cooperation between agents gathering intelligence about foreign threats and investigators prosecuting foreign terrorists—liaison that had been barred by administrative and judicial interpretations of FISA. Even the most strident of Patriot Act opponents would not want another terrorist attack to occur because a thirty-year-old provision prevented the law enforcement and intelligence communities from talking to each other about potential terrorist threats.

Section 218, essential as it is, raises important questions about the nature of law enforcement and domestic intelligence. The drafters of the Patriot Act grappled with questions such as whether the change is consistent with the Fourth Amendment protection against unreasonable search and seizure, whether criminal prosecutors should initiate and direct intelligence operations, and whether there is adequate process for defendants to seek exclusion of intelligence evidence from trial. In the end, Congress decided that Section 218 complies with the protections of the Fourth Amendment and that defendants have sufficient recourse to exclude evidence gathered by intelligence agencies from their trials. Although the drafters were confident that they had struck the correct balance, they recognized that prosecutors are fallible and, thus, left the ultimate decision with the courts. In November 2002, the Foreign Intelligence Surveillance Court of Review held that the provision was consistent with the Constitution.\(^\text{29}\)

II. Conclusion

The Patriot Act is far from being the executive grab for power and extension of government that many portray it as. Rather, the Act sensibly tidies up what judicial prerogative has too often confused, updates the law to keep pace with changing technology, and standardizes powers while restraining them. The Act gives the government the tools it needs to fight terrorism while at the same time observing cherished liberties. As counterterrorism is a dynamic process, the Patriot Act is not written in stone. It will need to be amended by Congress and it


\(^{29}\) See In re Sealed Case, 310 F.3d 717 (FISCR 2002).
will be scrutinized by the courts.

In many ways our nation is navigating uncharted waters. We have been forced to fight an unprovoked conflict; a war declared against us by nihilistic terrorists, not by our traditional adversary, a nation-state. During these times, when the foundation of liberty is under attack, it is critical that we both reaffirm the ideals of our constitutional democracy and also discern the techniques necessary to secure those ideals against the threat of terrorism. As Karl Llewellyn, the renowned law professor, once observed: "Ideals without technique are a mess. But technique without ideals is a menace."30 The Patriot Act, by combining ideals and technique is the domestic shield for American democracy, a protection deserving of renewal by our Congress.
