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## A CONGRESSIONAL PERSPECTIVE ON THE PATRIOT ACT EXTENDERS

DANIEL E. LUNGREN\*

*In the wake of 9/11, Congress was presented with the challenge of meeting its responsibility to protect the American public from future terrorist attacks. In seeking to fulfill this obligation, three critical provisions were enacted into law concerning the authority to use roving wiretaps, access to business records, and the so-called "lone wolf" provision. These three elements of the law contained sunset provisions which were extended in the reauthorization of the PATRIOT Act in the 109th Congress, the 111th Congress, and most recently in the 112th Congress. The requirement of prior judicial approval for their use and the exercise of vigorous oversight has been essential to continued support for these "extenders" within Congress. In the end, providing our nation's intelligence officials with these tools serves both the security and liberty interests of the American public.*

The date 9/11 is one that is indelibly etched in the minds of all Americans who witnessed that horrific day. It represents a date in our nation's history when we came face to face with an evil which forced us to recognize that others with premeditation and malice would enter our country with the purpose of killing innocent civilians.<sup>1</sup> The ability to carry out such a plot was facili-

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1. See *THE LONG SHADOW OF 9/11: AMERICA'S RESPONSE TO TERRORISM* 3 (Brian Michael Jenkins & John Paul Godges eds., 2011). The editors note:

The long shadow of 9/11 sometimes makes it difficult to recall what things were like before terrorists crashed hijacked airliners into New York skyscrapers and the Pentagon, killing thousands. The United States had been concerned about the growing phenomenon of terrorism since the late 1960s and had played a major role in international efforts to combat it. Terrorism escalated in the 1980s and 1990s as terrorists increasingly demonstrated their determination to kill in

tated by the absence of an appropriate legal framework to prevent the commission of such horrendous acts. A national security apparatus established to meet the challenges posed during the Cold War era was exposed as inadequate to respond to the very different threat posed by non-state actors whose method of operation is characterized by a conspiratorial effort to thwart detection.

Similarly, an investigation of suspected terrorists can also present quite distinct challenges from those encountered in a traditional criminal case. Perhaps most importantly, a criminal investigation often follows the commission of the crime. By contrast, the very purpose of an investigation into potential terrorist acts is to *prevent* potentially cataclysmic events before they take place.<sup>2</sup> As Judge Richard Posner of the Seventh Circuit United States Court of Appeals explains:

The aim of national security intelligence is to thwart attacks by enemy nations of terrorist groups rather than just to punish the perpetrators after an attack has occurred. The threat of punishment is not a reliable deterrent to such attacks, especially when the attackers are fanatics who place a low value on their own lives and when the potential destructiveness of such attacks is so great that even a single failure of deterrence can have catastrophic consequences. That is why, when government is fighting terrorism rather than ordinary crime, the emphasis shifts from punishment to prevention.<sup>3</sup>

Furthermore, the public nature of the offense is a distinct aspect of terrorism. A terrorist act is committed with the very idea of creating as much damage and disruption as possible. The *mens rea* of the offense entails a specific intent to kill civilians with the further purpose of inflicting a mass psychological wound. This is distinct from the burglar who enters a dwelling under the cover of darkness, or the circumstances where one perpetrates a murder from a position of "lying in wait." While both types of offense involve personal and public harm, the for-

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quantity and their willingness to kill indiscriminately. Terrorist attacks on American targets abroad had already provoked a military response on several occasions, but these were single actions.

*Id.*

2. See Remarks on Signing the USA PATRIOT ACT of 2001, 2 Pub. Papers 1306-07 (Oct. 26, 2001) (statement of President George W. Bush) ("The bill before me takes account of the new realities and dangers posed by modern terrorists. It will help law enforcement to identify, to dismantle, to disrupt, and to punish terrorists before they strike.").

3. RICHARD A. POSNER, NOT A SUICIDE PACT 92 (2006).

mulation of sound public policy must not ignore the gravity of the harm caused to the body politic by the failure to prevent the terrorist act.

In this context, foundational questions about the purpose of government itself are raised. On the basis of social contractarian legitimacy, the principle justification of the state lies in its responsibility to protect its citizens from harm by those outside of its jurisdictional boundaries. On the basis of natural rights theory, the protection of life is a properly basic good. Of those rights endowed by our Creator, the right to life is paramount in that without it others are rendered superfluous. The Preamble of our nation's Basic Law affirms such a role in acknowledging the responsibility of government to provide for the common defense.<sup>4</sup> Although our adversary may involve individuals or conspirators, it is the nature of the threat to society and our way of life which presents government with a responsibility to protect its citizens.

From the outset, it must also be acknowledged that the nature of this responsibility should be seen as a prudential safeguard of other rights and as a necessary precondition for human flourishing within society. One of the distinct aspects of the challenge posed by terrorism is that the murder of large numbers of people is done with the aim of disrupting the major institutions and the legal norms of its target. Those who have committed themselves to a nihilistic ideology at the same time have attempted to exploit the vulnerabilities and openness of free societies. We must always remember what it is that they seek to destroy in our effort to defeat them. In the end the alleged dichotomy between security and liberty is a false one. For only by respecting both will any definition of success be possible.

## I. LEGISLATIVE BACKGROUND

A critical aspect of the response to 9/11 involved a reassessment and reform of the tools available to federal officials necessary to enhance foreign intelligence and law enforcement surveillance authority. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT ACT" or "PATRIOT Act") was signed into law by then-President George W. Bush on October 26, 2001.<sup>5</sup> A subsequent response to the attack involved the enactment of the Intelligence Reform and

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4. U.S. CONST. pmbi.

5. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT

Terrorism Prevention Act of 2004 (“IRTPA”).<sup>6</sup> Among other things, new section 6001 of IRTPA<sup>7</sup> added those “engage[d] in international terrorism” to the list of categories of persons who are considered “agents of a foreign power” under the Foreign Intelligence Surveillance Act (“FISA”).<sup>8</sup> As a safeguard against potential abuse, sixteen sections of Title II of the PATRIOT Act<sup>9</sup> and section 6001 of IRTPA<sup>10</sup> were scheduled to expire on December 31, 2005.

Although it became necessary in the 109th Congress to extend the sunset deadlines to February 3, 2006,<sup>11</sup> and then later until March 10, 2006,<sup>12</sup> by March 9 the legislation was sent to

ACT), Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of U.S.C.).

6. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (codified as amended in scattered sections of U.S.C.).

7. *Id.* § 6001 (codified at 50 U.S.C. § 1801 (Supp. III 2009)).

8. 50 U.S.C. § 1801(b)(1)(C).

9. USA PATRIOT ACT § 224, 115 Stat. at 295. Section 102(a) of the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192, repeals section 224 of the USA PATRIOT ACT of 2001 that had mandated sixteen of its sections to expire on December 31, 2005 (later extended to March 10, 2006, by Pub. L. No. 109-170, 120 Stat. 3 (2006)).

Thus, section 102(a) of the USA Patriot Improvement and Reauthorization Act of 2005 made permanent the following fourteen sections of the USA PATRIOT ACT: section 201 (Electronic Communications Privacy Act (“ECPA”) wiretapping in certain terrorism investigations), section 202 (ECPA wiretapping in computer fraud and abuse investigations), section 203(b) (law enforcement sharing of court-ordered wiretap-generated foreign intelligence information wiretap information), section 203(d) (law enforcement sharing of foreign intelligence information notwithstanding any other legal restriction), section 204 (Foreign Intelligence Surveillance Act of 1978 (FISA) pen register order amendments including extension to electronic communications, e.g., Internet use), section 207 (duration of FISA wiretap and search orders involving agents of a foreign power), section 209 (seizure of stored voice-mail by warrant rather than ECPA order), section 212 (communications providers emergency disclosures of communications content or related records to authorities), section 214 (technical exception for foreign intelligence pen register/trap and trace device use), section 217 (law enforcement access to computer trespassers’ communications within the intruded system), section 218 (FISA wiretap or search orders with an accompanying law enforcement purpose; removal of “the wall” of separation between criminal catchers and spy catchers), section 220 (nationwide service of court orders directed to communication providers), section 223 (civil liability and disciplinary action for certain ECPA or FISA violations), section 225 (civil immunity for assistance in executing a FISA order).

