

**SECURITY FOR LIBERTY: TEN YEARS AFTER 9/11, WHY  
AMERICANS SHOULD CARE ABOUT THE EXTENSION OF THE  
PATRIOT ACT AND ITS CIVIL LIBERTIES IMPLICATIONS**

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**I. INTRODUCTION**

As he was taxiing the twin turbine engine commuter airplane toward the runway to depart from Raleigh, North Carolina on the morning of September 11, 2001, the air traffic controller's voice came through the radio and uttered a command that would forever change the pilot's life: "All flights ordered frozen on the ground."<sup>1</sup> The pilot scanned the horizon, which had the deceiving look of being a textbook flying day with its vast, clear, blue sky, for signs of distress at the airport, but nothing appeared to be out of the ordinary.<sup>2</sup> He turned to the captain seated to his left, who was reviewing the projected flight path, and asked about the unfamiliar phrase.<sup>3</sup> The captain had never heard this statement in his career, and both questioned what had led to the grounding of flights.<sup>4</sup>

Inside the airport, pilots gathered in the designated lounge, unaware of what had taken place only minutes before in New York City, discussing possibilities and trying to contact other pilots to see if this was an isolated event, or if flights had been grounded at other airports as well.<sup>5</sup> A few were able to make and receive a couple of calls before

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<sup>1</sup> Interview with Anonymous Pilot, Corporate Airlines, code share commuter partner of Midway Airlines, in Raleigh, North Carolina (September 11, 2001), and Ponte Vedra Beach, Florida (September 11, 2010) [hereinafter 9/11 Account]. This is a retelling to the author from the personal account of a commercial pilot who was flying the morning of September 11, 2001, and the events that occurred thereafter as the pilot perceived them. The pilot requested his identity remain confidential.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

cellular communications were overwhelmed and jammed.<sup>6</sup> Soon, they learned of the alarming news that a plane had hit one of the Twin Towers of the World Trade Center in New York City.<sup>7</sup> It was well known in the flying community that the New York City airspace was one of the most dangerous to fly through, so the pilots initially thought it was an accident.<sup>8</sup> But within fifteen minutes, the pilots would learn the unbelievable truth of what was occurring as the second airliner was flown into the remaining South Tower—and they waited, listened, and watched the reports in disbelief as they learned flights in the U.S. airspace had been suspended indefinitely.<sup>9</sup>

For the young pilot who had that week passed the one-thousand-hour flight mark necessary for a pilot to advance beyond the training stage, he realized this could be the end of his nascent career with his airline company, which had been struggling prior to the grounding.<sup>10</sup> His first officer,<sup>11</sup> however, was of Middle Eastern descent and was well aware of what this would mean to his career—he instantly realized his aviation career would be more challenging from that day forward.<sup>12</sup> With this insight, the young pilot had a terrible thought; while he was a flight instructor, he had two flight students from Saudi Arabia who were not concerned with learning how to land the airplane.<sup>13</sup>

Just after ten o'clock that morning, when passengers would overtake the hijacked fourth airliner and crash it into a field in Penn-

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*; NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT: EXECUTIVE SUMMARY 1 (2004) [hereinafter 9/11 COMMISSION EXECUTIVE SUMMARY], available at [http://govinfo.library.unt.edu/911/report/911Report\\_Exec.pdf](http://govinfo.library.unt.edu/911/report/911Report_Exec.pdf) (explaining the timeline of events that occurred on September 11, 2001).

<sup>8</sup> 9/11 Account, *supra* note 1.

<sup>9</sup> *Id.*; NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 326 (2004) [hereinafter 9/11 COMMISSION], available at <http://govinfo.library.unt.edu/911/report/911Report.pdf>.

<sup>10</sup> 9/11 Account, *supra* note 1. *Midway Airlines Granted Loan to Keep Operating*, N.Y. TIMES, Aug. 13, 2001, available at <http://www.nytimes.com/2001/08/25/business/company-news-midway-airlines-granted-loan-to-keep-operating.html>.

<sup>11</sup> A first officer is the title of a pilot who is in the beginning stages of his or her career. 9/11 Account, *supra* note 1.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

sylvania,<sup>14</sup> it had become clear that the day's events would not just impact the pilots and the companies they worked for. Rather, the entire population of the United States and the nation as a whole would thereafter feel the ramifications and be forever changed as a result.<sup>15</sup>

Tragically, more than three thousand people lost their lives as a result of the day's horrific events.<sup>16</sup> Two days passed, and flights remained grounded.<sup>17</sup> Additionally, airlines lost billions of dollars.<sup>18</sup> On the second day post-September 11, the young pilot received a call from the airline company that he was being furloughed;<sup>19</sup> later that month, it went bankrupt, and by the following year the airline's operations were completely suspended.<sup>20</sup> Furthermore, the Federal Bureau of Investigations (FBI) was investigating the flight school where the pilot had been a flight instructor prior to his work at the commercial airline because of his former flight students from Saudi Arabia.<sup>21</sup>

This is just one story, one personal account out of hundreds of millions of lives that were impacted on this infamous day ten years ago.<sup>22</sup> Whether one had a first-hand experience on September 11, 2001, or some other indirect effect from the attack, every American has been

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<sup>14</sup> 9/11 COMMISSION EXECUTIVE SUMMARY, *supra* note 7, at 1.

<sup>15</sup> 9/11 Account, *supra* note 1; *see also* 9/11 COMMISSION EXECUTIVE SUMMARY, *supra* note 7, at 1 (describing the United States as a "nation transformed").

<sup>16</sup> 9/11 COMMISSION EXECUTIVE SUMMARY, *supra* note 7, at 1-2.

<sup>17</sup> *See* 9/11 COMMISSION, *supra* note 9, at 326-27.

<sup>18</sup> *See, e.g.*, Terry Maxon, *A Decade After 9/11, American Airlines Still Struggles to Soar*, CHI. TRIB., June 27, 2011, [http://articles.chicagotribune.com/2011-06-27/business/ct-biz-0628-bf-american-airlines-20110627\\_1\\_chief-executive-gerard-arpey-amr-american-airlines](http://articles.chicagotribune.com/2011-06-27/business/ct-biz-0628-bf-american-airlines-20110627_1_chief-executive-gerard-arpey-amr-american-airlines) (noting that American Airlines needed to cut four billion dollars to stay solvent and a number of other airlines went bankrupt following the attacks on 9/11).

<sup>19</sup> 9/11 Account, *supra* note 1.

<sup>20</sup> Mark R. Wilson et al., *Midway Airlines Inc.*, in *ENCYCLOPEDIA OF CHICAGO* 935 (Janice L. Reiff et al. eds., 2005), *available at* <http://www.encyclopedia.chicago.history.org/pages/2775.html>.

<sup>21</sup> *Id.*

<sup>22</sup> *See U.S. & World Population Clocks*, U.S. CENSUS BUREAU, <http://www.census.gov/main/www/popclock.html> (last updated Jan. 21, 2012) (showing more than three hundred million people live in the United States); *see, e.g.*, Melissa Bell, *9/11: Where were you when the towers fell?*, BLOGPOST (Sept. 11, 2010, 2:00 PM), [http://voices.washingtonpost.com/blog-post/2010/09/911\\_memories\\_where\\_were\\_you\\_wh.html](http://voices.washingtonpost.com/blog-post/2010/09/911_memories_where_were_you_wh.html) (discussing Twitter users' 9/11 memories).

impacted, regardless of whether one has awareness of being affected or not. Mainly, this impact comes as a result of an act made in response to the terror attacks: On October 11, 2001, the 107th Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (PATRIOT Act), which has been used to prevent another attack, but has also implicated the civil liberties of every citizen.<sup>23</sup> Ever since its passage, the people of the United States have been left stranded on a bridge that stretches across a vast chasm—on one side, fraying ropes are anchored by national security and, on the other, by the liberties set forth in the Constitution—and it constantly sways according to the political winds.<sup>24</sup>

Accordingly, the PATRIOT Act has become a tempest among the structures of freedom for the people of the United States.<sup>25</sup> But the fear of falling into the crevice below, of another attack, and of relinquishing the liberties that America was founded upon has created immobilization across the nation.<sup>26</sup> Some have argued this inaction means Americans are standing still because they feel insecure in crossing such ravines because of the government's implementation of the PATRIOT Act.<sup>27</sup> Others have presented the idea that this immobilization results from a recognition that with too much weight on either side, the system is likely to collapse.<sup>28</sup> Whether the U.S. government will strike a balance between ensuring security and civil liberties, and how it may ac-

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<sup>23</sup> See, e.g., *PATRIOT Act Fears Are Stifling Free Speech, ACLU Says in Challenge to Law*, AM. CIV. LIBERTIES UNION (Nov. 3, 2003), <http://www.aclu.org/national-security/patriot-act-fears-are-stifling-free-speech-aclu-says-challenge-law> (noting just one of the civil liberties that is impacted by the PATRIOT Act). See generally Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of the U.S.C.) (noting the purpose of the PATRIOT Act is to “deter and punish terrorist acts”).

<sup>24</sup> See *infra* notes 27-30 and accompanying text.

