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Free Speech Viet Nam through the War on Terror

Abstract: In the decades immediately following the Vietnam War, there were no significant conflicts with free speech resulting from major policy or military action. In contrast, the global war on terror following the events of September 11, 2001, mirror in many ways where prior conflicts and government action clashed with Free Speech. Forty-five days after the worst attack on American soil since Pearl Harbor, Congress enacted the USA PATRIOT Act. In the months and years that followed, American forces fought abroad and opponents of and advocates for the Act fought at home. This article will review the implementation of the Patriot Act and two provisions, section 215 and 805, to follow the actions of the executive, legislative, and judicial branches of the federal government and those of civil liberties advocacy groups to review America's efforts to meet the challenges of providing security for the homeland and protecting Free Speech.

Keywords: Patriot Act, Free Speech, National security, FISA, terrorism

Following the end of the Vietnam War in 1975,[1] United States' military action in the last quarter of the twentieth century was limited in scope and duration—aside from the First Gulf War.[2] So too were instances in which the nation had to reconcile the concomitant duties of protecting national security and preserving the right to free speech as secured by the First Amendment. The most significant government action during this period was Congress's response to reported abuses concerning domestic surveillance of Americans by the Federal Bureau of Investigation (FBI), the Central Intelligence Agency, and the National Security Agency (NSA).

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In an investigation undertaken by what became known as the Church Committee, the Committee identified a covert program run by the FBI named COINTELPRO, which was "designed to 'disrupt' groups and 'neutralize' individuals deemed to be threats to domestic security." Individuals and groups targeted by the program ranged from Martin Luther King, Jr. to journalist Joseph Kraft to "Key Black Extremists" and a broadly defined "New Left," which mainly encompassed antiwar groups. The Committee concluded that the program effectively chilled the exercise of free speech rights "to engage in free and open discussions."[3] The key outcome of the Committee's work was passage of the Foreign Intelligence Surveillance Act of 1978 (FISA). FISA established limitations on the targets and purposes of surveillance and created the Foreign Intelligence Surveillance Court to provide for judicial review and authorization of domestic surveillance activities.[4]

Juxtaposed to the limited interactions between national security and free speech at the close of the twentieth century, the dawn of the twenty-first century brought significant new threats to the nation. America would once again be required to address the need to provide and maintain security and protect and preserve free speech. As demonstrated in rhetoric, actions by the executive and legislative branches of the federal government, and in judicial review, the nation proved to be more attentive than in previous eras to protecting free speech.

SEPTEMBER 11, 2001 AND TARGETING TERROR

Just as Americans who heard of the assassination of President John F. Kennedy could forever recall where they were and what they were doing when they heard the news, the words and images from the morning of September 11, 2001, were seared into our individual and national consciousness. Nineteen agents of al-Qaeda carried out a plan that was years in the making to hijack four commercial airliners. Each had gained entry to the United States by securing visas for various purposes, mostly tourist and business, and all were adherents of extremist Islamic beliefs. Two planes struck the Twin Towers of the World Trade Center in New York City, a symbol of America's economic strength. One plane hit the Pentagon in Arlington County, Virginia, a symbol of America's military strength. The fourth plane never made it to its intended target. Instead, it crashed in a field in Shanksville, Pennsylvania, due to the bravery and determination of passengers and crewmembers who, aware of what was transpiring with the other hijacked planes, refused to let the hijackers succeed, a symbol of America's indomitable spirit. Nearly 3,000 men, women, and children from different countries, different states, and of different religious faiths died that day.[5]

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Beginning with his address to the nation in the evening of September 11 and continuing in a speech before a special joint session of congress nine days later, President George W. Bush sought to comfort a grieving nation, give voice to righteous indignation, and rouse a world to action. He singled out the threat at hand as "a radical network of terrorists, and every government that supports them" and defined the conflict ahead as a "war against terrorism." And he cautioned Americans that although the "war on terror" would start against al-Qaeda, it would "not end until every terrorist group of global reach has been found, stopped and defeated."[6]

