

Introduction

ABA President Robert J. Grey, Jr.

In keeping with the finest traditions of the American Bar Association, I am pleased to introduce the following series of essays regarding the USA PATRIOT Act and related topics. Later this year, the Congress will determine whether the provisions of the Act that are due to expire at the end of 2005 should be renewed. The ABA believes that an intensive review and thorough civil discourse on the provisions of the Act should precede the congressional vote.

Pursuant to ABA Section on Individual Rights and Responsibilities Report Nos. 112B and 118, the ABA passed resolutions urging the Congress “to conduct a thorough review of the implementation of the powers granted to the Executive Branch under the [USA PATRIOT] Act before considering legislation that would extend or further expand such powers . . .” and “to conduct regular and timely oversight including public hearings . . . to ensure that government investigations undertaken pursuant to the Foreign Intelligence Surveillance Act . . . do not violate the First, Fourth, and Fifth Amendments of the Constitution. . . .”

As Congress prepares for that review and oversight this year, the ABA is delighted to contribute to and promote public debate through the publication of this series of “point” and “counterpoint” essay exchanges.

I extend my congratulations to the Standing Committee on Law and National Security and its chairman, Stewart Baker, for assembling some of the brightest minds in national security and privacy law for this important effort.

Editors' Introduction

Stewart Baker

John Kavanagh

It is now three and a half years since the September 11 attacks, and almost that long since the USA PATRIOT Act was adopted. For comparison purposes, in the three and a half years after Pearl Harbor, the United States crossed the Pacific, retook the Philippines, landed on Iwo Jima, and also crossed the Atlantic, the English Channel, and the Rhine. The war in Europe was essentially over, and the war in the Pacific had only a few months to run.

Measured by that standard, the eventful years since September 11, 2001, don't seem quite so dramatic. But they do make the three-and-a-half-year mark an appropriate time to evaluate the global war on terror and the tools we've used to wage it. The USA PATRIOT Act has been a part of that effort, and this compilation of essays is the beginning of the evaluation.

Many provisions of the USA PATRIOT Act will expire at the end of 2005. This book is devoted to civil and informed debate about these provisions and whether they should be renewed, as well as a few other issues that are likely to be part of the renewal debate in 2005. We have an all-star cast of contributors from both sides of the debate, and the Standing Committee's effort to spark a civil, tough debate about the USA PATRIOT Act is already paying dividends. For starters, it's becoming clear that large parts of the Act, and many of the provisions due to sunset, are nowhere near as controversial as the Act's press coverage might suggest. In several cases, the civil libertarians we recruited to find fault with particular provisions have ended up proposing modification rather than repeal. And for other provisions, we couldn't find anyone who wanted to argue against renewal.

That doesn't mean we lack for controversy or deeply felt divisions. But it does mean that the debate over USA PATRIOT may

boil down to a handful of sunset provisions—some of which are not serious candidates for repeal as much as for revision—and a variety of other issues spurred not by the sunset requirement but by a general desire to clean up some of the loose ends in the legal war on terror now that we have three and a half years of struggle behind us.

The contributors whom we have gathered for this series of debates are among the most eloquent voices in their field. We thank the authors for their time and contributions. We have attempted to capture the essence of their essays in the paragraphs below and hope to entice readers to turn quickly to the full debates.

Section 203

Perhaps the bravest of our contributors is Kate Martin, who agreed to make the case against section 203, the provision that authorizes information sharing between law enforcement and intelligence agencies. This was uncontroversial when USA PATRIOT was adopted, but Kate Martin argues that the legal barriers to sharing between agencies have been overrated as a cause of the intelligence failures before 9/11. She isn't prepared to argue for wholesale repeal of the provision, but she would require a second court order before data moves from the law enforcement world to the intelligence world and would put strict limits on what kinds of information can be moved across that boundary.

Viet Dinh returns to the arguments that got section 203 enacted—the need to abolish all excuses for a lack of information sharing about terrorism between agencies. And he says that section 203 contains statutory restrictions that, when combined with Attorney General guidelines, provide plenty of privacy protection.

Kate Martin's reply yields no ground, challenging Viet Dinh to show what barriers existed before section 203 and arguing that existing protections are illusory.