<sup>25</sup> See, e.g., *PATRIOT Act Fears Are Stifling Free Speech, ACLU Says in Challenge to Law*, *supra* note 23 (discussing a challenge to section 215 of the PATRIOT Act on First Amendment grounds).

<sup>26</sup> See 156 CONG. REC. S2108-09 (daily ed. Mar. 25, 2010) (statement of Sen. Wyden) (arguing for PATRIOT Act reforms that “should have been made years ago”).

<sup>27</sup> See *Dispelling Some of the Major Myths about the USA PATRIOT Act*, U.S. DEPARTMENT OF JUST., [http://www.justice.gov/archive/ll/subs/u\\_myths.htm](http://www.justice.gov/archive/ll/subs/u_myths.htm) (last visited Jan. 18, 2012).

<sup>28</sup> See 156 CONG. REC. S2108-09 (statement of Sen. Wyden).

comply with this balance, will depend on the attention the subject receives.<sup>29</sup> Despite much debate about civil liberties implications, Congress extended the provisions of the PATRIOT Act that were set to expire in 2011, without change, until June 1, 2015.<sup>30</sup> In the interim,

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<sup>29</sup> See *id.* (noting that more debate is necessary in order to accomplish the needed balance between security and freedom).

<sup>30</sup> PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112-14, 125 Stat. 216 (codified in scattered sections of 50 U.S.C.); see also Jim Abrams, *Patriot Act Extension Signed by Obama*, HUFFINGTON POST (May 27, 2011), [http://www.huffingtonpost.com/2011/05/27/patriot-act-extension-signed-obama-autopen\\_n\\_867851.html](http://www.huffingtonpost.com/2011/05/27/patriot-act-extension-signed-obama-autopen_n_867851.html); Paul Kane & Felicia Somnez, *Patriot Act Extension Signed into Law Despite Bipartisan Resistance in Congress*, WASH. POST, May 27, 2011, [http://www.washingtonpost.com/politics/patriot-act-extension-signed-into-law-despite-bipartisan-resistance-in-congress/2011/05/27/AGbVlsCH\\_story.html](http://www.washingtonpost.com/politics/patriot-act-extension-signed-into-law-despite-bipartisan-resistance-in-congress/2011/05/27/AGbVlsCH_story.html) (discussing the four-year extension of the PATRIOT Act provisions that were set to expire). The congressional record from the House of Representatives on the eve of the extension of the Act gives insight into its polarity: “[T]here are two priority items that need to be addressed here: Number one, ensuring that we do not face another terrorist attack against the United States or our interests; and number two—equally important—to preserve the civil liberties and the constitutional protections that the American people have.” 157 CONG. REC. H3738-46 (daily ed. May 26, 2011) (statement of Rep. Dreier).

[Four] months from now, America will mark the 10-year anniversary of the worst terrorist attack in U.S. history. Tonight at midnight, three national security provisions that have helped prevent another 9/11 attack will expire . . . .

Some argue that since we haven’t had a major terrorist attack since September 11, we no longer need these laws. Others argue that the death of Osama bin Laden brought an end to al Qaeda and the war on terror, but both of these claims lack merit.

The Patriot Act provisions continue to play a vital role in America’s counterterrorism efforts not only to prevent another large-scale attack but also to combat an increasing number of smaller terrorist plots.

*Id.* at H3739 (statement of Rep. Smith of Texas).

The PATRIOT Act was originally passed at a time of high emotion in this country. Nearly a decade at [sic] the PATRIOT Act enactment, the death of Osama bin Laden has provided us with an opportunity to stop and reflect on all that has transpired over the last 10 years. It is past time for us to pause and reexamine the validity of the assumptions that led to the passage of the PATRIOT Act and the validity of its current application.

But, you say, we cannot debate the validity of its current application because those applications are classified at a very high level. That is precisely one of the points we should be debating thoroughly before any reauthorization.

*Id.* at H3743 (statement of Rep. Holt).

open records and discussions will be the necessary conduit to allow for the reconciliation of America's promises of "Life, Liberty and the Pursuit of Happiness"<sup>31</sup> to be freely crossed, without fear.<sup>32</sup>

## II. THE WAR ON TERROR AND SURVEILLANCE OF U.S. CITIZENS UNDER THE PATRIOT ACT

### A. *Civil Liberties and the PATRIOT Act*

Once the sequence of events that led to the 9/11 attacks was uncovered, Congress moved quickly to enable the government in its effort to protect the country from another terrorist attack.<sup>33</sup> Correspondingly, Congress enacted the PATRIOT Act the following month "[t]o deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other pur-

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Benjamin Franklin, one of the founders of our nation wrote "They who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety."

For many weeks I have reflected on this quote as I have studied this issue to make a decision on how I should cast my vote on the reauthorization of provisions of the PATRIOT Act . . . .

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. . . I have determined that the most important constitutional right, one which I have taken an oath to protect, is the right to life for all Americans. We must do whatever is necessary to prevent another terrorist attack on our soil and how to do this must be fully and openly debated.

When we killed Osama bin Laden, we may have killed the face of evil and the mastermind of numerous terrorist attacks, however, we face an emboldened enemy who now operates on a 21st century battlefield.

*Id.* at H3745 (statement of Rep. West).

<sup>31</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>32</sup> See 157 CONG. REC. H3738-46 (statements of Reps. Dreyer, Polis, Smith, Nadler, Jackson Lee, Sensenbrenner, Kucinich, Holt, Daniel E. Lungren, Ruppertsberger, Marino, Becerra, Schakowsky, Van Hollen, Blumenauer, and West) (debating the PATRIOT Sunsets Extension Act of 2011, a number of representatives voiced their opposition to the extension without an open debate with public records).

<sup>33</sup> See 9/11 COMMISSION EXECUTIVE SUMMARY, *supra* note 7, at 3 (describing the events leading up to the attacks on 9/11); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (showing the Act was passed within two months after the attacks on 9/11).

poses.”<sup>34</sup> An overwhelming majority of the Senate and House of Representatives passed the PATRIOT Act within a two-day period.<sup>35</sup> The PATRIOT Act significantly broadened the scope of the government’s investigatory and surveillance powers,<sup>36</sup> and “enhanced [the government’s] ability to prevent, investigate, and prosecute acts of terror.”<sup>37</sup> Specifically, two sections of the PATRIOT Act have caused much controversy for their civil liberties implications and findings of abuse, namely, section 215 concerning business records, and section 505 regarding national security letters.<sup>38</sup> Of these, since its passage, section 215 has escaped attention, for the most part, outside of two senators who discussed its abuses in Congress.<sup>39</sup> Although the American Library Association and American Civil Liberties Union (ACLU) were very outspoken about section 215 upon its initial passage, dialogue on this particular provision has waned in the latter part of the decade as exemplified by reports, lawsuits, and amicus briefs that date from 2005

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<sup>34</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act § 1, 115 Stat. at 272.

<sup>35</sup> See *The USA PATRIOT Act: Preserving Life and Liberty*, U.S. DEPARTMENT OF JUST., [http://www.justice.gov/archive/ll/what\\_is\\_the\\_patriot\\_act.pdf](http://www.justice.gov/archive/ll/what_is_the_patriot_act.pdf) (last visited Jan. 19, 2012). Of the Senate, only one vote was against the passage of the PATRIOT Act as presented; and in the House, sixty-six representatives voted against the Act, while 357 votes were for its passage. Detailed Senate and House Votes on the USA PATRIOT Act, U.S. DEPARTMENT OF JUST., [http://www.justice.gov/archive/ll/subs/detailed\\_vote\\_2001.htm](http://www.justice.gov/archive/ll/subs/detailed_vote_2001.htm) (last visited Jan. 19, 2012).

<sup>36</sup> See 156 CONG. REC. S793-94 (daily ed. Feb. 25, 2010) (statement of former Sen. Feingold).

<sup>37</sup> *The USA PATRIOT Act: Preserving Life and Liberty*, *supra* note 35.

<sup>38</sup> See, e.g., 156 CONG. REC. S793-94 (statement of former Sen. Feingold) (arguing that the government is misusing section 215); CARY STACY SMITH & LI-CHING HUNG, *THE PATRIOT ACT: ISSUES AND CONTROVERSIES* 152-86 (2010); Alison Leigh Cowan, *Judges Question Patriot Act in Library and Internet Case*, N.Y. TIMES, Nov. 3, 2005, [http://www.nytimes.com/2005/11/03/nyregion/03library.html?\\_r=1](http://www.nytimes.com/2005/11/03/nyregion/03library.html?_r=1) (reporting on controversy surrounding national security letters).

