

## SPECIAL ISSUE

### USA Patriot Act

*By Viet D. Dinh\**

#### A. Introduction

On January 20, 2004, during the State of the Union address,<sup>1</sup> President Bush called for key sections of the USA Patriot Act<sup>2</sup> 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.<sup>3</sup>

The different responses illustrate how far the debate over counter-terrorism legislation has become politicized. The issue is dominated by hyperventilating rhetoric and political gamesmanship. The feverish chorus of discontents criticizing the Patriot Act and other responses to the continuing terrorism threat has reached a crescendo, which is both unfortunate and unhelpful. What we need now is for the United States 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.

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<sup>1</sup> President George W. Bush, State of the Union Address (Jan. 20, 2004) *available at* <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html> (last viewed Feb. 9, 2004).

<sup>2</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107\\_cong\\_public\\_laws&docid=f:publ056.107.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ056.107.pdf) (PDF File) and [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107\\_cong\\_public\\_laws&docid=f:publ056.107](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ056.107) (Text File) (last viewed Feb. 9, 2004).

<sup>3</sup> 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.)" President George W. Bush, State of the Union Address (Jan. 20, 2004) *available at* <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html> (last viewed Feb. 9, 2004).

The fundamental question facing Americans today is not the false trade-off between security and liberty,<sup>4</sup> 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 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 the Department of Justice, the US government has disrupted over 100 terrorist cells and incapacitated over 3,000 al-Qaeda operatives worldwide. The U.S. Department of Justice has indicted on criminal charges 284 persons linked to 9/11, of whom 149 have pled guilty or been convicted. U.S. immigration officials have deported 515 foreigners of interest to the 9/11 investigation for immigration violations. In addition, the US government has initiated 70 investigations into terrorism financing, freezing \$133 million in terrorist assets, and has obtained 23 convictions or guilty pleas.<sup>5</sup>

Counter terrorism 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 important work of the Congress in passing 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 USA Patriot Act." The Patriot Act, of course, owes its existence to the near unanimous vote of Congress after careful work by its Judiciary Committees.<sup>6</sup>

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<sup>4</sup> Assistant Attorney General Viet D. Dinh, *Ordered Liberty in the Age of International Terrorism*, Harold Leventhal Talk (June 7, 2002), available at <http://www.usdoj.gov/olp/leventhalthalk.pdf> (last viewed Feb. 9, 2004).

<sup>5</sup> Figures are available at [http://lifeandliberty.gov/subs/a\\_terr.htm](http://lifeandliberty.gov/subs/a_terr.htm) (last viewed Feb. 9, 2004).

<sup>6</sup> The House of Representatives passed the Patriot Act on October 24, 2001, by a vote of 357 to 66, with 9 members not voting. 147 CONG. REC. H7224 (daily ed. Oct. 24, 2001) (roll call vote 398). The Senate followed suit shortly thereafter, passing the act on October 25, 2001, by a vote of 98 to 1, with 1 senator not voting. 147 CONG. REC. S11,059-60 (daily ed. Oct. 25, 2001) (roll call vote 313).

## B. 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 report to Congress every six months as to the number of times and the manner in which the provision has been used. 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.”<sup>7</sup> Moreover, in September 2003, the Attorney General made public the previously classified information that Section 215 has not been used once since its passage.<sup>8</sup>

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. 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” 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 Con-

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<sup>7</sup> Press Release, U.S. House of Representatives, Committee on the Judiciary, Sensenbrenner Statement and Release of Justice Department’s Answers to USA-PATRIOT Act Oversight Questions (Oct. 17, 2002), available at <http://www.house.gov/judiciary/news101702.htm> (last viewed Feb. 9, 2004).

<sup>8</sup> E.g., Dan Eggen, *Patriot Monitoring Claims Dismissed; Government Has Not Tracked Bookstore or Library Activity*, *Ashcroft Says*, WASH. POST at A2 (Sept. 19, 2003).

stitution or laws of the United States.”<sup>9</sup> 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,<sup>10</sup> an appropriations rider that would have prohibited investigators from asking a court to delay notice to a suspect of a search warrant.<sup>11</sup> Had the Otter amendment provision 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.<sup>12</sup> Even the generally permissive Ninth Federal Circuit Court of Appeals, whose judges are seen to be liberal in their decisions, 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 the execution 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 US. The Congress solved this problem in Section 213 of the USA 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,

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<sup>9</sup> THE ATTORNEY GENERAL’S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND DOMESTIC SECURITY/TERRORISM INVESTIGATIONS 7 (2002), *available at* <http://www.usdoj.gov/olp/general-crimes2.pdf> (last viewed Feb. 9, 2004).

<sup>10</sup> See 149 CONG. REC. H7299 (daily ed. July 22, 2003) (roll call vote 408).

<sup>11</sup> 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.” *Id.*

<sup>12</sup> *Dalia v. United States*, 441 U.S. 238, 247 (1979).

witness intimidation, seriously jeopardizing an investigation, or unduly delaying a trial (awkward).

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. Furthermore, the act demands that approval only be granted in specified situations. 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 15 seconds after announcing their presence.<sup>13</sup> Again, the criticism that the Patriot Act extends government powers is shown to be inconsistent with the facts of legal practice. The reasonable cause standard in the act, that the government 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 US 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 which these agencies have for monitoring the population. Section 218 of the Patriot Act amended the Foreign Intelligence Surveillance Act (FISA)<sup>14</sup> to facilitate increased cooperation between agents gathering intelligence about foreign threats and investigators prosecuting foreign terrorists—liaison which had been barred by administrative and judicial interpretations of FISA. Even the most strident of opponents of the Patriot Act would not want another terrorist attack to occur because a 30-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 it was decided that Section 218 is compatible with the Fourth Amendment

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<sup>13</sup> United States v. Banks, 124 S. Ct. 521 (2003).

<sup>14</sup> Foreign Intelligence Surveillance Act (FISA) of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. § 1801 *et seq.* (2004)), available at <http://www4.law.cornell.edu/uscode/50/ch36.html> (last viewed Feb. 9, 2004).

and that defendants do 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 lawyers are fallible and that the courts will ultimately decide.

### C. 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, standardizes powers while restraining them and at the same time gives the government the tools it needs to fight terrorism while observing the cherished liberties of Americans. The Patriot Act is not written in stone. It will need to be amended and it will be debated by the courts. Already there has been a successful challenge in a federal court to Section 805, which bars the provision of expert advice to terrorist organizations.<sup>15</sup> The intention of Section 805 is sound, but its execution in this case may not have been.

In many ways our nation is navigating uncharted waters. We have been forced to fight an unprovoked conflict, war declared against us by nihilistic terrorists, not by the 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."<sup>16</sup> The Patriot Act, by combining ideals and technique is the domestic shield for American democracy, a protection deserving of renewal by our Congress.

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<sup>15</sup> Humanitarian Law Project v. Ashcroft, 2004 U.S. Dist. LEXIS 926 (C.D. Cal. Jan. 22, 2004), available at <http://news.findlaw.com/cnn/docs/terrorism/hlpash12304ord.pdf> (last viewed Feb. 9, 2004).

<sup>16</sup> Karl Llewellyn, *On What Is Wrong With So-Called Legal Education*, 35 COLUM. L. REV. 651, 662 (1935).