10. Intelligence Reform and Terrorism Prevention Act § 6001.

11. Act of Dec. 30, 2005, Pub. L. No. 109-160, 119 Stat. 2957.

12. Act of Feb. 3, 2006, Pub. L. No. 109-170, 120 Stat. 3.

President Bush and was signed into law.<sup>13</sup> As a member of the House Judiciary Committee, I worked to permanently extend fourteen of the sixteen expiring provisions of the PATRIOT Act. At the time, it was my view that the larger debate concerning the appropriate scope of government authority under the PATRIOT Act warranted a more cautious approach to the extension of the PATRIOT Act's section 206 roving wiretap provision,<sup>14</sup> and the section 215 business records provision.<sup>15</sup> The 2005–06

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13. The House agreed to the conference report accompanying H.R. 3199 on December 14, 2005. 151 CONG. REC. 28,306 (2005). But due to a failure to invoke cloture in the Senate, 151 CONG. REC. 28,818 (2006), it was necessary for Congress to enact legislation to postpone the three expiring provisions until February 3. See 151 CONG. REC. 30,923 (2005) (House consideration and passage of extension); 151 CONG. REC. 30,917 (2005) (Senate concurrence in the House Amendment); Pub. L. No. 109-160, 119 Stat. 2957 (2005). Thereafter, the expiring provisions were further extended until March 10. See 152 CONG. REC. 573 (2006) (House passage under suspension of the rules); 152 CONG. REC. 745–46 (2006) (Senate consideration and passage); Pub. L. No. 109-170, 120 Stat. 3 (2006). On March 1, 2006, the Senate passed a separate bill, S. 2271, which included three provisions which were not included in the conference report. 152 CONG. REC. 2300 (2006). This enabled the Senate to invoke cloture and to pass the conference report on March 2, 2006. See 152 CONG. REC. 2418 (2006). Under the Suspension of the House Rules, the House passed S. 2271 on March 7, 2006, 152 CONG. REC. 2785–86 (2006), and both H.R. 3199 and S. 2271 were signed into law by the President, USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006).

14. USA PATRIOT ACT § 206, 115 Stat. at 282 (codified at 50 U.S.C. 1805(c)(2)(B) (2006)) authorizes Foreign Intelligence Surveillance Act orders to direct “other persons” to assist with electronic surveillance if “the Court finds, based on specific facts provided in the application, that the actions of the target . . . may have the effect of thwarting the identification of a specified person.” Intelligence Authorization Act for Fiscal Year 2002, Pub. L. No. 107-108, § 314(a)(2)(A), 115 Stat. 1394, 1402 (2001) amended 50 U.S.C. § 1805(c)(1)(B) to provide that the order must specify the location or the surveillance if the facilities or places are known. USA PATRIOT Improvement and Reauthorization Act of 2005, § 108(b)(4), 120 Stat. at 203 (codified at 50 U.S.C. § 1805(c)(3)), requires that the FISA Court be told the nature and location of each new facility or place, the facts and circumstances relied upon to justify the new surveillance, a statement of any proposed minimization procedures that differ from those contained in the original application, and the number of facilities or places subject to surveillance under the authority of the present order.

15. See USA PATRIOT Improvement and Reauthorization Act § 106(b), 120 Stat. at 196. The section 215 amendments in the 2005–06 authorization adopted the standard to require a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to a foreign intelligence, international terrorism, or espionage investigation. Records are presumptively relevant if they pertain to a foreign power or an agent of a foreign power; the activities of a suspected agent of a foreign power who is the subject of such authorized investigation; or an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of such authorized investigation. *Id.*

reauthorization would also provide a sunset of the lone wolf provision of IRTPA.<sup>16</sup> I felt that Congress had a solemn responsibility to the public to seek a course which would maximize support for our efforts to thwart another attack. In this regard, it was imperative for us to act in a fashion that was most likely to produce legislation which would have legitimacy in the eyes of the American public.

An integral aspect of the logic of sunsets was that they would entail a vigorous exercise of the oversight function of Congress. In a government based upon the concept of separation of powers, it is imperative for the legislative branch to ensure that duly enacted statutes are implemented as intended. This is of particular importance with respect to legislation such as the PATRIOT Act, where controversy over allegations of abuse have been raised by critics of the law. The pendency of an expiration date provides additional incentives for the exercise of oversight and scrutiny.<sup>17</sup> Although, evidence in support of these assertions was not

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16. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6001(a), 118 Stat. 3638, 3742 (codified at 50 U.S.C. § 1801(b)(1)(C)), provides that persons, other than U.S. citizens or permanent residents, engaged in international terrorism are presumptively considered to be agents of a foreign power.

17. H.R. Rep. No. 109-174, pt. 1, at 5 (2005), from the 109th Congress reports:

H.R. 3199 is based on four years of extensive oversight consisting of hearing testimony, Department of Justice Inspector General reports, briefings, and oversight correspondence. Since April of this year alone, this Committee has heard testimony from 35 witnesses during 11 hearings on the USA PATRIOT ACT. That testimony and related oversight has demonstrated that the USA PATRIOT ACT has been an effective tool against both terrorists and criminals intent on harming innocent people, and therefore deserves to be reauthorized with some modifications. H.R. 3199 accomplishes this objective by reauthorizing provisions set to sunset and making some improvements.

Two legislative hearings were held on the subject of the USA PATRIOT ACT during the 111th Congress. The first met on September 22, 2009. *USA PATRIOT ACT: Hearing before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties*, 111th Cong. (2009). The second, before the full Judiciary Committee, conducted a classified briefing for Members of Congress on October 29, 2009. In the 112th Congress, the Committee on the Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security held three hearings on the USA PATRIOT ACT on March 9, 2011, March 30, 2011, and May 11, 2011. Testimony was received from the following people: Mr. Todd Hinnen, U.S. Department of Justice; Mr. Robert S. Litt, Office of the Director of National Intelligence; Professor Nathan Sales, George Mason University; Mr. Julian Sanchez, Cato Institute; Mr. Kenneth Wainstein, O'Melveny & Myers, LLP; Mr. Michael German, American Civil Liberties Union; Mr. Patrick Rowan, McGuireWoods LLP; The Honorable Bob Barr, former Member of Congress; Mr. Bruce Fein, Campaign for Liberty; and Sergeant Ed Mullins, Sergeant

proffered before the House Judiciary Committee, Congressional oversight is nonetheless indispensable if Congress is to fulfill its responsibility within the constitutional framework of checks and balances.

Unfortunately, the 111th Congress failed to act with the appropriate level of dispatch concerning the extension of the expiring provisions of the PATRIOT Act and IRTPA. A short term extension until February 28, 2010 was attached to the FY 2010 Department of Defense Appropriations Act.<sup>18</sup> As that expiration date approached, Congress once again passed a temporary extension, pushing the reauthorization of these expiring provisions off onto the next Congress.<sup>19</sup>

Thus, upon being sworn in, the new Congress had a little over a month to act before the expiration of the sunset date on February 28. This was to prove more complicated than anticipated. The House attempted to pass an extension of the three expiring provisions under a suspension of the House rules. This process, designed for the passage of noncontroversial bills, proved to be ill-suited for consideration of the PATRIOT Act, and the legislation failed to garner the necessary two-thirds support required.<sup>20</sup> The House of Representatives had just previously gone through an historic shift in the composition of its membership and a change in its leadership. There was a clear sentiment among House Members that they wanted the oversight responsibilities of the House to be exercised by the House Judiciary Committee. With such assurances, the House passed another temporary extension after concurring with Senate language which moved the sunset date to May 27, 2011.<sup>21</sup>

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Benevolent Association of New York City. Additional materials were submitted by: the American Civil Liberties Union, Keep America Safe, the Federal Law Enforcement Officers Association, the Federal Bureau of Investigation Agents Association, the Cato Institute, the Sergeants Benevolent Association of New York City, the Society of Former Special Agents of the FBI, the National Association of Assistant United States Attorneys, and the Association of State Criminal Investigative Agencies. H.R. REP. NO. 112-79, at 3-4 (2011).

18. Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 1004, 123 Stat. 3409, 3470. (passage by House, 155 CONG. REC. H15,419-20 (daily ed. Dec. 16, 2009); passage by Senate, 155 CONG. REC. S13,472-77 (daily ed. Dec. 19, 2009)).

19. Act of Feb. 27, 2010, Pub. L. No. 111-141, 124 Stat. 37; 156 CONG. REC. S736-37 (daily ed. Feb. 24, 2010), 156 CONG. REC. H848-49 (daily ed. Feb. 25, 2010).

20. 157 CONG. REC. H520-28 (daily ed. Feb. 8, 2011).

21. FISA Sunsets Extension Act of 2011, Pub. L. No. 112-3, 125 Stat. 5 (amendment and passage by Senate, 157 CONG. REC. S727-31 (daily ed. Feb. 15, 2011); passage by House 157 CONG. REC. H1075-79 (daily ed. Feb. 17, 2011)).