<sup>39</sup> 156 CONG. REC. S2108-09 (daily ed. Mar. 25, 2010) (statement of Sen. Wyden); 156 CONG. REC. S793-94 (statement of former Sen. Feingold); see also *Resolution on the USA PATRIOT Act and Libraries*, AM. LIBR. ASS’N, <http://www.ala.org/offices/oif/statementspols/ifresolutions/usapatriotactlibraries> (last visited Jan. 19, 2012) (describing the uses of section 215); *The USA PATRIOT Act*, AM. LIBR. ASS’N, <http://www.ala.org/advocacy/advleg/federallegislation/theusapatriotact> (last visited Jan. 19, 2012) (explaining the PATRIOT Act and its impact on libraries and their patrons).

or earlier.<sup>40</sup> Remarkably, the extension of section 215 in February of 2010 resulted in very little discussion outside of the previously mentioned senators, one of whom was not reelected in 2011; its most recent extension in May of 2011 was without change despite fervent rhetoric by a few senators and representatives.<sup>41</sup> Because of its expansive nature, section 215 warrants a more detailed understanding and examination before it comes before Congress again in June of 2015.<sup>42</sup>

Section 215 enables the FBI, or someone designated by the FBI, to require those targeted to produce “any tangible thing,” which includes books, records, papers, and other documents, regarded by the government as essential to preventing terrorism.<sup>43</sup> Upon the initial enactment of section 215, it was especially controversial among librarians

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<sup>40</sup> See *Gerstein v. Cent. Intelligence Agency*, No. C-06-4643 MMC, 2006 WL 3462658 (N.D. Cal. Nov. 29, 2006); *Muslim Cmty. Ass’n of Ann Arbor v. Ashcroft*, 459 F. Supp. 2d 592 (E.D. Mich. 2006); *Am. Civil Liberties Union of N. Cal. v. U.S. Dep’t of Justice*, No. C 04-4447 PJH, 2005 WL 588354 (N.D. Cal. Mar. 11, 2005); *Am. Civil Liberties Union v. U.S. Dep’t of Justice*, 321 F. Supp. 2d 24 (D.D.C. 2004); *Resolution on the USA PATRIOT Act and Libraries*, *supra* note 39. But see Victoria Szymczak, *Section 215 One More Time*, LAW LIBR. BLOG (Mar. 1, 2010), [http://lawprofessors.typepad.com/law\\_librarian\\_blog/2010/03/section-215-one-more-time.html](http://lawprofessors.typepad.com/law_librarian_blog/2010/03/section-215-one-more-time.html) (showing that some librarians are still arguing for section 215 to be amended).

<sup>41</sup> 156 CONG. REC. S2108-09 (statement of Sen. Wyden); 156 CONG. REC. S793-94 (statement of former Sen. Feingold); 157 CONG. REC. H3738-45 (daily ed. May 26, 2011) (statements of Reps. Dreyer, Polis, Smith, Nadler, Jackson Lee, Sensenbrenner, Kucinich, Holt, Daniel E. Lungren, Ruppertsberger, Marino, Becerra, Schakowsky, Van Hollen, Blumenauer, and West); 157 CONG. REC. S3367-72 (daily ed. May 26, 2011) (statements of Sens. McConnell, Wyden, Udall, Merkley, and Cardin); see also Beverly Goldberg, *Patriot Act Renewal Renews Reformers’ Determination*, AM. LIBR. (May 31, 2011), <http://americanlibrariesmagazine.org/news/05302011/patriot-act-renewal-renews-reformers-determination> (reporting on the most recent extension of section 215); Katharine Q. Seelye, *In Feingold’s Loss, Independents Turn on One of Their Own*, N.Y. TIMES, Nov. 4, 2010, <http://www.nytimes.com/2010/11/05/us/politics/05feingold.html> (reporting on former Sen. Feingold’s reelection loss in 2011).

<sup>42</sup> 156 CONG. REC. S2108-09 (statement of Sen. Wyden); 156 CONG. REC. S793-94 (statement of Former Sen. Feingold); see also OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, A REVIEW OF THE FBI’S USE OF SECTION 215 ORDERS FOR BUSINESS RECORDS IN 2006 (2008), <http://www.justice.gov/oig/special/s0803a/final.pdf> [hereinafter SECTION 215 REVIEW].

<sup>43</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, § 215, 115 Stat. 272, 287-88 (codified as amended at 50 U.S.C. §§ 1861-1863); SECTION 215 REVIEW, *supra* note 42, at 8; USA PATRIOT Act Reauthorization:

and associations representing libraries throughout the United States<sup>44</sup> because it granted the FBI a nearly unlimited scope of authority in requesting patrons' records, which was coupled with a low standard of proof to acquire an individual's personal records.<sup>45</sup> Another aspect of section 215 that has been controversial is its prohibition on disclosure of both the records requested and the actual request itself.<sup>46</sup> With this expansion of the government's authority, many groups interested in protecting civil liberties have challenged the PATRIOT Act,<sup>47</sup> and some in Congress have voiced their concerns about the importance of protecting the "rights of innocent Americans while also ensuring that the government has the authorities it needs to protect national security."<sup>48</sup>

Since its initial passage in 2001, the PATRIOT Act was amended in 2006,<sup>49</sup> and provisions that were set to expire in 2010 were extended without change until February 28, 2011.<sup>50</sup> Thereafter, another extension was granted until May 26, 2011, which was again extended without change (nearly missing a midnight deadline that would have caused the provisions to sunset) for four years until June 1, 2015.<sup>51</sup> The USA PATRIOT Improvement and Reauthorization Act of 2005

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*Section 215*, AM. ASS'N L. LIBR. (July 2009), [http://www.aallnet.org/aallwash/DayonHill\\_Section215.pdf](http://www.aallnet.org/aallwash/DayonHill_Section215.pdf).

<sup>44</sup> *Resolution on the USA PATRIOT Act and Libraries*, *supra* note 39.

<sup>45</sup> *Id.*

<sup>46</sup> SECTION 215 REVIEW, *supra* note 42, at 8.

<sup>47</sup> *See, e.g.*, Allie Bohm, *The Score on USA Patriot Act*, AM. CIV. LIBERTIES UNION (Mar. 3, 2010, 2:31 PM), <http://www.aclu.org/blog/national-security/score-usa-patriot-act> (reporting on the reauthorization of the USA PATRIOT Act for another year without any changes).

<sup>48</sup> 156 CONG. REC. S793-94 (daily ed. Feb. 25, 2010) (statement of former Sen. Feingold).

<sup>49</sup> USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006) (codified as amended in scattered sections of the U.S.C.).

<sup>50</sup> Act of Feb. 27, 2010, Pub. L. No. 111-141, § 1(a), 124 Stat. 37, 37 (2010) (extending expiring provisions of the USA PATRIOT Improvement and Reauthorization Act of 2005 and Intelligence Reform and Terrorism Prevention Act of 2004 until Feb. 28, 2011).

<sup>51</sup> FISA Sunsets Extension Act of 2011, Pub. L. No. 112-3, § 2(a), 125 Stat. 5, 5 (codified as amended in scattered sections of 50 U.S.C.) (extending the PATRIOT Act to May 27, 2011); PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112-14, § 2(a), 125 Stat. 216, 216 (codified as amended in scattered sections of 50 U.S.C.) (extending the PATRIOT Act to June 1, 2015); Associated Press, *Senate Votes to Extend Terrorism Provisions*, N.Y. TIMES, Feb. 15, 2011, <http://www.nytimes.com/>

(Reauthorization Act) did require a relevancy standard for section 215 applications, although it also established that “foreign powers, agents of foreign powers, subjects of authorized counterterrorism or counterintelligence investigations, and individuals known to associate with subjects of such investigations” were of a presumptively relevant nature.<sup>52</sup> The Reauthorization Act also enabled recipients of certain section 215 records requests, such as those relating to tax, medical, library, and educational records, to bring a challenge to the Foreign Intelligence Surveillance Court (FISA Court) on the legality of requests.<sup>53</sup> Additionally, the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006 amended section 215 to allow recipients of section 215 records requests an avenue for challenging the nondisclosure requirement by petitioning the FISA Court.<sup>54</sup> What these amendments to section 215 did not do, however, was limit the scope of the FBI’s authority to request records or gain access to business records, or allow those who have been the subjects of the record requests to be made aware that the government has been collecting personal information from a myriad of possible records in the name of detecting terrorists or terrorist activities.<sup>55</sup>

Because of the nondisclosure requirement, the public is at a disadvantage in understanding the full extent of how the FBI has used section 215.<sup>56</sup> Indeed, the only records the public has to date on investigations into this provision are a handful of cases and the required re-

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2011/02/16/us/politics/16brfs-SENATEVOTEST\_BRF.html?\_r=1&ref=usapatriotact; Abrams, *supra*, note 30.

<sup>52</sup> SECTION 215 REVIEW, *supra* note 42, at 9; *see also* USA PATRIOT Improvement and Reauthorization Act of 2005 § 106, 120 Stat. at 196 (codified as amended at 50 U.S.C. § 1861(b)(2)).

<sup>53</sup> USA PATRIOT Improvement and Reauthorization Act of 2005 § 115, 120 Stat. at 211 (codified as amended at 18 U.S.C. § 3511).

<sup>54</sup> USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, Pub. L. No. 109-178, § 3, 120 Stat. 278, 278 (codified as amended at 18 U.S.C. § 1861(f)(2)(A)(i)); SECTION 215 REVIEW, *supra* note 42, at 9-10.