He identified the resources to employ as "every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war—to the disruption and to the defeat of the global terror network" in order to "starve terrorists of funding, turn them one against another, drive them from place to place, until there is no refuge or no rest." To meet the specific goal of protecting America from another domestic attack, President Bush stated the need "to give law enforcement the additional tools it needs to track down terror here at home. We will come together to strengthen our intelligence capabilities to know the plans of terrorists before they act, and find them before they strike."[7]

Importantly and distinct from the past, President Bush avoided rhetoric demonizing all adherents of Islam or those of Arab descent by entreating Americans to "uphold the values of America, and remember why so many have come here." He underscored the point further by stating that "We are in a fight for our principles, and our first responsibility is to live by them. No one should be singled out for unfair treatment or unkind words because of their ethnic background or religious faith."[8]

LEGISLATIVE ACTION AND THE PATRIOT ACT

Congress and the President moved swiftly after September 11. On September 18, 2001, Congress passed Senate Joint Resolution 23, which authorized the use of military force "in order to prevent any future acts of international terrorism against the United States."[9] Pursuant to the authorization to use military force, United States' forces began Operation Enduring Freedom in Afghanistan on October 7, 2001. The first target was the Taliban in Afghanistan and the al-Qaeda leadership and resources therein.[10]

While military action was underway against the Taliban and al-Qaeda, Bush administration officials in the Department of Justice (DOJ) worked with congressional leadership to provide law enforcement the tools identified as

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essential to address the domestic security goal of detecting terrorist plans before execution and thwart any future attacks on the homeland.[11] Congress consequently enacted the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism" Act on October 26, 2001. Better known as the USA PATRIOT Act, or Patriot Act (hereafter, the Act), its stated purpose was to bring those responsible for the attacks of September 11 to justice and deter any future attack. The Act consisted of ten titles addressing the enhancement of domestic security and surveillance procedures; strengthening tools to interdict international money laundering; border protection; facilitating the investigation of terrorism; strengthening related criminal laws; and improving the collection, assessment, and dissemination of intelligence between federal agencies and among local, state, and federal law enforcement, as well as providing for the victims of terrorism. Significant statutes amended by the Act included Title III of The Omnibus Crime Control and Safe Streets Act of 1968 (Wiretap Act), the Electronic Communications Privacy Act, Computer Fraud and Abuse Act, the Family Education Rights and Privacy Act, and FISA.[12]

In response to concerns raised by members of Congress and civil liberties groups regarding provisions in Title II relating to enhanced surveillance procedures, the Act included a section requiring reauthorization for a majority of the Title II sections by December 31, 2005, or they would cease to have effect.[13] Additionally, the legislation at section 102, underscored that the United States was not at war with Islam and did not seek to limit First Amendment protected activity:

> It is the sense of Congress that the civil rights and civil liberties of all Americans, including Arab Americans, Muslim Americans, and Americans from South Asia, should be protected; that violence and discrimination against any American should be condemned; and that the patriotism of Americans from every ethnic, racial, and religious background should be acknowledged.

The Patriot Act drew opposition before it passed. In a letter to Senators expressing concerns with the scope of the Act, the American Civil Liberties Union (ACLU) argued that "[t]hese new and unchecked powers could be used against … those whose First Amendment activities are deemed to be threats to national security by the Attorney General."[14] An alliance of groups across the political spectrum, including various groups such as the Center for Democracy

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& Technology, the Electronic Frontier Foundation, as well as the CATO Institute, joined with the ACLU to decry what was generally branded as a growth in government authority at the expense of civil liberties. Additional criticism from the ACLU focused on what it characterized as the ability of the Attorney General (Atty. Gen.) "to deny re-admission to the United States of non-citizens (including lawful permanent residents) for engaging in speech protected by the First Amendment." And that by "[c]reat[ing] a broad new definition of 'domestic terrorism,'" the Act "could sweep in people who engage in acts of political protest and subject them to wiretapping and enhanced penalties."[15]

SECTION 215 AND ITS DISCONTENTS

Section 215 of Title II amended FISA by expanding the category of FBI officials authorized to seek a court order requiring the production of an increased range of records and items from an increased scope of entities. Now, FBI officials down to the level of assistant special agents in charge of a field office could apply for an order requiring "the production of any tangible things (including books, records, papers, documents, and other items)." Furthermore, although records could only previously be sought from a "common carrier, public accommodation facility, physical storage facility, or vehicle rental facility," section 215 removed the categorical limitations. Finally, section 215 prohibited disclosure by the recipient of an order for records to anyone "other than those persons necessary to produce the tangible things" regarding what was requested or provided.