The Senate Judiciary Committee then acted by reporting S. 193, which, among other things, extended the three expiring provisions until December 31, 2013.<sup>22</sup> Furthermore, the Senate bill also would have applied the sunset provision to national security letters, which are a form of administrative subpoena.<sup>23</sup> Although Chairman James Sensenbrenner of the House Judiciary Committee, Crime Subcommittee did conduct oversight hearings concerning the other non-expiring provisions of the PATRIOT Act, the specific charge of our committee was seen to be the extension of the provisions facing a sunset. Our committee reported H.R. 1800, which would have extended the roving wiretap and business records provisions of the PATRIOT Act until December 31, 2017, and would have made the “lone wolf” provision of the bill permanent.<sup>24</sup> As a cosponsor of the legislation and the original author of the sunset provisions in the House version of the PATRIOT Act in the 109th Congress, it was and remains my view that no justification has been offered as to why the lone wolf provision should not be made a permanent feature of our law. Furthermore, as will be discussed, there is much evidence that the stateless actor with no formal ties to groups may represent a new and increasingly dangerous aspect of the terrorist threat.

In the end, despite issues relating to the business records provisions of the PATRIOT Act, the Senate passed S. 990,<sup>25</sup> which then was approved by the House on May 26, 2011, providing for an extension of section 206 (roving wiretap), section 215 (business records), and section 6001 of IRTPA (lone wolf) until June 1, 2015.<sup>26</sup>

An argument could certainly be made that we have had a sufficient amount of experience with the PATRIOT Act extend-

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22. USA PATRIOT Act Sunset Extension Act of 2011, S. 193, 112th Cong. (2011). S. 193 would have extended Title V of the Foreign Intelligence Surveillance Act and the three expiring provisions until December 31, 2013. It would also have made changes to the expiring authorities, national security letters and other provisions of the PATRIOT Act. *Id.* § 2.

23. *Id.*

24. H.R. 1800, 112th Cong. § 2 (2011).

25. S. 990, 112th Cong. (2011); 157 CONG. REC. S3367-3402 (daily ed. May 26, 2011). The Senate had attempted to pass S. 1038, which would have provided a four year extension of the expiring provisions, but that bill was tabled on May 24, 2011. S. 1038, 112th Cong. § 2 (2011). Two days later, the Senate passed the text of S. 1038 as an amendment in the nature of a substitute to S. 990. Before the substitute amendment, S. 990 had been a Small Business Administration reauthorization bill that had passed both the Senate and House in different versions. S. 990, 112th Cong. § 1 (2011).

26. PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112-14, 125 Stat. 216 (House passage, 157 CONG. REC. H3738-46 (daily ed. May 26, 2011)).

ers to make them permanent features of our national security law. From the standpoint of our intelligence gathering professionals, there is much to be said concerning the advantages of continuity and predictability of the law.<sup>27</sup> On the other hand, in a democracy it is of vital importance that the public have confidence and the assurance that the legitimate interest we have in securing our nation from another attack is effected in a manner consistent with our values and legal tradition. This of course includes a willingness to consider the views of dissenting voices.<sup>28</sup>

The debate which took place in the 112th Congress over the extension of these expiring provisions embodied a thorough examination and exchange of views concerning both the effectiveness of the PATRIOT Act and its impact on the liberty interests of the American people. In the end, the extension of the three expiring provisions represented a recognition that liberty

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27. See *Oversight Hearing on the Fed. Bureau of Investigation: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. (Mar. 16, 2011), available at [http://judiciary.house.gov/hearings/hear\\_03162011.html](http://judiciary.house.gov/hearings/hear_03162011.html). FBI Director Robert Mueller made the following point:

[H]aving a sunset provision contributes a degree of uncertainty in the months going up to when that provision is to be reauthorized that is unsettling and disturbing in the sense that you don't know where your investigations will be at a particular time when it comes up for Congress' reauthorization. And consequently and quite obviously, we prefer not to have that uncertainty, not to have that question about what will be our powers down the road.

*Id.*; see also *Reauthorization of the PATRIOT Act: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 51 (2011). Robert S. Litt, General Counsel, Office of the Director of National Intelligence:

I think from the intelligence community's point of view we certainly share the hope that we can reach the stage where these authorities can be authorized on a permanent basis. From our point of view, while we encourage oversight, having to run up against repeated expirations is not something that we particularly enjoy doing. I guess at the generic level, I can share the sentiment that I hope we get to the stage where we all agree on what the appropriate way is that we can authorize these permanently. We may disagree as to what the details of that are.

*Id.*

28. See *USA PATRIOT Act: Dispelling the Myths: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 68–83 (2011) (statement of Bruce Fein, Campaign for Liberty) (representative of the testimony received that was critical of the USA PATRIOT ACT); see also *id.* 21–68 (statement of former Rep. Bob Barr, opposing sunsetted provisions of the PATRIOT ACT); *Permanent Provisions of the PATRIOT Act: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 31 (statement of Michael German, Policy Counsel for National Security and Privacy, American Civil Liberties Union); *Reauthorization of the PATRIOT Act*, *supra* note 27, at 36–44 (statement of Julian Sanchez, Research Fellow, Cato Institute).

and security presuppose an equipoise which must be secured from those who seek to destroy both.

## II. ROVING WIRETAPS

A roving or multi-point wiretap is tied to individuals and enables intelligence officials to obtain a single order that covers any communications device used by the target of the surveillance. In the absence of such authority, government officials would be required to seek a new court order every time a change in the location, phone, or computer occurred.<sup>29</sup>

The issue of roving wiretaps raises the classic dilemma of technology outpacing the evolution of the law. To put this issue in its historical context, at the time of the passage of the Foreign Intelligence Surveillance Act in 1978, our nation was in the midst of a cold war with another nation-state in a bi-polar world. Communications were then carried out with devices which would hardly be recognized today as a telephone. The revolutionary advances that we have seen in communications technology have benefited both personal and commercial life, while at the same time presenting intelligence officials with new and evolving challenges. We have come a long way beyond the contemplation of most, excluding perhaps a few prescient science fiction writers. For example, the use of prepaid or disposable cell phones has changed the rules of the game. While ongoing technological innovation forced changes to our criminal laws, the demands placed upon the intelligence community have been equally netlesome, if not more so. This is the context within which roving or multi-point wiretaps arose in the national security arena.

Under normal circumstances in applying for a wiretap, when the government appears before the FISA Court, it must demonstrate probable cause that a subject is a foreign power or an agent of a foreign power and uses a facility such as a telephone number.<sup>30</sup> If the court approves the request, it will issue two orders—the first to the government authorizing the surveillance, and the second to the telephone company with an order to provide assistance to the government.<sup>31</sup> However, if the government is able to demonstrate that the subject may take steps to thwart surveillance (e.g., switching telephone companies), the court may also

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29. See H.R. REP. NO. 112-79, at 2 (2011).

30. 50 U.S.C. § 1805(a)(2) (Supp. III 2009); *Reauthorization of the PATRIOT Act*, *supra* note 27, at 8–9 (statement of Todd M. Hinnen, Acting Assistant Att’y Gen., Nat’l Security Div., Dep’t of Justice).

31. *Reauthorization of the PATRIOT Act*, *supra* note 27, at 12 (statement of Todd M. Hinnen).

issue a roving or multi-point order which can be served on the new provider without first going back to the court.<sup>32</sup> After the government identifies the new number used by the subject and initiates surveillance, it is required to notify the FISA Court within ten days.<sup>33</sup>

One of the significant accomplishments of the PATRIOT Act was to tear down the so-called wall between law enforcement and intelligence concerning the sharing of information.<sup>34</sup> In this same regard, there is little reason to deny those in the intelligence community the tools that are available to law enforcement officials. Since 1986, law enforcement has been able to use roving or multipoint wiretaps to investigate ordinary crimes, including drug offenses and racketeering.<sup>35</sup> In fact, even the Ninth Circuit—known for its liberal jurisprudence—has upheld roving wiretaps in the criminal context against a Fourth Amendment challenge.<sup>36</sup> Section 206 of the PATRIOT Act simply authorized the same techniques in national security investigations. When one considers that the aim of those who are plotting terrorist acts is to inflict death on large numbers of innocent people in order to impose further psychological damage on the larger society, there is ample justification for doing so. As Professor Sales put it in his testimony before the House Subcommittee on Crime, Terrorism, and Homeland Security, “[i]f a roving wiretap is good enough for Tony Soprano, it is good enough for Mohamed Atta.”<sup>37</sup>

In 1968, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act concerning the permissible use of electronic surveillance in criminal cases.<sup>38</sup> It is noteworthy that its scope did not reach national security cases and that the Act explicitly provided that the criminal wiretap laws did not affect

32. 50 U.S.C. § 1805(c)(2)(B).

33. 50 U.S.C. § 1805(c)(3); *Reauthorization of the PATRIOT Act*, *supra* note 27, at 12 (statement of Todd M. Hinnen, Acting Assistant Att’y Gen., Nat’l Security Div., Dep’t of Justice).

34. *Permanent Provisions of the PATRIOT Act*, *supra* note 28, at 6 (statement of Todd M. Hinnen, Acting Assistant Att’y Gen., Nat’l Security Div., Dep’t of Justice).

35. Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 106(d)(3), 100 Stat. 1848, 1857 (1986) (codified as amended at 18 U.S.C. § 2518 (2006)).

36. *United States v. Petti*, 973 F.2d 1441, 1445 (9th Cir. 1992).

37. *Reauthorization of the PATRIOT Act*, *supra* note 27, at 24 (statement of Nathan A. Sales, Assistant Professor of Law, George Mason Univ.).

38. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968).

the President's constitutional duty to protect national security.<sup>39</sup> The specific provisions of Title III should not be construed to limit the scope of what was deemed permissible outside of the context of criminal cases nor to define the specific response to cases which were not contemplated by the Act.

It is not accidental that Title III followed in the wake of what is perhaps the seminal Supreme Court ruling in modern Fourth Amendment jurisprudence. In *Katz v. United States*, the Court held that the protections of the Fourth Amendment extended to electronic surveillance of oral communications despite the absence of a physical trespass.<sup>40</sup> The Court, however, did not extend its holding to cases involving national security. Justice Stewart, writing for the majority, observed that "[w]hether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case."<sup>41</sup> Justice White offered a similar disclaimer in his concurrence with the majority.<sup>42</sup>

This is not to suggest that the Fourth Amendment is not implicated in the collection of intelligence. In *United States v. United States District Court*, the United States Supreme Court held that in the case of *domestic* national security surveillance, prior judicial approval is required to satisfy the Fourth Amendment.<sup>43</sup>

39. *Id.* § 2511(3). Section 2511(3) provides:

Nothing contained in this chapter or in section 605 of the Communications Act of 1934 shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary or to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government.

*Id.*

40. *Katz v. United States*, 389 U.S. 347, 353 (1967).

41. *Id.* at 358 n.23.

42. *Id.* at 363 (White, J. concurring) ("In this connection . . . the Court points out that today's decision does not reach national security cases.")

43. *United States v. U.S. District Court (Keith)*, 407 U.S. 297, 319-21 (1972). Writing for the Majority, Justice Powell explained:

These Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch. . . . The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evi-

In such cases, the Court deferred to Congress to develop standards for domestic intelligence that were distinct from those established for criminal investigations under Title III.<sup>44</sup>

Finally, in drawing a clear line between domestic and foreign intelligence gathering, the Court observed that:

We emphasize, before concluding this opinion, the scope of our decision. As stated at the outset, this case involves only the domestic aspects of national security. We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents.<sup>45</sup>

Thus, in what has come to be known as the *Keith* case, the court expressed no opinion concerning the scope of the Fourth Amendment with respect to issues involving foreign powers or their agents.

In general, the procedures under Title III are similar to those of the Foreign Intelligence Surveillance Act as amended by section 206. However, unlike criminal cases where the question relates to probable cause that a crime is being or is about to be committed, the issue before a FISA Court relates to whether (1) there is probable cause that the subject of an investigation is a foreign power or an agent of a foreign power and (2) probable cause that the device is being used or is about to be used by a foreign power or an agent of a foreign power.<sup>46</sup> Under section 206, the FISA Court order must describe the specific target in detail when authorizing a roving wiretap for a suspect whose

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dence and overlook potential invasions of privacy and protected speech.

*Id.* at 316–17. It should be noted that the procedures contained within section 206 are enacted by Congress and signed into law by the President. Furthermore, an order under section 206 must be approved by the FISA Court before it can be executed.

44. *Id.* at 322–23. As the Court explained:

Given these potential distinctions between Title III criminal surveillances and those involving the domestic security, Congress may wish to consider protective standards for the latter which differ from those already prescribed for specified crimes in Title III. Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection.

*Id.*

45. *Id.* at 321–22.

46. 50 U.S.C. § 1805(a)(2) (Supp. III 2009).

identity is not known.<sup>47</sup> The Act recognizes that it is the very actions of the subject of the investigation to thwart surveillance, which renders his or her identity unascertainable.<sup>48</sup> Furthermore, the FISA Court must be informed of the nature and location of each new facility or place, and the facts and circumstances relied upon to justify the new surveillance,<sup>49</sup> and provided with a statement of any proposed minimization procedures<sup>50</sup> that differ from those in the original order.<sup>51</sup>

Similarly, with regard to the issue of notification, section 206 recognizes an obvious distinction between criminal cases and those involving foreign powers and agents of a foreign power. If the notice provisions of Title III were applied in the context of an investigation of a terror suspect, intelligence officials would

47. USA PATRIOT ACT; Pub. L. No. 107-56. § 206, 115 Stat. 272, 282 (2001); see also *Oversight Hearing on the Fed. Bureau of Investigation*, *supra* note 27. FBI Director Robert Mueller explained:

We have to go to the judge with sufficient information to identify this individual from all other individuals. We may not have an accurate name . . . but nonetheless, we may have been surveilling him for a period of time. We may have information on somebody. The name is affixed to this particular person, but we don't know the true name. But we, in order to get the warrant, have to have sufficient specificity to identify this individual from all others.

*Id.*

48. 50 U.S.C. § 1805(c)(2)(B).

49. USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 108(b)(4), 120 Stat. 192, 203 (2006) (codified as amended at 50 U.S.C. § 1805(c)(3)). The government normally must demonstrate to the FISA Court within ten days of initiating surveillance of the new facility that probable cause exists to tie the target to the new facility. For "good cause" the notification period may be extended for up to 60 days. See also *Oversight Hearing on the Fed. Bureau of Investigation*, *supra* note 27 (statement of FBI Director Robert Mueller).

50. USA PATRIOT Improvement and Reauthorization Act of 2005 § 106(g)(2), 120 Stat. at 199 (codified as amended at 50 U.S.C. § 1801(h) (Supp. III 2009)); *Reauthorization of the PATRIOT Act*, *supra* note 27, at 56 (questioning of Todd M. Hinnen, Acting Assistant Att'y Gen., Nat'l Security Div., Dep't of Justice). Minimization relates to the excising of information concerning U.S. persons:

In a criminal context, real-time minimization is required. In other words, an agent literally listens to the phone call, and if it appears to be a call to mom about picking up milk on the way home, the call is dropped. Because Congress recognized that spies and terrorists don't always operate that way, there may be language issues, there may be issues of talking in code, there may be tradecraft issues, the FISA statute does not require real-time minimization. It requires after-the-fact minimization.

*Id.*

51. USA PATRIOT Improvement and Reauthorization Act of 2005 § 108(b)(4).

be required to notify the suspect within the required period of time that the surveillance had taken place.<sup>52</sup> Such a scenario would undermine the intelligence gathering process. By contrast, under section 206, the supervision requirement of the FISA Court after the required notification is actuated provides further assurance of compliance with the purpose of the law.<sup>53</sup>

Critics of section 206 have made the argument that even if the case for roving wiretaps has been established, it is superfluous because of the available alternative of obtaining a warrant under Title III. In testimony before the House Judiciary Committee, FBI Director Robert Mueller addressed this question:

On the title III and criminal side, you are looking for a person who has committed or is in the process of committing a crime. On the national security side, you are trying to prevent that terrorist act and identify that person as a terrorist. . . .

There is another aspect to it and that is often on the counter-terrorism side and since September 11th, we integrate information from the CIA, NSA, and other intelligence entities. There are provisions on the national security side to protect that information, the sources and the methods that you do not have on the criminal side. And consequently the mechanisms we have on the FISA Court and FISA statute to allow us to do often that which cannot be done on the criminal side, and where the focus is an agent of a foreign power, the agent of a foreign power in this case being a terrorist.<sup>54</sup>

Director Mueller's statement captures with great clarity the stakes involved in terrorist surveillance cases. Unlike criminal cases where someone is committing or has committed a crime, intelligence officials are in the prevention business—stopping a potentially catastrophic act before it takes place. In order to accomplish this objective, the protection of sources and methods of intelligence collection are a matter of paramount concern.

It is important to understand that a section 206 roving or multi-point wiretap must be obtained from the FISA Court. The court itself is comprised of federal judges appointed by the Chief Justice of the United States Supreme Court.<sup>55</sup> The 2005 amend-

52. 18 U.S.C. § 2518(8)(d) (2006).

53. 50 U.S.C. § 1805(c)(3) (2006).

54. *Oversight Hearing on the Fed. Bureau of Investigation*, *supra* note 27 (statement of Robert Mueller, FBI Director).

55. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, § 103, 92 Stat. 1783, 1788 (codified at 50 U.S.C. § 1803 (2006 & Supp. III



ments to the PATRIOT Act provided an extra layer of judicial review as additional insurance that intelligence officials will not abuse this multi-point authority.<sup>56</sup> The requirement in the statute of a description of the suspect and the nature and location of each new facility dispel any argument that a roving order is somehow tantamount to a general warrant.<sup>57</sup> Furthermore, it goes without saying that terrorists use various forms of different communication devices in order to conceal themselves and their communications. Such efforts to avoid detection must not be rewarded by doctrinaire legal theory divorced from the violent world of facts. Section 206 represents a reasonable response to the obligation to protect the public within the parameters of well-settled law.