<sup>55</sup> SECTION 215 REVIEW, *supra* note 42, at 8-10; *see also* USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006 §§ 1-5, 120 Stat. at 278-82 (codified as amended in scattered sections of the U.S.C.); USA PATRIOT Improvement and Reauthorization Act of 2005 §§ 1-756, 120 Stat. at 192-277.

<sup>56</sup> 156 CONG. REC. S793-94 (daily ed. Feb. 25, 2010) (statement of former Sen. Feingold); *see also* SECTION 215 REVIEW, *supra* note 42 (showing that a discussion of section 215 requests is redacted from public reports).

ports by the Inspector General.<sup>57</sup> As a result of an amendment to the PATRIOT Act, the Inspector General is required to report, for public disclosure, on the number of section 215 applications made.<sup>58</sup> But the Inspector General's unclassified report is deceiving in its apparent openness as it has many redacted portions that seem to indicate possible issues with the FBI's use of section 215 requests and records.<sup>59</sup> For instance, the Inspector General's most recent report on section 215 contains a table listing the number of people and records requested by the FBI per year.<sup>60</sup> The portions of the table identifying the number of U.S. persons and those not considered U.S. persons who have been subject to these requests, however, have been blacked out.<sup>61</sup>

### ***B. Collecting Business Records under Section 215 of the PATRIOT Act***

As one of the PATRIOT Act's most controversial provisions, section 215 has received much attention from organizations like the ACLU and American Association of Law Libraries for the broad expansion of authority it grants to the FBI in requesting records of U.S. citizens.<sup>62</sup> Before the PATRIOT Act became law, the FBI was limited in

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<sup>57</sup> See *Gerstein v. Cent. Intelligence Agency*, No. C-06-4643 MMC, 2006 WL 3462658 (N.D. Cal. Nov. 29, 2006); *Muslim Cmty. Ass'n of Ann Arbor v. Ashcroft*, 459 F. Supp. 2d 592 (E.D. Mich. 2006); *Am. Civil Liberties Union of N. Cal. v. U.S. Dep't of Justice*, No. C 04-4447 PJH, 2005 WL 588354 (N.D. Cal. Mar. 11, 2005); *Am. Civil Liberties Union v. U.S. Dep't of Justice*, 321 F. Supp. 2d 24 (D.D.C. 2004); 156 CONG. REC. S793-94 (statement of former Sen. Feingold) (noting that some information has been released regarding section 215 requests to senators, but that more information is necessary); SECTION 215 REVIEW, *supra* note 42; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT (2003) [hereinafter PATRIOT INVESTIGATIONS].

<sup>58</sup> BRIAN T. YEH & CHARLES DOYLE, CONG. RESEARCH SERV., RL 33332, USA PATRIOT IMPROVEMENT AND REAUTHORIZATION ACT OF 2005: A LEGAL ANALYSIS 5 (2006).

<sup>59</sup> See 156 CONG. REC. S793-94 (statement of former Sen. Feingold); SECTION 215 REVIEW, *supra* note 42.

<sup>60</sup> SECTION 215 REVIEW, *supra* note 42, at 17.

<sup>61</sup> *Id.*

<sup>62</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272; see *PATRIOT Act Fears Are Stifling Free Speech, ACLU Says*

its requests for documents and had to show evidence the person “was a terrorist or a spy.”<sup>63</sup> What the PATRIOT Act did was remove the evidentiary requirement showing the subject of the records requests to be a terrorist or spy, as was required under the Foreign Intelligence Surveillance Act of 1978 before section 215 expanded its scope.<sup>64</sup>

Under section 215 of the PATRIOT Act, the only requirement for the government to order a business, entity, or organization to turn over records on an individual is that the records “are sought for an authorized investigation”<sup>65</sup> to “protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the First Amendment to the Constitution.”<sup>66</sup> Decidedly, the government defines a United States person as

a citizen of the United States, an alien lawfully admitted for permanent residence . . . , an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power . . . .<sup>67</sup>

While this may seem innocuous, the government can make a request for records of any U.S. citizen, any person here legally from another country, or from any businesses, entity, or organization, a far reach from the statute section 215 amended that merely allowed records

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*in Challenge to Law, supra* note 23; USA PATRIOT ACT REAUTHORIZATION: SECTION 215, AM. ASS’N L. LIBR., [http://www.aallnet.org/aallwash/DayonHill\\_Section215.pdf](http://www.aallnet.org/aallwash/DayonHill_Section215.pdf).

<sup>63</sup> 156 CONG. REC. S2108-09 (daily ed. Mar. 25, 2010) (statement of Sen. Wyden).

<sup>64</sup> *Id.*; 50 U.S.C. § 1861(b)(2)(A) (Supp. III 2009); SECTION 215 REVIEW, *supra* note 42, at 7-9.

<sup>65</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act § 215, 115 Stat. at 288 (codified as amended at 50 U.S.C. § 1861).

<sup>66</sup> *Id.* § 215, 115 Stat. at 287.

<sup>67</sup> 50 U.S.C. § 1801(i) (2006).

requests for those evidenced to be spies or terrorists.<sup>68</sup> The types of records covered by section 215 include “any tangible things,” from books, credit card records, papers, documents, Internet and phone records, and even personal medical information and biological specimens, such as samples of one’s blood and tissue.<sup>69</sup> A records request, however, is “not [to be] conducted solely upon the basis of activities protected by the First Amendment to the Constitution [of the United States],” according to the provision.<sup>70</sup>

Additionally, businesses that receive a section 215 records request are prohibited from revealing they have received such a request to anyone other than those necessary to comply with the order, which has been referred to as a gag order.<sup>71</sup> Although the FBI must submit its requests for orders to the FISA Court, an investigation by the Department of Justice of section 215 requests found every application submitted to the FISA Court had been approved.<sup>72</sup>

Originally, section 215 was to sunset in 2005, but the Reauthorization Act extended the provision until 2009,<sup>73</sup> and it was again extended until June of 2015 with the most recent action.<sup>74</sup> With

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<sup>68</sup> See 50 U.S.C. § 1861 (Supp. III 2009); SECTION 215 REVIEW, *supra* note 42, at 1, 7-9.

<sup>69</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act § 215, 115 Stat. at 287 (codified as amended at 50 U.S.C. 1861(a)(1)); 156 CONG. REC. S2108-09 (daily ed. Mar. 25, 2010) (statement of Sen. Wyden); *see also* SMITH & LI-CHING HUNG, *supra* note 38, at 184-85; *USA PATRIOT Act Reauthorization: Section 215*, *supra* note 43.

<sup>70</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act § 215, 115 Stat. at 287 (codified as amended at 50 U.S.C. 1861(a)(1)).

<sup>71</sup> *USA PATRIOT Act Reauthorization: Section 215*, *supra* note 43; *see also* SECTION 215 REVIEW, *supra* note 42, at 9-10 (noting that the entity may request to notify others of the order if certain requirements are met).

<sup>72</sup> SECTION 215 REVIEW, *supra* note 42, at 4.

<sup>73</sup> *Id.* at 2; Kevin Bankston, *Epic Fail in Congress: USA PATRIOT Act Renewed Without Any New Civil Liberties Protections*, ELECTRONIC FRONTIER FOUND. (Feb. 26, 2010), <http://www.eff.org/deeplinks/2010/02/epic-fail-congress-usa-patriot-act-renewed-without>.

<sup>74</sup> PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112-14, § 2(a), 125 Stat. 216, 216 (codified in scattered sections of 50 U.S.C.); *see supra* notes 49-51 and accompanying text.

the midterm election now behind Congress, it remains to be seen whether this provision will become a topic of debate among senators, representatives, and their constituents, or if it will again be extended without change.<sup>75</sup> Reports following the midterm election indicated voter distaste with an intrusive government caused the unseating of many Democrats by Republicans and the displacement of incumbent Republicans with Tea Party activists.<sup>76</sup> But what is meant by an intrusive government has yet to be uncovered, especially considering one of the Senate's most vocal advocates of reform to section 215 and unchecked governmental authority was defeated in the midterm election.<sup>77</sup>

### III. HOW THE PATRIOT ACT HAS IMPLICATED CIVIL LIBERTIES

The U.S. Department of Homeland Security produced a pamphlet in the fall of 2010 as a primer on recognizing the potential terrorist who may be living next door.<sup>78</sup> Mainly, the pamphlet describes activities that may indicate an individual is engaged in or supporting terrorist acts and asks Americans to report those that fall within the listed descriptions.<sup>79</sup> One of the activities listed that may raise suspicions is “[n]ew or increased interest in Websites and reading materials that ad-

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<sup>75</sup> David M. Herszenhorn & Jeff Zeleny, *G.O.P. Leaders Vow to Repeal Health Care Law*, FUNDERS' COMMITTEE FOR CIVIC PARTICIPATION (Nov. 3, 2010), [http://funderscommittee.org/resource/gop\\_leaders\\_vow\\_to\\_repeal\\_health\\_care\\_law](http://funderscommittee.org/resource/gop_leaders_vow_to_repeal_health_care_law) (noting that Republicans took control of the House of Representatives following the mid-term elections in 2010).