Section 206

Like Kate Martin's treatment of section 203, Jim Dempsey's criticism of section 206 falls into the "mend it, don't end it" school.

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Section 206 allows roving wiretaps—taps that follow the suspect as he moves from home to cell phone to cybercafe to pay phone (if he can find one). Jim Dempsey would leave the provision in place but require the authorities to verify that the target is actually using the tapped connection (“OK, I see him logging on. Go ahead and start the intercept.”) and would require that the wiretap order specify either the identity of the target or the facilities to be tapped.

Paul Rosenzweig is having none of it. He argues that section 206 is a necessary adjustment to the way we communicate today, and that it’s just fine the way it is. He considers Jim Dempsey’s proposed modifications “unnecessary and unwise.”

Sections 209, 212, and 220

We had trouble figuring out why these provisions were considered controversial enough to justify a sunset. In fact, no one really wanted to write a full set of essays on each separate provision, so we combined sections 209, 212, and 220, on the theory that they all do modest tinkering with the law for intercepts of new technology. We paired two of our most technology-savvy essayists, Jim Dempsey and Orin Kerr, on this set of provisions, and they produced a rare moment of (partial) agreement.

Jim Dempsey argues that the provisions suffer from a lack of balance, and he suggests tweaks to all of them—perhaps notice to subscribers when their voicemail has been inspected, protections against false or exaggerated claims of “emergency” to gain the cooperation of service providers, and allowing service providers to challenge overbroad orders in their home districts.

In a rare example of convergence among our essayists, Orin Kerr doesn’t express great objection to Jim Dempsey’s proposed changes, at least from a policy point of view.

Section 213

We’ve always thought that “sneak and peek” was an ACLU epithet for something that might better be described as a “delayed notice” search. But Jim Dempsey explains that “sneak and peek” is

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what such searches used to be called by the FBI (always its own worst enemy when it comes to names—remember Carnivore?).

This is a controversial provision, and it produces plenty of sparks. Heather Mac Donald demonstrates why she's the most feared (or beloved, depending on your point of view) advocate on legal policy today. She defends section 213 with verve, attacking as myths the claims that delayed-notice searches are a new power, an unchecked power, or a permanent limit on what defendants learn about the government's investigation.

Jim Dempsey, however, doesn't respond with heavy artillery of his own. He calls section 213 "a good idea gone too far" and suggests a series of modifications—making it harder to justify delayed notice, shortening the length of court-ordered delays, and mandating reports on the practice to Congress.

This doesn't mollify Heather Mac Donald, though. She rips into a list of errors she finds in his essay and argues that delayed notice is essential in terrorism investigations, not an authority in need of further checks. Jim Dempsey maintains that the standard is too liberal, noting that the courts have never denied a government request based on this section.

Sections 214 and 215

Section 215 has managed to become the librarians' *bete noire*—without ever mentioning libraries. Andrew McCarthy explains that section 215 simply allows national security investigators to obtain "books, papers," and other records from third parties, much the way criminal investigators can. He goes on to argue that libraries and book stores should not be investigation-free zones. He does suggest one modification to the section: he would allow the recipient of a 215 order to challenge it in court.

Peter Swire is eager to do battle. He attacks section 215 as a major expansion of government authority that goes beyond what criminal investigators have, mainly because it prohibits the recipient from revealing the existence of the order (what he calls a "gag

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rule”). He would not get rid of the provision, but he would restrict searches of library records, impose a higher standard for section 215 orders, and cut back the gag rule.

These two essayists may be our best-matched pair. They like to mix it up, and they do it well. Even so, when we tried to spark a fight over a separate provision, section 214, we were unable to create much controversy. Andrew McCarthy defends it as an “eminently reasonable” modification of the rules for obtaining a pen register when investigating an agent of a foreign power. Peter Swire suggests that the standard may have been set too low. But no one wants to waste much firepower on the section.

Section 218

Section 218 allows national security wiretaps when foreign intelligence is “a significant purpose”—as opposed to the primary purpose of the tap. Before 9/11, the Justice Department was haunted by fear that a national security tap would be declared unlawful because the government’s purpose had shaded across the line between intelligence and prosecution. This amendment was meant to move the line and allow more cooperation between law enforcement and intelligence agencies. Andrew McCarthy ably sets forth this history, including the appellate decision that greatly eased the government’s primary purpose worries, not long after Congress had enacted section 218. Going back to the primary-purpose test after all that history, he argues, would be a disaster.