### III. SECTION 215 BUSINESS RECORDS

Section 215 of the PATRIOT Act amended the business records section of FISA to authorize the Director of the Federal Bureau of Investigation or his or her designee to apply to the FISA Court in order to obtain an order granting intelligence officials access to “any tangible things” (including books, records,

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2009)); *see also Reauthorization of the PATRIOT Act, supra* note 27, at 22 (statement of Robert Litt, Gen. Counsel, Office of Dir. of National Intelligence).

The FISA Court is composed of eleven Article III judges selected from districts around the country and appointed by the Chief Justice of the United States for seven-year terms. As noted above, the judges of the FISA Court engage in a thorough and searching review of every FISA application to ensure that the application complies with the statutory standards. Moreover, the FISA Court not only approves the use of these authorities, it also takes an active role in ensuring that the government is complying with the FISA Court orders, by regularly reviewing the activities approved, prescribing procedures that agencies must follow in executing their orders and by requiring that violations of these procedures be reported.

*Id.*

56. 50 U.S.C. § 1805(c)(3); *see also* 151 CONG. REC. 27,850–58 (Joint Explanatory Statement of the Committee of Conference to the USA PATRIOT Improvement and Reauthorization Act of 2005).

57. *See Reauthorization of the PATRIOT Act, supra* note 27, at 60 (statement of Nathan Sales, Assistant Professor of Law, George Mason Univ.)

I think we are pretty far away from the days of King George III. FISA, as amended by the PATRIOT Act, doesn't allow the sort of general warrant dragnets that our founders justifiably worried about 200 years ago. That is not the situation that FISA authorizes. In all cases, FISA, as amended by the PATRIOT Act, requires probable cause to believe that the target is an agent of a foreign power, i.e., somebody who is a spy or a terrorist. That seems like it meets the particularity requirement pretty precisely to me.

*Id.*

papers, and other documents) no matter who holds it in foreign intelligence, international terrorism, and clandestine intelligence cases.<sup>58</sup> The applicable standard adopted by Congress in the 2005–06 reauthorization required “a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to the authorized investigation.”<sup>59</sup> Records are deemed to be presumptively relevant if they pertain to: a foreign power or an agent of a foreign power; the activities of a suspected agent of a foreign power who is the subject of such authorized investigation; or an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of such authorized investigation.<sup>60</sup>

The importance of section 215 is that it enables intelligence officials to go before a FISA Court to demonstrate the relevance of things like car rental records relating to travel, or purchase records from a pharmacy where the suspect may be seeking to obtain precursor chemicals for the construction of an explosive device.<sup>61</sup> Such information can provide critical pieces of information which are essential for officials to be able to connect the dots in order to prevent terrorist acts. In testimony before the House Committee on the Judiciary, FBI Director Mueller testi-

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58. USA PATRIOT ACT, Pub. L. No. 107-56, § 215, 115 Stat. 272, 287 (2001) (codified at 50 U.S.C. §§ 1861–62 (2006)). Prior to enactment of the PATRIOT Act, four categories of business records were subject to compulsory production. The FBI could seek a FISA Court order for the production of business records from common carriers, public accommodation facilities, storage facilities, and vehicle rental facilities. 50 U.S.C. § 1861.

59. USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 106(b), 120 Stat. 192, 196 (2006) (codified at 50 U.S.C. § 1861(b)(2)(A)); see Michael J. Woods, *Counterintelligence and Access to Transactional Records: A Practical History of USA PATRIOT Act Section 215*, 1 J. NAT'L SEC. L. & POL'Y, 37, 57 (2005). Note that in 1998, Congress amended the FISA statute 50 U.S.C. § 1862(b)(2)(B)(2000) to authorize the FISA Court to issue an order for the production of documents if the application contained “specific and articulable facts” giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power. Then, under section 215 of the PATRIOT Act, as originally enacted, the application needed to “specify that the records concerned [were] sought” for a foreign intelligence, international terrorism, or espionage investigation. USA PATRIOT ACT § 215. But then in the 2005–06 reauthorization, Congress changed the standard to require “a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant” to a foreign intelligence, international terrorism, or espionage investigation. USA PATRIOT Improvement and Reauthorization Act § 106(b).

60. 50 U.S.C. § 1861(b)(2)(A).

61. See *Oversight Hearing on the Fed. Bureau of Investigation*, *supra* note 27 (statement of Robert Mueller, FBI Director).

fied, “[w]e have used that provision [section 215] over 380 times since 2001.”<sup>62</sup>

The ability of intelligence officials to obtain access to business records under section 215 has come to be known by the misnomer of the “library provision.”<sup>63</sup> Ironically, the original text of section 215 did not mention libraries<sup>64</sup>—it was in response to concerns expressed about possible chilling effects on First Amendment rights that a library-specific provision was included in the 2005–06 reauthorization of the Act. The new language was intended to circumscribe the use of the statute with respect to “library circulation records, library patron lists, book sales records, firearms sales records, tax return records, educational records, or medical records containing information that would identify a person . . . .”<sup>65</sup> Use of section 215 with respect to any of these categories would require approval by the Director of the FBI, the Deputy Director, or the Executive Assistant Director for National Security.<sup>66</sup> Furthermore, where the investigative target is a U.S. person,<sup>67</sup> the government must show that the investigation is not based solely on activities protected by the First Amendment.<sup>68</sup>

It is of course noteworthy that prosecutors have the ability to obtain records from libraries through grand jury subpoenas. As Professor Sales testified before our subcommittee concerning section 215:

This provision isn’t aimed at libraries, though it conceivably might be applied to them, although as we have heard, it has not yet been so. Still, that is not unusual. Grand juries sometimes demand business records from libraries in ordinary criminal investigations. Indeed, the Iowa Supreme Court once upheld a library subpoena in a case involving cattle mutilation. If we can investigate cattle mutilators,

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62. *Id.*

63. See KEITH FIELDS, AM. LIBRARY ASS’N, RESOLUTION ON THE USA PATRIOT ACT AND RELATED MEASURES THAT INFRINGE ON THE RIGHTS OF LIBRARY USERS, (2003), available at <http://www.ala.org/offices/sites/ala.org.offices/files/content/wo/reference/colresolutions/PDFs/012903-CD20.1.pdf>; Judith King, Letter to the Editor, *FBI ‘Fishing Expeditions’ Librarians’ Biggest Worry*, WALL ST. J., May 24, 2004, at A15.

64. USA PATRIOT ACT § 215; 50 U.S.C. § 1862(a)–(b).

65. 50 U.S.C. § 1861(a)(3).

66. *Id.*

67. 50 U.S.C. § 1801(i) (defining “United States person” as a U.S. citizen, lawfully admitted alien for permanent residence, or U.S. corporation).

68. 50 U.S.C. § 1861(a)(1)–(a)(2)(B).

hopefully we can investigate international terrorists using the same [investigation] technique[s].<sup>69</sup>

No one has suggested that libraries should be targeted with respect to terror related investigations. In fact, the 2005–06 amendments created additional safeguards beyond those which already existed for libraries and bookstores. At the same time, however, surely no one would suggest that libraries and booksellers should be excluded from national security investigations in a manner that has never been contemplated in criminal cases. To do so would be to create a de facto haven for terrorists. Section 215 represents a careful and balanced approach to prevent such a possibility while yet protecting the First Amendment rights of the American people.<sup>70</sup>

It should also be noted that the standards and procedures established under section 215 for obtaining an order from the FISA Court do not implicate the Fourth Amendment.<sup>71</sup> The rationale for what has come to be known as the “third party doctrine” is that the disclosure of information to a third party vitiates a reasonable expectation of privacy.<sup>72</sup> However, Professor Orin Kerr has argued that the better rationale can be better understood in terms of the consent doctrine. As he frames the argument, “[d]isclosure to third parties eliminates protection because it implies consent.”<sup>73</sup> Regardless of the rationale, this is one of those instances where different viewpoints over public policy do not necessarily translate into a disagreement of a constitutional stature. This is not to suggest that differences over policy are of any less importance in terms of their actual impact,

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69. *Reauthorization of the PATRIOT Act*, *supra* note 27, at 25 (statement of Nathan A. Sales, Assistant Professor of Law, George Mason Univ.).

70. *See* 50 U.S.C. § 1861 (a)(2)(B) (“An investigation conducted under this section shall . . . not be conducted of a United States person solely upon the basis of activities protected by the first amendment to the Constitution of the United States.”).

71. *United States v. Miller*, 425 U.S. 435, 443 (1976) (“[T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.”).

72. *Id.* at 442; *see also* *Couch v. United States*, 409 U.S. 322 (1973); *United States v. Payner*, 447 U.S. 727 (1980).

73. Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 565 (2009). Kerr adds that the use of third parties could give rise to a substitution effect. Without the rule, it could enable wrongdoers to take public aspects of their crimes and replace them with a private transaction. “Without the third-party doctrine, savvy wrongdoers could use third-party services in a tactical way to enshroud the entirety of their crimes in zones of Fourth Amendment protection.” *Id.* at 564.

but rather to clarify the specific nature of the dispute over section 215.

As previously noted, section 215 is much like a grand jury subpoena in that it requires the recipient third party to identify and provide the things requested by the government. It should be recognized that section 215 authority is narrower in scope than that of a grand jury.<sup>74</sup> The former is limited to national security investigations, while a grand jury can issue a subpoena “merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.”<sup>75</sup> It warrants emphasis that a section 215 order is much more than a grand jury subpoena in that the order is issued by a court comprised of federal judges. As such, we should not afford less deference to a court comprised of independent judges than we do with respect to a grand jury.

Along with the other protections which have been built into section 215, one of the more obvious safeguards provides a recipient of a business records production order with the ability to challenge it.<sup>76</sup> The FISA Court judge has seventy-two hours in which to review the petition and to make a determination whether it is frivolous.<sup>77</sup> The court is also empowered to modify or set aside the order if it does not meet the requirements of FISA or is otherwise unlawful.<sup>78</sup> Furthermore, the recipient of a section 215 order has the right to seek judicial review before the FISA Court of Review and the United States Supreme Court through a writ of certiorari.<sup>79</sup>

The PATRIOT Act also contains vigorous oversight provisions which are applicable to section 215.<sup>80</sup> Under the terms of the USA PATRIOT Improvement and Reauthorization Act of

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74. *Reauthorization of the PATRIOT Act*, *supra* note 27, at 25 (statement of Nathan A. Sales, Assistant Professor of Law, George Mason Univ.).

75. *United States v. Morton Salt Co.*, 338 U.S. 632, 642–43 (1950); *see also Reauthorization of the PATRIOT Act*, *supra* note 27, at 25 (statement of Nathan A. Sales, Assistant Professor of Law, George Mason Univ.).

76. 50 U.S.C. § 1861(f)(2)(A)(i) (2006).

77. *Id.* § 1861(f)(2)(A)(ii).

78. *Id.* § 1861(f)(2)(B).

79. *Id.* § 1861(f)(3).

80. *See* H. COMM. ON THE JUDICIARY, 112TH CONG., MARKUP OF H.R. 1800, FISA SUNSETS REAUTHORIZATION ACT OF 2011 (Comm. Print 2011). In fact, Congressman John Conyers, the Ranking Member of the House Judiciary Committee and an opponent of the PATRIOT Act extension, stated:

I also want to salute the committee in having a wide-ranging view—of views from the witnesses yesterday on the PATRIOT Act. Conservative witnesses like our former colleague, Bob Barr; a constitutional authority, conservative, Bruce Fein, I think brought a deeper perspective to this hearing on the PATRIOT Act than we have enjoyed before. And I

2005, the Attorney General is required to submit an annual report to the House and Senate Intelligence Committees and the Judiciary Committees of both bodies concerning the use of this section.<sup>81</sup> Furthermore, one of the additional oversight mechanisms established by the 2005 PATRIOT Act reauthorization was to provide audit authority for the Inspector General of the Department of Justice relating to the FBI's use of section 215 authority.<sup>82</sup>

As a member of the House Judiciary Committee, with oversight responsibilities concerning the PATRIOT Act, it is my view that these provisions of the Act are indispensable to ensuring that the law is carried out in the manner that Congress intended. All human institutions are fallible, as are the individuals who work within them. It is because of this very fact that continued vigilance is required.

In considering the safeguards built into section 215, it must also be remembered that the privacy interests of innocent Americans are protected under the USA PATRIOT Improvement and Reauthorization Act of 2005 as a result of the required minimization standards which apply to section 215.<sup>83</sup> These procedures are intended to limit the collection and dissemination of non-publicly available information relating to United States persons.<sup>84</sup> The purpose of the PATRIOT Act is to prevent another

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heard good, probing questions coming from my colleagues, my conservative colleagues on this committee.

*Id.* at 11.

81. 50 U.S.C. § 1862 (2006). The annual report is due each April and must submit information from the previous year relating to the total number of applications made for section 215 production orders approving requests for the production of tangible things; the total number of such orders granted as requested, granted as modified, or denied; and the number of 215 orders either granted as modified, or denied for the production of library circulation records, library patron lists, book sales records, or book customer lists, firearms sales records, tax return records, educational records, and medical records containing information that would identify a person. *Id.* § 1862(b).

82. USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 106A, 120 Stat. 192, 200 (2006).

83. See 50 U.S.C. § 1861(g) (2006).

84. See H.R. REP. NO. 109-333, at 91 (2005) (Conf. Rep.) (explaining minimization procedures).

[S]ection 106 directs the Attorney General to draft minimization procedures that apply to information obtained under a FISA "business records" order. In the application for the order, the applicant must enumerate the minimization procedures applicable to the retention and dissemination of the tangible things sought by the FBI in the application. Such enumerated procedures should meet the requirements set forth in the definition of minimization procedures found in new subsection (g) of section 501. If the court finds that the enumer-

cataclysmic event like that which occurred on 9/11. This has nothing to do with spying on innocent Americans, and the protections built into section 215, along with minimization requirements, reinforce that objective.

Another improvement to section 215 in the 2005 reauthorization and the more recently enacted extenders in the 112th Congress, relates to the non-disclosure provisions of the Act. Some controversy arose over the prohibition against disclosure by the recipient of an order to the suspect under investigation or to other persons.<sup>85</sup> In the popular nomenclature, this came to be known as the so-called “gag order.”<sup>86</sup> Prior to the enactment of the 2005–06 reauthorizations, disclosure of an order was limited to those necessary to assist in the execution of the order. The changes to section 215 in the 109th Congress expanded the list of those who could receive notice of an order to include attorneys necessary to provide the recipient of the order with legal counsel.<sup>87</sup>

Furthermore, a related provision in the USA PATRIOT Improvement and Reauthorization Act of 2005 had required the recipient of an order to disclose to the FBI upon its request, the identities of persons to whom disclosure was made.<sup>88</sup> Concerns were raised at the time that this might have a “chilling effect” on the right to seek counsel.<sup>89</sup> Consequently, in reauthorizing the PATRIOT Act in the 109th Congress, we provided an exemption

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ated procedures fail to meet the requirements of subsection (g), the Conferees expect that the court will direct that other procedures adopted by the Attorney General be applied to the information sought, consistent with the authority of the court specified in section 501(c)(1), as amended.

*Id.*

85. *See, e.g., Doe v. Gonzales*, 449 F.3d 415, 421 (2d Cir. 2006) (dismissing as moot appeals from rulings that the gag order of the PATRIOT Act was unconstitutional on the grounds that the 2005 USA PATRIOT Improvement and Reauthorization Act had cured constitutional concerns).

86. The “gag order” provision, codified at 50 U.S.C. § 1861(d)(1), reads: No person shall disclose to any other person that the Federal Bureau of Investigation has sought or obtained tangible things pursuant to an order under this section, other than to— (A) those persons to whom disclosure is necessary to comply with such order; (B) an attorney to obtain legal advice or assistance with respect to the production of things in response to the order; or (C) other persons as permitted by the Director of the Federal Bureau of Investigation or the designee of the Director.

87. USA PATRIOT Improvement and Reauthorization Act of 2005 § 106(e), 120 Stat. at 197 (codified at 50 U.S.C. § 1861(d)(1)).

88. *Id.* (codified as amended at 50 U.S.C. § 1861(d)(2)(C)).

89. 152 CONG. REC. 1806 (2006).

concerning the required disclosure of the identity of legal counsel relating to section 215 orders.<sup>90</sup>

Finally, the 2006 reauthorization amendments to the Act provided a judicial review procedure for the non-disclosure provisions of section 215.<sup>91</sup> After the expiration of one year, the recipient of a business records order may petition the FISA Court to set aside the non-disclosure requirement.<sup>92</sup> This language represented a careful balancing of the interests of disclosure to others and the compelling need to prevent a suspect from being tipped off that he or she is under investigation. It is important to remember that we are dealing with national security cases involving persons with certain specified connections to a foreign power or an agent of a foreign power and that the order to produce this transactional information began with the court.

The business records provisions of section 215 of the PATRIOT Act have drawn an inordinate amount of attention for reasons which are largely unrelated to the actual language in the statute.<sup>93</sup> Abstract principles, lacking correspondence with legislative language, all too often produce more heat than light. The use of such principles in public policy debate has an understandable appeal. However, where the stakes are so high and where our intelligence professionals are expected to get it right every time, more is required. The extension of the business records section by the 112th Congress was not aimed at libraries and did not entail any changes in the law relating to national security letters.<sup>94</sup> Although these are both important matters of public con-

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90. USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, Pub. L. No. 109-178, § 4(a), 120 Stat. 278, 280 (codified at 50 U.S.C. § 1861(d)(2)(C)).