<sup>76</sup> *Id.*; Michael D. Shear, *Live Blogging Election Night*, N.Y. TIMES (Nov. 3, 2010, 12:07 AM), <http://thecaucus.blogs.nytimes.com/2010/11/02/live-blogging-election-night-2/>; Catherine E. Shoichet & Shannon Travis, *Election Projections Fuel Tea Party Fervor*, CNN (Nov. 3, 2010), <http://www.cnn.com/2010/POLITICS/11/03/tea.party/index.html>.

<sup>77</sup> 156 CONG. REC. S793-94 (daily ed. Feb. 25, 2010) (statement of former Sen. Feingold); Michael D. Shear, *Feingold's Concession Speech*, N.Y. TIMES, (Nov. 3, 2010, 12:07 AM), <http://thecaucus.blogs.nytimes.com/2010/11/02/live-blogging-election-night-2/>.

<sup>78</sup> HOMELAND SEC., IDENTIFYING HOMEGROWN VIOLENT EXTREMISTS BEFORE THEY STRIKE (2010), <http://info.publicintelligence.net/DHSHomegrownThreats.pdf>; see also Spencer Ackerman, *Doc of the Day: Feds' Guide to Snitching on Your Terrorist Neighbor*, WIRED, (Sept. 22, 2010, 7:00 AM), <http://www.wired.com/dangerroom/2010/09/doc-of-the-day-feds-guide-to-snitching-on-your-terrorist-neighbor/>.

<sup>79</sup> HOMELAND SEC., *supra* note 78.

vocate violence.”<sup>80</sup> The Homegrown Terrorist Guide does, however, say it is not promoting the infringement of citizens’ rights who are upholding the law.<sup>81</sup> Prior to the terrorist attacks ten years ago, someone coming across this pamphlet with its photographs of men with beards and features associated with those of Middle Eastern descent may have thought it a relic from the days of Japanese American internment camps<sup>82</sup> or McCarthy Era anti-communism tactics.<sup>83</sup> But in the aftermath of 9/11, this is the new reality confronting U.S. citizens.<sup>84</sup>

### ***A. Investigations of Possible Civil Liberties Abuses Under the PATRIOT Act***

According to a report by the U.S. Department of Justice, it received more than one thousand complaints related to PATRIOT Act civil liberties or civil rights violations for the time period the investigation covered, from December 16, 2002 to June 15, 2003.<sup>85</sup> While this may seem to be a small percentage of the population of the United States,<sup>86</sup> this amount represents fifty percent of the total complaints received by the department for this period; thirty-four of which were found to have been “credible Patriot Act complaint[s]” within the jurisdiction of the department.<sup>87</sup> One story from the department’s investigations into civil liberties and civil rights violations is of an Egyptian who the FBI arrested illegally and subjected to “duplicative invasive body cavity searches,” detained without access to counsel or the Egyptian Consulate, and prohibited from exercising his religion, among others.<sup>88</sup> Other investigations for the period of this report stem from the abuse of

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> See *Korematsu v. United States*, 323 U.S. 214 (1944) (allowing the internment of Japanese Americans during World War II).

<sup>83</sup> See RICHARD M. FRIED, *NIGHTMARE IN RED: THE MCCARTHY ERA IN PERSPECTIVE* (1990).

<sup>84</sup> See Richard A. Posner, *The 9/11 Report: A Dissent*, N.Y. TIMES, Aug. 29, 2004, § 7, at 10 (arguing that customs agents must be on high alert for altered travel documents of Muslims); *PATRIOT Act Fears Are Stifling Free Speech, ACLU Says in Challenge to Law*, *supra* note 23.

<sup>85</sup> PATRIOT INVESTIGATIONS, *supra* note 57, at 6.

<sup>86</sup> See *U.S. & World Population Clocks*, *supra* note 22.

<sup>87</sup> PATRIOT INVESTIGATIONS, *supra* note 57, at 6.

<sup>88</sup> *Id.* at 7.

Muslim inmates, an illegal search and seizure of an Arabian American's residence, abuse of detainees, unlawful detainment of aliens, and forcing a detainee who overstayed his visa to "eat pork . . . even though it was against his religion."<sup>89</sup>

### 1. Section 215 Investigations

As part of the Reauthorization Act, the Department of Justice is required to report on the FBI's "effectiveness and use, including any improper or illegal use" in relation to obtaining information through section 215 records requests.<sup>90</sup> According to the Department of Justice's most recent report on the FBI's use of section 215, it did not discover any illegally obtained section 215 requests for the time period it examined, which was the 2006 year.<sup>91</sup> The report did find records had been received that were "outside the scope of[ ] Section 215 orders,"<sup>92</sup> but because of the redactions throughout the unclassified report, the details remain unavailable to the public.<sup>93</sup> Additionally, the report found requests may have been improperly used in other situations.<sup>94</sup> For instance, one such paragraph states,

Similar to our previous report, we examined how the FBI has used information obtained from Section 215 orders in national security investigations. Aside from . . . we found that in 2006 Section 215 orders were used *primarily* to exhaust investigative leads, although in some instances the FBI obtained information to support additional FBI investigative requests and to . . . .<sup>95</sup>

This type of redaction of information on potential or known abuses is present throughout the document.<sup>96</sup> Another example is in the second

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<sup>89</sup> *Id.* at 7-10.

<sup>90</sup> USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 106A, 120 Stat. 192, 200 (2006) (codified as amended at 50 U.S.C. § 1861).

<sup>91</sup> SECTION 215 REVIEW, *supra* note 42, at 1-5.

<sup>92</sup> *Id.* at 5.

<sup>93</sup> *See generally id.* (showing that redactions occur throughout the review).

<sup>94</sup> *Id.* at 5-6.

<sup>95</sup> *Id.* at 4 (emphasis added). The ellipses represent redacted portions of the quoted paragraph.

<sup>96</sup> *See generally id.*

section of the report, which analyzes previously mentioned *noteworthy items*.<sup>97</sup> As presented, the public will not be able to discover or know what the noteworthy items were or continue to be, because nearly the entire section explaining the investigation of the FBI in this regard has been redacted.<sup>98</sup>

Consequently, the apparent openness of the report is negated by the blacked out sections, words, and sentences that begin to describe seemingly problematic aspects of investigations under section 215.<sup>99</sup> But the public, to date, has not been privy to this insight.<sup>100</sup> The Department of Justice has refused to provide the classified report to the public because of concerns it says about revealing too much information on the government's investigatory procedures to those engaged in terrorist activities, and to prevent future attacks on America.<sup>101</sup>

## 2. Congressional Findings

Thereafter, two outspoken proponents of PATRIOT Act reform, former Senator Russ Feingold, the only senator to vote against the initial passage of the PATRIOT Act,<sup>102</sup> and Senator Ron Wyden, have reported abuses of the PATRIOT Act in the congressional record.<sup>103</sup> After the previous administration denied repeated requests for information on the government's actions under the PATRIOT Act,<sup>104</sup> the Senate Intelligence Committee recently determined that classified papers detailing the government's use of PATRIOT Act provisions would be accessible to members of Congress, although kept in a secure

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<sup>97</sup> *Id.* at 65-74 (showing that a majority of the discussion of these noteworthy items are redacted from the report).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *See id.* at 4-6.

<sup>101</sup> *Id.* at 1; *see also Dispelling Some of the Major Myths about the USA PATRIOT Act*, *supra* note 27.

<sup>102</sup> Detailed Senate and House Votes on the USA PATRIOT Act, *supra* note 35.

<sup>103</sup> 156 CONG. REC. S2108-09 (daily ed. Mar. 25, 2010) (statement of Sen. Wyden); 156 CONG. REC. S793-94 (daily ed. Feb. 25, 2010) (statement of former Sen. Feingold).

<sup>104</sup> Adam Clymer, *Justice Dept. Balks at Effort to Study Antiterror Powers*, N.Y. TIMES, Aug. 15, 2002, <http://select.nytimes.com/gst/abstract.html?res=F10811FA3D590C768DDDA10894DA404482&scp>.

Department of Justice office.<sup>105</sup> With this new insight, Senator Wyden stated the broad investigatory scope permitted under section 215's relevancy standard "could potentially permit the government to collect the personal information of large numbers of law-abiding Americans who have no connection to terrorism whatsoever."<sup>106</sup> Moreover, advocates of section 215 had previously said no misuse had taken place of the authority granted to the FBI under this provision.<sup>107</sup> According to former Senator Feingold, this is no longer accurate; although he was unable to expound on this, he stated, "Section 215 has been misused."<sup>108</sup>

### **B. Constitutional Boundaries**

Although many reports have surfaced of constitutional violations resulting from PATRIOT Act surveillance, few actual findings of constitutional violations exist, mainly because of the nature of section 215 of the PATRIOT Act, which binds those who receive requests from disclosure of such requests.<sup>109</sup> For this reason, lawsuits to date that have reached the federal court challenging section 215 do not pertain to individual claims of constitutional violations, but mainly to requests for information on the amount of records the FBI has requested.<sup>110</sup> Generally, plaintiffs have brought a Freedom of Information Act (FOIA) claim as the rationale for gaining disclosure of the FBI's requests of records under the PATRIOT Act.<sup>111</sup> Overall, courts have denied such claims based on a national security exception to records available to the

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<sup>105</sup> 156 CONG. REC. S2109.