David Cole is as brave as Kate Martin in arguing that section 218 did not eliminate the wall that contributed to the intelligence failures before 9/11. He blames bureaucratic barriers, not the primary-purpose test, for a lack of information sharing, which he says was perfectly legal under the old rules. If the purpose of a wiretap migrates into criminal territory, he argues, then the government can always get a criminal wiretap order and continue as before. In fact, it has to, according to David Cole, because that’s what the Constitution requires.

Intercepting Lone Wolf Terrorists

Long after USA PATRIOT, Congress amended FISA's wiretap standards as part of a bill enacting the 9/11 Commission's reform package. The amendment makes it easier to wiretap terrorists without tying them conclusively to a particular group or nation. The change arises out of the Moussaoui mess. FBI agents thought that they had to link Moussaoui to a particular terrorist group in order to get a FISA warrant to search his computer. The lone wolf provision makes clear that such ties aren't required.

Michael Woods defends the provision by arguing that other aspects of FISA provide an assurance that the law cannot be used against domestic terrorists. That's because FISA still requires an international element to any terrorists subject to intercept under that Act.

Suzanne Spaulding thinks the amendment was unnecessary—the FBI misunderstood the law in the *Moussaoui* case—and is likely to undermine FISA's constitutional standing by moving too far from the military and foreign affairs focus that takes FISA out of the normal Fourth Amendment rubric.

Borders

Control of U.S. borders is not formally an issue raised by the expiration of some parts of USA PATRIOT. But it is almost certain to be part of the debate, given the support in the House for the "REAL I.D. Act" sponsored by Rep. Sensenbrenner. George Terwilliger urges aggressive legal action to control illegal immigration. He supports a national identity card, an approach to applicants for entry that differentiates by likely threat, an end to the release of asylum claimants while their cases are pending, the exclusion of illegal immigrants, with jail terms for repeat offenders, and the fingerprinting of all foreign visitors and immigrants.

Tim Edgar is appalled. He attacks the REAL I.D. Act, noting that it wouldn't have stopped the 9/11 hijackers, and condemns as ineffective and counterproductive any effort to identify likely terrorists by ethnic or other measures.

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Detainees

Detainees aren't formally on the USA PATRIOT agenda either. But detainee issues have spurred much of the judicial law-making on terrorism since 9/11. And Congress may need to shore up the Executive's eroding strategy for detaining potentially dangerous people. Calls for Congress to enact an American "preventive detention" law have come from unexpected quarters. Patricia Wald and Joe Onek are skeptical about preventive detention—and about most of the other detention mechanisms invoked in the weeks after 9/11. They would like to see a ban on using the material witness statute as a holding device unconnected to imminent testimony.

John Yoo and Gregory Jacob defend the Administration's record on detentions, finding comfort even in recent Supreme Court cases. They liken the use of material witness laws to Robert Kennedy's pledge to prosecute mobsters for a variety of crimes, including "spitting on the sidewalk." Wald and Onek respond that the definition of "enemy combatant" should be limited to an enemy soldier or a person captured on the battlefield and engaged in armed conflict against the United States. Yoo and Jacob object that even the Geneva Convention defines "enemy combatant" more broadly.

Material Support to Terrorist Organizations

The USA PATRIOT Act expanded an existing ban on providing "material support or resources" to organizations designated as "foreign terrorist" groups by the Secretary of State. The Intelligence Reform Act further elaborated on the provision. Although this provision is not scheduled for sunset, David Cole thinks that a ban on providing "expert advice or assistance" is unconstitutional and a likely source of serious First Amendment abuses. He relies heavily on Supreme Court cases from the 1950s that protected Communist Party members from "guilt by association" to argue that such assistance can only be unlawful if the donor intends or knows that the gift will assist terrorist acts.

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Paul Rosenzweig wonders what all the fuss is about. The provisions have been around a long while and the claimed abuses haven't materialized. Any help to a terrorist organization is suspect, he says, even aid to humanitarian activities, since this just frees up other resources for terror attacks. As for vagueness and overbreadth, he argues, the statute is clear enough and has not been systematically abused despite the overwrought claims on the left.