91. *Id.* § 3 (codified at 50 U.S.C. § 1861(f)).

92. 50 U.S.C. § 1861(f)(2)(A)(i).

93. See, e.g., *Reauthorization of the PATRIOT Act*, *supra* note 27, at 45–50. An exchange with one of the witnesses before the subcommittee is illustrative of this point:

Mr. GOWDY. You are upset about national security letters, but that is not part of what we are doing.

Mr. SANCHEZ. I was tying those with—

Mr. GOWDY. But that is not part of this reauthorization.

Mr. SANCHEZ. That is true.

*Id.* at 49.

94. A national security letter (“NSL”) is essentially an administrative subpoena issued by a federal agency requiring the production of information by third party custodians. See *Permanent Provisions of the PATRIOT Act*, *supra* note 28, at 13 (prepared statement of Todd M. Hinnen, Acting Assistant Att’y Gen., Nat’l Security Div., Dep’t of Justice). NSLs are authorized on the basis of the Electronic Communications Privacy Act (ECPA) 18 U.S.C. § 2709; the Right to Financial Privacy Act (RFPA) 12 U.S.C. § 3414; the Fair Credit Reporting Act



cern, they were unrelated to the extension of section 215 and the other two expiring provisions of the PATRIOT Act.

This is not to suggest that the business records language should not be scrutinized with the highest degree of care. That is a solemn responsibility of Congress in exercising its oversight responsibility. After attempting to look at all of the evidence, the 109th Congress made important changes to the underlying statute that were subsequently reenacted in the 112th Congress.

It is not necessary to speculate concerning the substantive nature of the improvements made to section 215. A number of organizations filed suit in 2003 on the basis that section 215 violated the First, Fourth, and Fifth Amendments.<sup>95</sup> While legal proceedings were pending, Congress adopted the USA PATRIOT Improvement and Reauthorization Act of 2005, which embodied many of the changes to the act previously discussed. On October 27, 2006, the plaintiffs filed a motion seeking voluntary withdrawal of their complaint.<sup>96</sup> While this in no way suggests acquiescence with section 215 by its critics, it does reflect the outcome of an openness and willingness on the part of Congress to take action where warranted to make improvements to section 215. Both the 2005-06 reauthorization and the more recently enacted extension of the business records provisions of the Act in the 112th Congress reflect these reforms.

#### IV. THE LONE WOLF PROVISION

The so-called “lone wolf” provision was originally enacted as part of the Intelligence Reform and Terrorism Prevention Act of 2004 (“IRTPA”).<sup>97</sup> Although it was not a part of the original PATRIOT Act, it was subjected to the sunset provisions of the Act.<sup>98</sup> It amends the definition of “agent of a foreign power” to

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(FCRA) 15 U.S.C. §§ 1681u, 1681v; and the National Security Act (NSA) 50 U.S.C. § 436.

95. *Muslim Cmty. Ass'n v. Ashcroft*, 459 F. Supp. 2d 592, 594–95 (E.D. Mich. 2006).

96. See *Reauthorization of the PATRIOT Act*, *supra* note 27, at 45 (statement of Rep. James Sensenbrenner) ([W]hen the reauthorization was done, section 215 was declared unconstitutional by a Federal court. I believe it was in Michigan. And after the Congress did the reauthorization that many of my friends opposed, the plaintiffs withdrew their lawsuit.).

97. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6001(a), 118 Stat. 3638, 3742 (codified at 50 U.S.C. § 1801(b)(1)(C) (2006 & Supp. III 2009)).

98. Section 6001(a) was originally made subject to the sunset provisions of section 224 of the USA PATRIOT ACT. *Id.* § 6001(b). Section 103 of the USA PATRIOT Improvement and Reauthorization Act of 2005 extended the sunset on the amendment made by section 6001 by four additional years, from

include individuals—other than U.S. persons—engaging in international terrorism.<sup>99</sup>

The purpose of the lone wolf provision is to obviate the need to prove a specific connection between the terror suspect and a foreign government or terrorist organization. There are evidentiary problems connected with the burden of establishing such a connection which give rise to the need for such a provision. The difficulty of doing so is particularly onerous during the early stages of an investigation when intelligence officials have yet to paint a clear picture of the suspect and his or her intentions.<sup>100</sup> At the same time, the government would have to have sufficient information about the individual and his or her plans for a terrorist act to be able to satisfy the definition of international terrorism.<sup>101</sup>

Concerns relating to terrorist recruitment over the Internet and the potential for self-radicalization provide the rationale for the lone wolf provisions of the law. Those who share the ideological tenets of radical groups such as al Qaeda, and are willing to act on them, pose a threat to public safety regardless of whether they are following the operational plans of a group operating on similar presuppositions. Acting Assistant Attorney General for the National Security Division, Todd Hinnen, explained the lone wolf provision:

For example, it might allow surveillance when an individual acts based upon international terrorist recruitment and training on the internet without establishing a connection to any terrorist group. It might also be used when a member of an international group, perhaps dispatched to the United States to form an operational cell, breaks with the group but nonetheless continues to plot or prepare for acts of international terrorism.<sup>102</sup>

There is simply no reason why our intelligence gathering tools should not be used against terrorists simply because a sus-

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December 31, 2005 to December 31, 2009. USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 103, 120 Stat. 192, 195 (2006).

99. Intelligence Reform and Terrorism Prevention Act of 2004, § 6001(a). Section 6001 amends the definition of “agent of a foreign power” to include any non-U.S. person who “engages in international terrorism or activities in preparation therefore.” See 50 U.S.C. § 1801(b)(1)(C).

100. See *Reauthorization of the PATRIOT Act*, *supra* note 27, at 33 (prepared statement of Nathan A. Sales, Assistant Professor of Law, George Mason Univ.).

101. *Id.* at 13 (prepared statement of Todd M. Hinnen, Acting Assistant Att’y Gen., Nat’l Security Div., Dep’t of Justice).

102. *Id.*

pect is not known to be affiliated with a terrorist organization. It is difficult but necessary for us to contemplate the unthinkable. One individual possessing a weapon of mass destruction could potentially pose as much of a threat to the safety and security of the people of our nation as anyone affiliated with a foreign government or an organization.

The lone wolf provision, like the two other PATRIOT Act provisions previously discussed, had its genesis with the 9/11 attack. In this regard, there has been much speculation over the adequacy of the tools which might have been used with respect to the so-called twentieth hijacker, Zacarias Moussaoui.<sup>103</sup> He had been in federal custody on immigration charges and had paid cash to learn to fly a 747 jet. Since Moussaoui had not yet been connected to any foreign terrorist group, the question has been raised as to whether the FBI would have had the legal authority to search his laptop.<sup>104</sup>

Although the lone wolf provision has not yet been used in an investigation of a terror suspect, there are reasons to believe that the lone wolf may become the future face of terrorism.<sup>105</sup> In the House Homeland Security Committee, on which I am also

103. *Id.* at 25 (statement of Nathan A. Sales, Assistant Professor of Law, George Mason Univ.).

104. *Is Congress the Real "Lawbreaker"?: Reconciling FISA with the Constitution, in Warrantless Surveillance and the Foreign Intelligence Surveillance Act: The Role of Checks and Balances in Protecting Americans' Privacy Rights (Part I): Hearing Before the H. Comm. on the Judiciary, 110th Cong. 54 (2007)* (prepared statement of Robert F. Turner, Univ. of Virginia School of Law). Professor Turner's prepared statement remarked:

It seems very clear as well that FISA itself was a contributing factor to the success of the 9/11 attacks. I'm sure everyone here recalls the compelling congressional testimony of FBI lawyer Colleen Rowley, who was named one of *Time* magazine's "Persons of the Year" in 2002 . . . . Most Americans never did learn the reason Rowley's requests had been denied. There was simply no evidence that Moussaoui was an officer, employee, member, or agent of al Qaeda or any other foreign terrorist organization. He was what we call a "lone wolf," a "sympathizer" or perhaps a "fellow-traveler." But in its wisdom, Congress made it a *felony* for anyone in the Intelligence Community to engage in surveillance of Moussaoui without a FISA warrant – and it also made it illegal for the FISA Court to issue such a warrant in Moussaoui's case. What those contemptible FBI lawyers had done was to obey the law passed by Congress.

*Id.*

105. *Contra* MARKUP OF H.R. 1800, *supra* note 80, at 11–12 (statement of Rep. John Conyers).