<sup>106</sup> 156 CONG. REC. S2108.

<sup>107</sup> 156 CONG. REC. S793.

<sup>108</sup> *Id.*

<sup>109</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, § 215, 115 Stat. 272, 288 (codified as amended at 50 U.S.C. § 1861(d)); *see also* AM. CIVIL LIBERTIES UNION, POLICING FREE SPEECH: POLICE SURVEILLANCE AND OBSTRUCTION OF FIRST AMENDMENT-PROTECTED ACTIVITY (2010), [http://www.aclu.org/files/assets/policingfreespeech\\_20100806.pdf](http://www.aclu.org/files/assets/policingfreespeech_20100806.pdf) (noting examples from thirty-three states and the District of Columbia where violations of civil liberties occurred).

<sup>110</sup> *See* Gerstein v. Cent. Intelligence Agency, No. C-06-4643 MMC, 2006 WL 3462658 (N.D. Cal. Nov. 29, 2006); Muslim Cmty. Ass'n of Ann Arbor v. Ashcroft, 459 F. Supp. 2d 592 (E.D. Mich. 2006); Am. Civil Liberties Union of N. Cal. v. U.S. Dep't of Justice, No. C 04-4447 PJH, 2005 WL 588354 (N.D. Cal. Mar. 11, 2005); Am. Civil Liberties Union v. U.S. Dep't of Justice, 321 F. Supp. 2d 24 (D.D.C. 2004).

<sup>111</sup> *See, e.g., Am. Civil Liberties Union*, 321 F. Supp. 2d at 37.

public under the FOIA.<sup>112</sup> For instance, the court in *American Civil Liberties Union v. Department of Justice* concluded that the precedent set by the circuit court required the court to uphold the denial of FOIA requests that would compromise national security, a finding supported by what has been deemed the *mosaic theory*.<sup>113</sup>

Basically, the government has been successfully arguing that even if a FOIA request is for a seemingly small fragment of information, such as the number of section 215 applications submitted to the FISA Court, each of these individual shards of FOIA requests, when artfully arranged by terrorists or those engaged in terrorist activities, would reveal a completed piece detailing the government's methods of surveillance and strategy in preventing terrorism.<sup>114</sup> The government further contends the resulting composition would, therefore, enable terrorists or those engaged in terrorist activities to avoid surveillance, thus subjecting the United States to attack.<sup>115</sup>

Despite its decision to uphold the circuit's precedent, the court in *American Civil Liberties Union v. Department of Justice* did acknowledge section 215 "unquestionably implicates important individual liberties and privacy concerns which are of immediate public interest in view of the ongoing debate regarding the . . . Patriot Act."<sup>116</sup> The main reason for the FOIA request in this case was to allow the public to acquire the information necessary to debate section 215 and its possible renewal or expiration prior to its sunset in the upcoming year.<sup>117</sup> Specifically, the plaintiff supported this argument with various articles describing the broad legal standard of section 215, and one in particular described it as "so loose that the government is virtually certain to get whatever it wants, whenever it wants."<sup>118</sup> Subsequently, a district court case in California, *Gerstein v. CIA*, echoed the concern about enabling prompt debate on section 215, stating a delay of a FOIA request would prevent "any meaningful contribution to the ongoing public debate and

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<sup>112</sup> *Id.* at 37-38.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 38 n.16.

<sup>116</sup> *Id.* at 29.

<sup>117</sup> *Id.* at 30.

<sup>118</sup> *Id.* at 30 n.6 (quoting Bernie Sanders, *Patriot Act Overreaches*, USA TODAY, Sept. 23, 2003, at 22A).

render any disclosure little more than a historical footnote.”<sup>119</sup> Consequently, the government’s block on releasing information acquired under this provision has stifled the public’s ability to have an informed debate, while section 215 continues to be extended and used well after it was intended to expire.<sup>120</sup>

Prominent among constitutional debates surrounding section 215 has been the alleged governmental infringement on guarantees of the First Amendment<sup>121</sup> in relation to the FBI’s use of the provision in gathering information on U.S. citizens.<sup>122</sup> Principally, section 215 expressly prohibits the investigation of a U.S. citizen for activities protected by the First Amendment.<sup>123</sup> But the inclusion of this prohibition does not mean section 215 has not been challenged for First Amendment violations.<sup>124</sup> Since its enactment in 1791, the principle pillars of the First Amendment have supported the free exercise of religion and free speech and have expressly prohibited the government from interfering with these fundamental guarantees.<sup>125</sup> But because of the nondisclosure requirement of section 215 and other national security exceptions,<sup>126</sup> examples of governmental attempts to ferret out terrorists or terrorist activity that have restricted First Amendment guarantees exist mainly in

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<sup>119</sup> *Gerstein v. Cent. Intelligence Agency*, No. C-06-4643, 2006 WL 3462658, at \*7 (N.D. Cal. Nov. 29, 2006).

<sup>120</sup> 156 CONG. REC. S2108-09 (daily ed. Mar. 25, 2010) (statement of Sen. Wyden); *see also Am. Civil Liberties Union*, 321 F. Supp. 2d at 29-30.

<sup>121</sup> *See, e.g., AM. CIVIL LIBERTIES UNION*, *supra* note 109 (discussing freedom of speech violations from around the country).

<sup>122</sup> *See SECTION 215 REVIEW*, *supra* note 42, at 8.

<sup>123</sup> *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*, Pub. L. No. 107-56, § 215, 115 Stat. 272, 287 (codified as amended at 50 U.S.C. § 1861).

<sup>124</sup> *See, e.g., AM. CIVIL LIBERTIES UNION*, *supra* note 109 (noting a number a challenges to government actions on First Amendment grounds).

<sup>125</sup> U.S. CONST. amend. I.

<sup>126</sup> *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act § 215*, 115 Stat. at 288 (codified as amended at 50 U.S.C. § 1861); *see, e.g., Am. Civil Liberties Union v. U.S. Dep’t of Justice*, 321 F. Supp. 2d 24, 37 (D.D.C. 2004) (noting the national security exception to the FOIA).

newspaper accounts, reports by the ACLU, and a minute selection of cases.<sup>127</sup>

One case that presented a First Amendment challenge to section 215 was *Muslim Community Association of Ann Arbor v. Ashcroft*.<sup>128</sup> In this case, Muslim and Arab organizations alleged section 215 violated the First Amendment because of its prohibition on disclosure and permissive expense for “the FBI to investigate individuals based on their exercise of . . . free expression, free association, and free exercise of religion.”<sup>129</sup> Because this case began before the PATRIOT Act’s amendment but had not been decided prior to its modification, the government argued the amendments had “cured all of the constitutional deficiencies” and requested dismissal of the case, to which the plaintiffs contested.<sup>130</sup> But the court did allow the plaintiffs the option of amending their complaint to reflect the PATRIOT Act amendments.<sup>131</sup>

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<sup>127</sup> See *Gerstein v. Cent. Intelligence Agency*, No. C-06-4643 MMC, 2006 WL 3462658 (N.D. Cal. Nov. 29, 2006); *Muslim Cmty. Ass’n of Ann Arbor v. Ashcroft*, 459 F. Supp. 2d 592 (E.D. Mich. 2006); *Am. Civil Liberties Union of N. Cal. v. U.S. Dep’t of Justice*, No. C 04-4447 PJH, 2005 WL 588354 (N.D. Cal. Mar. 11, 2005); *Am. Civil Liberties Union*, 321 F. Supp. 2d 24; Mike Carter, *Activist Spied On? Man Wins Settlement*, SEATTLE TIMES, May 4, 2010, [http://seattletimes.nwsourc.com/html/localnews/2011780363\\_spysettle05m.html](http://seattletimes.nwsourc.com/html/localnews/2011780363_spysettle05m.html); Charlie Savage & Scott Shane, *Intelligence Improperly Collected on U.S. Citizens*, N.Y. TIMES, Dec. 16, 2009, [http://www.nytimes.com/2009/12/17/us/17disclose.html?\\_r=3&ref=todayspaper](http://www.nytimes.com/2009/12/17/us/17disclose.html?_r=3&ref=todayspaper); *FBI Counterterrorism Unit Spies on Peaceful, Faith-Based Protest Group*, AM. CIV. LIBERTIES UNION (May 4, 2006), <http://www.aclu.org/national-security/fbi-counterterrorism-unit-spies-peaceful-faith-based-protest-group>; *Statement - Peter Ackerman, Target of Illegal Spying*, AM. CIV. LIBERTIES UNION (Feb. 24, 2006), <http://www.aclu.org/national-security/statement-peter-ackerman-target-illegal-spying>; *ACLU of Kentucky Joins in Requests to Uncover More FBI Spy Files: Kentucky Minister Detained for Unknown Reasons by Canadian Border Officials*, AM. CIV. LIBERTIES UNION (May 18, 2005), [http://www.aclu.org/spyfiles/kentucky\\_pressrelease.pdf](http://www.aclu.org/spyfiles/kentucky_pressrelease.pdf).