We now have before us the controversial lone wolf surveillance power. And the suggestion in the bill that is before us is that it be made permanent. Now, we never used it, so why do we need to make it permanent? If we do have it, and I would rather debate whether we should

privileged to serve, former 9/11 Commission member Lee Hamilton warned that “[l]one wolves, who are not connected to formal terrorist organizations, are the most difficult to detect in part because they do not fit any particular ethnic, economic, educational or social profile.”<sup>106</sup>

Similarly, in testimony before the House Homeland Security Committee, Michael E. Leiter, the Director of the National Counterterrorism Center, warned of the efforts to inspire the cooperation of individuals with radical terrorist objectives. He pointed out that “[s]pecifically, over the past year, AQAP [Al Qaeda in the Arabian Peninsula] released four issues of its . . . English magazine Inspire, which attempts to persuade adherence to launch attacks on their own in the West.”<sup>107</sup>

There is a growing concern within the intelligence community regarding the impact of the Internet and other new technologies on this phenomenon of self-radicalization.<sup>108</sup> The difficulty in identifying these individuals is compounded by their mode of operation, which by definition involves an absence of ties with other entities, specifically foreign governments or formal terrorist organizations. Connecting the dots is made more difficult simply because there are fewer dots to connect.

The potential threat posed by the lone wolf terrorist should not be dismissed. In 2011, a twenty-year-old student from Saudi Arabia was charged with attempting to use weapons of mass destruction in the Dallas area.<sup>109</sup> Our intelligence officials must be equipped to address this growing challenge posed by alienated individuals who are attracted to the broader extremist movement. There is simply no reason why this additional tool should

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have it or not, but certainly not whether or not we should make it permanent or continue it for 3 or 4 more years.

*Id.*

106. *Threats to the American Homeland After Killing Bin Laden: An Assessment: Hearing Before the H. Comm. on Homeland Security*, 112th Cong. 12 (2011) (prepared statement of Hon. Lee Hamilton, Bipartisan Policy Center).

107. *Understanding the Homeland Threat Landscape—Considerations for the 112th Congress: Hearing Before the H. Comm. on Homeland Sec.*, 112th Cong. 19 (2011) (statement of Michael Leiter, Dir., Nat’l Counterterrorism Ctr.).

108. *Threats to the American Homeland After Killing Bin Laden: An Assessment*, *supra* note 106, at 68 (statement of Evan Kohlmann, Flashpoint Global Partners) (“[W]e are seeing individuals who are popping up who were not recruited by any individual cleric or any individual mosque. They are being motivated purely by what they see on the web.”).

109. See Criminal Complaint, *United States v. Aldawsari*, No. 5:11-MJ-017 (N.D. Tex. Feb. 23, 2011); James C. McKinley Jr. & Sarah Wheaton, *Agents Say Saudi Man Was Acting Alone in Bomb Plot*, N.Y. TIMES, Feb. 26, 2011, at A14.

not be available simply because it is unknown whether or not a suspect is affiliated with a terrorist organization.

President Obama discussed the magnitude of this threat in observing that “[t]he most likely scenario that we have to guard against right now ends up being more of a lone wolf operation than a large, well-coordinated terrorist attack.”<sup>110</sup> He noted further that “[w]hen you’ve got one person who is deranged or driven by a hateful ideology, they can do a lot of damage, and it’s a lot harder to trace those lone wolf operators.”<sup>111</sup> The President’s description of the evolving nature of the terrorist threat is a sober warning which reflects the best assessment of our intelligence community. The danger posed by the lone wolf is real. It is imperative that our intelligence officials have the ability to monitor these non-U.S. persons who present a clear and present danger to the safety of the American public.

## V. CONCLUSION

The adoption of the PATRIOT Act extenders by the 112th Congress assists with the continuing obligation of the government to protect Americans from violent attack. While the traditional threats to national security have involved nation states, perpetrators of terror include both state and non-state actors. The surreptitious nature of the enterprise and the exploitation of evolving technologies require great dexterity by intelligence officials attempting to keep up with those dedicated to thwarting their detection. Any measure of success in this endeavor places the responsibility on lawmakers to assess on an ongoing basis the continued effectiveness of the law in meeting these challenges. Unlike the criminal law, the task is to prevent a cataclysmic event before it happens.

Our response to the threat presented by terrorism must be predicated upon not only the need to stop horrific events from happening, but also upon the need to defeat its larger objective of forcing changes in the way we live as a reaction to their murderous acts. For the aim of terrorism is to inflict psychological as well as physical harm on our society. The focus of the rage of radical extremist ideology ultimately relates to a hatred of our democratic values and their embodiment in our laws. Responding to this threat in a manner which reflects an understanding

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110. *The Situation Room: Wolf Blitzer Interview with President Barack Obama* (CNN television broadcast Aug. 16, 2011), available at <http://cnnpressroom.blogs.cnn.com/2011/08/16/pres-obama-ultimately-the-buck-stops-with-me-im-going-to-be-accountable/>.

111. *Id.*

and appreciation for those values is thus an essential element in confronting this ideologically driven assault on our nation and its most deeply held beliefs.

At the same time, it is necessary to repeat what has been said before: the attempt to characterize the responsibility of government to protect its citizens as somehow antithetical to their liberty interests is a false dichotomization. The gravity of the potentially cataclysmic consequences of a failure to get it right presents a threat not only to our national security, but also to the protection of our civil liberties. All of us who are concerned about the protection of civil liberties should be most alarmed by the potential consequences of a successful terrorist attack on the United States with weapons of mass destruction. This is the real threat to civil liberties. As the United States Supreme Court acknowledged in the *Keith* case, were the government to fail “to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered.”<sup>112</sup> The 9/11 Commission itself anticipated this issue with great foresight in observing that “[t]he choice between security and liberty is a false choice, as nothing is more likely to endanger America’s liberties than the success of a terrorist attack at home.”<sup>113</sup> Judge Posner explains the interrelationship between security and civil liberties:

Civil libertarians neglect a genuine lesson of history: that the greatest danger to American civil liberties would be another terrorist attack on the United States, even if it was on a smaller scale than the 9/11 attacks—but it could be on the same or even a much larger scale. . . .

Civil liberties depend on national security in a broader sense. Because they are the point of balance between security and liberty, a decline in security causes the balance to shift against liberty. An even more basic point is that without physical security there is likely to be very little liberty.<sup>114</sup>

Criticism of the PATRIOT Act should be taken seriously. However, it should also be acknowledged that assertions without facts fail to rise to the level of an actual argument. Those who seek to raise the Constitution against a proven threat should have the burden of supporting such assertions with evidence. Otherwise the discussion devolves into mere “rights talk.” In contrast

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112. *United States v. U.S. District Court (Keith)*, 407 U.S. 297, 312 (1972).

113. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 395 (2004).

114. POSNER, *supra* note 3, at 46–47.

to the French Revolution, our nation was not born out of mere abstract principles.

The Constitution is neither honored nor well-served by a hermeneutic that presupposes a conflict with attempts to protect the public from attack. Duly enacted statutes with built-in oversight—and, with respect to PATRIOT Act extenders, sunset dates—are true to the process envisioned in our nation's Basic Law. The fulfillment of the obligations of the executive branch in carrying out the law is subject to the independent approval or disapproval of the judicial branch. This system of checks and balances is the surest means of protecting the civil liberties of the American people.

The Founders above all understood the relationship between the provision for the common defense and the protection of liberty. The idea of redacting this fundamental purpose of government from the law of our land would likely have been perplexing to them. In *Federalist* No. 41, James Madison cautioned:

The means of security can only be regulated by the means and the danger of attack. They will, in fact, be ever determined by these rules, and by no others. It is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions.<sup>115</sup>

The necessity of self-preservation exists for the state as a corollary of the rights of those whose consent was necessary to its formation in the first instance. Constitutional governance should not be seen as disabling the state from acting on behalf of those it is obligated to defend. In short, Justice Robert Jackson had it right in observing that the Constitution is not a suicide pact.<sup>116</sup>

The passage of the PATRIOT Act extenders by the 112th Congress represented a necessary response to the circumstances confronting the United States. The death of Osama bin Laden

115. THE FEDERALIST NO. 41, at 207 (James Madison) (Ian Shapiro ed., 2009).

116. See *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). The actual quote from Justice Jackson is relevant in that it is offered as a broadside against the use of doctrinaire constitutional logic: "The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." *Id.*

may constitute a “red letter” date in the struggle against al Qaeda; however, the franchising of its ideology presents us with new challenges with respect to its detection and suppression. Continued diligence will be required if we are to be successful in this endeavor. This diligence will be required as long as there are those who treasure a culture of death more than they value human life. It is most regrettable that our struggle against those who wish to kill us does not have an expiration date. Nonetheless, we will once again return to the question of extending these three expiring provisions of the law on June 1, 2015. Until then, we can be thankful each night when we close our eyes that those who have been entrusted to protect us have been given the tools necessary to do so.