<sup>128</sup> *Muslim Cmty. Ass’n of Ann Arbor*, 459 F. Supp. 2d at 595.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 596.

<sup>131</sup> *Id.* at 602.

### C. *Striking a Balance Between National Security and Civil Liberties*

Notwithstanding the confidentiality required of Congress regarding its knowledge of the government's use of section 215 requests, some information on the provision became public through various lawsuits and statements of those who have been targets of investigations,<sup>132</sup> which allege the compromised state of civil liberties as a result of the government's broad use of section 215.<sup>133</sup> But how does America balance the need to protect its country and people without infringing on individuals' rights to be free of governmental intrusions? One suggestion by former Senator Feingold is to modify the gag order for section 215 requests to comply with the First Amendment and to require the government to show an individual has a connection to terrorism prior to a business records request of the individual.<sup>134</sup> The relevancy standard in use, former Senator Feingold argued, is "dangerously overbroad and the burden of proof should be on its proponents to explain why a more focused standard . . . cannot serve as an effective counterterrorism and national security tool."<sup>135</sup> This proposition is not unfamiliar to senators, who unanimously supported this proposal in 2005, although it failed to become law.<sup>136</sup>

Similarly, Senator Wyden proposed a "'nexus to terrorism' standard," which would still allow for business records requests under the PATRIOT Act, but would narrow the scope of requests to "records pertaining to a terrorist suspect, or the suspect's activities, or any individual that the suspect has been in contact with or directly linked to in any way."<sup>137</sup> Chiefly, the nexus of terrorism standard would restrict the section 215 records available for request and would seem to focus the pur-

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<sup>132</sup> See *Gerstein*, 2006 WL 3462658; *Muslim Cmty. Ass'n of Ann Arbor*, 459 F. Supp. 2d 592; *Am. Civil Liberties Union of N. Cal.*, 2005 WL 588354; *Am. Civil Liberties Union*, 321 F. Supp. 2d 24.

<sup>133</sup> AM. CIVIL LIBERTIES UNION, RECLAIMING PATRIOTISM: A CALL TO RECONSIDER THE PATRIOT ACT 14-25 (2009), [http://www.aclu.org/pdfs/safefree/patriot\\_report\\_20090310.pdf](http://www.aclu.org/pdfs/safefree/patriot_report_20090310.pdf).

<sup>134</sup> 156 CONG. REC. S793 (daily ed. Feb. 25, 2010) (statement of former Sen. Feingold).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> 156 CONG. REC. S2108-09 (daily ed. Mar. 25, 2010) (statement of Sen. Wyden).

pose of the requests to those aimed at stopping terrorists or terrorist activity.<sup>138</sup> In contrast, the proposed nexus to terrorism standard would still allow for a broader purview in obtaining records than the law allowed for prior to the PATRIOT Act.<sup>139</sup> In effect, Senator Wyden contends adhering to a nexus to terrorism standard would enable the government to pursue investigations specifically related to terrorism and “would greatly reduce potential intrusions on the privacy of law-abiding Americans.”<sup>140</sup> Much like former Senator Feingold’s proposal, the nexus to terrorism standard was in a previous bill that the Senate unanimously passed but never became law.<sup>141</sup>

Alternatively, it has been argued the PATRIOT Act has been successful in preventing terrorist attacks, especially considering recent attempts that have been derailed.<sup>142</sup> The Executive Summary accompanying the 9/11 Commission Report, for example, states that the United States has had success in extinguishing a majority of terrorist sects, and that homeland security has been enhanced since the attacks of September 11, 2001.<sup>143</sup> The authors of this summary have presented the dichotomy of the debate on the PATRIOT Act that Americans and the

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at S2109; Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1862 (2000).

<sup>140</sup> 156 CONG. REC. S2108-09.

<sup>141</sup> *Id.* at S2109.

<sup>142</sup> See, e.g., Jena Baker McNeill et al., *30 Terrorist Plots Foiled: How the System Worked*, BACKGROUND, Apr. 29, 2010, [http://thf\\_media.s3.amazonaws.com/2010/pdf/bg\\_2405.pdf](http://thf_media.s3.amazonaws.com/2010/pdf/bg_2405.pdf); Paul Richter et al., *Explosives Found in Two U.S.-Bound Packages, Thwarting Terrorist Attack*, L.A. TIMES, Oct. 30, 2010, <http://www.latimes.com/news/nationworld/nation/la-na-cargo-planes-20101030,0,5847748.story>; Associated Press, *Al Qaeda Mastermind Linked to Massive NYC Subway Bomb Plot*, N.Y. DAILY NEWS (June 30, 2010), [http://www.nydailynews.com/news/ny\\_crime/2010/06/30/2010-06-30\\_al\\_qaeda\\_mastermind\\_linked\\_to\\_massive\\_nyc\\_subway\\_bomb\\_plot.html](http://www.nydailynews.com/news/ny_crime/2010/06/30/2010-06-30_al_qaeda_mastermind_linked_to_massive_nyc_subway_bomb_plot.html); Bob Cesca, *No Attacks Since When?*, HUFFINGTON POST (Dec. 5, 2008), [http://www.huffingtonpost.com/bob-cesca/no-attacks-since-when\\_b\\_148857.html](http://www.huffingtonpost.com/bob-cesca/no-attacks-since-when_b_148857.html) (noting that Peggy Noonan has stated that no terrorist attacks have occurred in American since 9/11); Helen Kennedy, *FBI Nabs Former Staten Island Man Charged in Plot to Bomb Washington D.C. Subway System*, N.Y. DAILY NEWS (Oct. 27, 2010), [http://www.nydailynews.com/news/national/2010/10/27/2010-10-27\\_virginia\\_man\\_charged\\_by\\_fbi\\_in\\_terror\\_plot\\_to\\_bomb\\_washington\\_dc\\_metro\\_subway\\_sy.html](http://www.nydailynews.com/news/national/2010/10/27/2010-10-27_virginia_man_charged_by_fbi_in_terror_plot_to_bomb_washington_dc_metro_subway_sy.html).

<sup>143</sup> 9/11 COMMISSION EXECUTIVE SUMMARY, *supra* note 7, at 16.

country have been struggling with since the 9/11 attacks.<sup>144</sup> Overall, the summary concludes, “[W]e believe we are safer today. But we are not safe.”<sup>145</sup> Recommendations on how to solve this polarity have been examined by those in favor of heightened governmental surveillance under the PATRIOT Act, and those who believe tighter governmental restrictions should be in place.<sup>146</sup>

The PATRIOT Act, therefore, has been an ample source of debate;<sup>147</sup> but whether Americans, legislators, and those impacted by the PATRIOT Act will voice their concerns depends on their willingness to understand its history, applications, and abuses.<sup>148</sup> These issues seemed to have been buried under the midterm congressional elections that loomed over the heads of legislators<sup>149</sup> who heard the voices of discontent of the more tangible and visible economic threats on the minds of Americans.<sup>150</sup>

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<sup>144</sup> See *id.*

<sup>145</sup> *Id.*

<sup>146</sup> See, e.g., *id.* at 26 (arguing for heightened surveillance); *Dispelling Some of the Major Myths about the USA PATRIOT Act*, *supra* note 27 (arguing that heightened surveillance is not necessarily coexistent with lesser civil liberties); AM. ASS’N L. LIBRARIES ET AL., LIBERTY & SECURITY: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS 175-288 (2008), <http://www.constitutionproject.org/pdf/LibertyandSecurityTransitionReport.pdf> (weighing the government’s need and desire to enhance surveillance to secure freedoms against the extension of government authority); *USA Patriot Act*, ELECTRONIC PRIVACY INFO. CENTER., <http://epic.org/privacy/terrorism/usapatriot/> (last visited Jan. 21, 2012) (explaining extensions and revisions of the PATRIOT Act).

<sup>147</sup> Ellen Nakashima, *White House Proposal Would Ease FBI Access to Records of Internet Activity*, WASH. POST, July 29, 2010, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/28/AR2010072806141.html>; Larry Abramson & Maria Godoy, *The Patriot Act: Key Controversies*, NAT’L PUB. RADIO (Feb. 14, 2006), <http://www.npr.org/news/specials/patriotact/patriotactprovisions.html#issue3>.

<sup>148</sup> 156 CONG. REC. S793-94 (daily ed. Feb. 25, 2010) (statement of former Sen. Feingold).

<sup>149</sup> Faye Fiore & Mark Z. Barabak, *The War the Election Forgot*, L.A. TIMES, Nov. 2, 2010, <http://www.latimes.com/news/nationworld/nation/la-na-midterms-war-20101102,0,3854094.story> (noting that during the election process neither side took positions dealing with the war on terrorism).

<sup>150</sup> Janie Lorber, *Weekend Word: Sun, Spending and Steele*, N.Y. TIMES (July 3, 2010, 1:38 PM), <http://thecaucus.blogs.nytimes.com/2010/07/03/weekend-word-sunspending-and-steele/>.

Senator Wyden's push for this limiting standard seems to have been based on classified information of the applications for section 215 records requests and resultant surveillance that was made available to Congress, which he found to be "key information . . . relevant to the debate on the Patriot Act."<sup>151</sup> Conclusively, Senator Wyden advocates for allowing declassification of section 215 information responsibly in order for the public and their representatives to debate the merits of the provision while allowing for a more transparent government.<sup>152</sup> Senator Wyden further explains this transparency is necessary to allow the public to understand the "discrepancy between what most Americans believe is legal and what the government is actually doing under the Patriot Act."<sup>153</sup> But this governmental transparency, Senator Wyden has countered, must be done in a way that does not jeopardize national security.<sup>154</sup>

Backing the notion of governmental transparency is the idea that by declassifying information on section 215, the debate about the merits of this provision may begin among the public, and thereby motivate Congress to limit governmental intrusion.<sup>155</sup> But former Senator Feingold has expressed his concern that it is not possible to have an "open and honest debate" as things stand.<sup>156</sup> This seems to be the crux of the issue with section 215, which former Senator Feingold has mined—a need to hold the government accountable for its actions, with independent oversight, while guaranteeing "both that our government has the tools to keep us safe and that the privacy and civil liberties of innocent Americans will be protected. These are not mutually exclusive goals. We can and must do both."<sup>157</sup>

Ultimately, it is up to the people of the United States to engage in the debates and dialogue on whether the government's war on terror has resulted in more harm to citizens by taking away freedom at the

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<sup>151</sup> 156 CONG. REC. S2108-09 (daily ed. Mar. 25, 2010) (statement of Sen. Wyden).

<sup>152</sup> *Id.* at 2109.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *See* 156 CONG. REC. S793-94 (daily ed. Feb. 25, 2010) (statement of former Sen. Feingold).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at S794.

expense of foregoing constitutionally guaranteed rights.<sup>158</sup> Ideally, the discussion should include thoughts on what changes to the PATRIOT Act would allow the government to further secure the safety of its citizens and country from another terrorist attack while not implicating constitutional guarantees. With more independent checks in place for those gathering information under the PATRIOT Act, accountability would resurface in the government without impeding the prevention of terrorist attacks.<sup>159</sup> But, the central question that needs to be understood is whether Americans care if the PATRIOT Act implicates their civil liberties, so long as it prevents another attack. The questions necessary to find the answers to these inquiries may not be available until the economy recovers, jobs surface, and political power struggles dissipate.<sup>160</sup> For without these inquiries, liberties Americans have considered as guarantees will continue to be eroded from unchecked governmental power.<sup>161</sup> A bridge between security and liberty that has been standing for centuries was undoubtedly erected on solid pillars built to withstand storms that may come. But even the most structurally sound work will succumb to the shifting earth below if not maintained. If left unchecked, this structure threatens to become either a relic that will be left for more stable routes or a source of fear that, should it collapse, will deny the free passage to anything but the chasm below.

#### IV. CONCLUSION

The questions the people of the United States should be asking is how much of their civil liberties they are willing to give up under the auspice of national security.<sup>162</sup> Before the PATRIOT Act comes before Congress in June of 2015,<sup>163</sup> Americans should consider asking the difficult questions of legislators and other government officials that have not set boundaries for the investigatory surveillance that the PATRIOT

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<sup>158</sup> See *supra* notes 147-50 and accompanying text.

<sup>159</sup> See *supra* notes 155-57 and accompanying text.

<sup>160</sup> See Lorber, *supra* note 150 (noting that in the last election the voters cared more about the economy than they did about domestic safety and civil liberties).

<sup>161</sup> See *supra* Part III.A-B.

<sup>162</sup> See *supra* Part III.C.

<sup>163</sup> An Act of Feb. 27, 2010, Pub. L. No. 111-141, 124 Stat 37 (codified as amended in scattered sections of 50 U.S.C.).

Act has posed to U.S. citizens.<sup>164</sup> Today, the only America the post-9/11 generation is familiar with is a United States of sweeping surveillance, security checks, profiling, increased censorship, terrorist watch lists, and so-called “patriot terrorist killings.”<sup>165</sup>

Even if Americans find it is in the best interest of the country today to allow for a more intrusive government to be free from another terrorist attack, regardless of the expense to constitutional guarantees,<sup>166</sup> those concerned with preserving the freedoms the founders of this country fought and died for should do so for the generations yet to come.<sup>167</sup>

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<sup>164</sup> See 156 CONG. REC. S793-94 (daily ed. Feb. 25, 2010) (statement of former Sen. Feingold).

<sup>165</sup> See, e.g., Pam Fessler, *New Airport Screening Described as ‘Intrusive’*, NAT’L PUB. RADIO (Dec. 30, 2009), <http://www.npr.org/templates/story/story.php?storyId=122043015> (detailing the intrusive nature of airport screening which began after 9/11); Valarie Kaur, *Shadow Generation*, HUFFINGTON POST (Sept. 15, 2010), [http://www.huffingtonpost.com/valarie-kaur/shadow-generation\\_b\\_716769.html](http://www.huffingtonpost.com/valarie-kaur/shadow-generation_b_716769.html) (discussing a “patriot killing”); David Kravets, *House Considers Limiting Patriot Act Spy Powers*, WIRED (Oct. 21, 2009), [http://www.wired.com/threatlevel/2009/10/conyers\\_bill/](http://www.wired.com/threatlevel/2009/10/conyers_bill/) (discussing proposals to limit some of the surveillance powers of the United States in the House of Representatives); Amhal Majack, *Patriot Act’s Controversy Rekindled*, THE N.H. (Sept. 6, 2009), <http://www.tnhonline.com/2.3536/patriot-act-s-controversy-rekindled-1.396938?compArticle=yes> (discussing how the PATRIOT Act can “scare the hell out of [an] audience”); Richard A. Serrano, *FBI Improperly Investigated Activities, Justice Department Review Finds*, L.A. TIMES, Sept. 21, 2010, <http://articles.latimes.com/2010/sep/21/nation/la-na-fbi-activists-20100921>; see also Richard A. Serrano, *FBI Faulted For Singling Out Activists; A Federal Report Finds Greenpeace, others were improperly investigated after 9/11*, L.A. TIMES, Sept. 21, 2010, at AA1 (noting how the FBI is singling out activist groups with no ties to terrorism); Lydia Stutz, *Can’t Blame Past Administration Forever: As 9/11 Approaches, It’s Time to Look Forward*, DAILY CARDINAL, Sept. 9, 2010, at 6, available at [http://issuu.com/the\\_daily\\_cardinal/docs/sept10](http://issuu.com/the_daily_cardinal/docs/sept10) (noting that groups such as Greenpeace and People for the Ethical Treatment of Animals have been investigated after 9/11); *Obama Betrays His Own Campaign Promises*, BLUE BANNER, Sept. 29, 2010, at 23, available at [http://issuu.com/thebluebannerunca/docs/issue\\_5](http://issuu.com/thebluebannerunca/docs/issue_5) (arguing that Obama broke a campaign promise by extending the PATRIOT Act).

<sup>166</sup> U.S. CONST. amends. I-X.

<sup>167</sup> See 151 CONG. REC. H4910 (daily ed. June 22, 2005) (statement of Rep. Lofgren); See generally ERIC BURNS, *INFAMOUS SCRIBBLERS: THE FOUNDING FATHERS AND THE ROWDY BEGINNINGS OF AMERICAN JOURNALISM* 214-21, 230-36 (2006) (recounting newspaper reports on the Revolutionary War that detailed the destruction and losses to the colonies at the hands of the British and the role publishers had in advancing the

To allow the PATRIOT Act to continue as it is seems more likely to perpetuate fears of groups that have been lumped into the terrorist categories<sup>168</sup> than to further the principles of what this country was founded upon—that “all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”<sup>169</sup>

George Washington, as a general of the Revolutionary War, was said to have bolstered those fighting for America’s independence with these words: “Remember officers and soldiers that you are free men, fighting for the blessings of liberty.”<sup>170</sup> Notably, the words of the Declaration of Independence and those of the famous general were not advocating for the birth of a nation with liberty only for those the government determines not to be engaged in seemingly suspicious acts.<sup>171</sup> In fact, as the Declaration of Independence explains, the purpose was to escape the previous confines of an overreaching government that suppressed freedom.<sup>172</sup> It is time for America to look to its history and the implications of the PATRIOT Act to begin the dialogue on whether it is possible to protect life and liberty, or if these will ultimately become mutually exclusive terms.

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independence of America); DAVID McCULLOUGH, 1776 155-97 (2005) (describing the British invasion of New York and the ensuing battle and defense by American troops under General George Washington).

<sup>168</sup> Matea Gold, *Muslims Worry Analyst’s Firing May Fan Ill Will; The Uproar Shifts the U.S. Debate About Islam in the Wrong Direction, They Say*, L.A. Times, Oct. 22, 2010, at A12, available at <http://articles.latimes.com/print/2010/oct/22/nation/la-na-juan-williams-20101022>.

<sup>169</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>170</sup> McCULLOUGH, *supra* note 167, at 155.

<sup>171</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); McCULLOUGH, *supra* note 167.

<sup>172</sup> THE DECLARATION OF INDEPENDENCE (U.S. 1776).