Even though the Act precluded an application if it was "sought in conjunction with the investigation of an American or permanent resident alien predicated solely on the basis of activities protected by the First Amendment," the possibility that free speech activities could nonetheless serve as part of the basis of an investigation generated significant opposition. Of course, the inherent problem in trying to forestall a terrorist attack anchored in radical Islamist ideology is the overlap with otherwise constitutionally protected religious activity or expressive conduct under the First Amendment.

Congress exercised its oversight of the executive branch early on concerning the implementation of the Patriot Act given civil liberties concerns and the sunset provision of section 224. On June 13, 2002, the House Judiciary Committee sent a letter to Atty. Gen. John Ashcroft requesting information. With respect to use of the investigative tools provided in section 215, the Committee asked,

> How many applications and orders, pursuant to Section 215 of the Act, have been made or obtained for tangible objects in any investigation to protect the United States from international terrorism or clandestine intelligence activities? What procedures are in place to ensure that such orders are not sought solely on the basis of activities protected by the First Amendment to the U.S. Constitution? How many total applications have been made and of those, how many applications were made by FBI Assistant Special Agents in Charge, rather than a higher ranking official? How many orders have been issued upon the application of FBI Assistant Special Agents in Charge?
>
> Has Section 215 been used to obtain records from a public library, bookstore, or newspaper? If so, how many times has Section 215 been used in this way? How many times have the records sought related to named individuals? How many times have the records sought been entire databases? Is the decision to seek orders for bookstore, library, or newspaper records subject to any special policies or procedures such as requiring supervisory approval or requiring a determination that the information is essential to an investigation and could not be obtained through any other means?[16]

Atty. Gen. Ashcroft responded, "The number of times the Government has requested or the Court has approved requests under this section since passage of the PATRIOT Act, is classified, and will be provided in an appropriate channel."[17] Although this information was subsequently provided in a classified manner, the information was not publicly disclosed.[18] The lack of public disclosure resulted in speculation and assertions of abuse and infringement of civil liberties, as well as litigation. The ACLU filed a Freedom of Information Act request for the information, which then led to the case of *ACLU v. U.S. Dept. of Justice*.[19]

As the United States District Court for the District of Columbia stated, "the information at issue concerns the number of times DOJ has used the particular surveillance and investigatory tools authorized by the Patriot Act since the statute took effect."[20] The DOJ rested on statutory exemptions for refusing to disclose the records sought. Primarily, the DOJ argued that the records withheld were "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and … in fact properly classified pursuant to such Executive order."[21]

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The District Court found the exemption, valid and the ACLU failed to get the information it sought,[22] but the suit sharpened the controversy over section 215 as a contest between access to information believed essential to protect against the overreach and abuse of civil liberties and the necessity for maintaining operational security of ongoing terrorism investigations.

Another suit related to section 215, *Muslim Community Association of Ann Arbor v. Ashcroft*, presented a direct challenge on First Amendment free speech grounds. The plaintiffs, Muslim community organizations that included a local Islamic school and a mosque, brought suit in June of 2003 against the attorney general and the director of the FBI. The plaintiffs alleged that "[s]ection 215 violates the First Amendment by categorically and permanently prohibiting any person from disclosing to any other person that the FBI has sought records or personal belongings" and "by authorizing the FBI to investigate individuals based on their exercise of First Amendment rights, including the rights of free expression."[23]

Each of the different organizations involved provided a range of religious and educational services, including legal, health care, and financial, as well as job training. Consequently, they had created and possessed personal records, including credit card and banking information, of their members, staff, students, and those who sought the services provided. Given the relationship each organization had with its members and others who had been subject to investigation, detention, or arrest subsequent to September 11, they professed concern that the FBI had used section 215 authority to obtain information or personal property of people associated with each organization or would do so in the future. The various groups therefore asserted, respectively, that their members were afraid to seek services, attend mosque, practice their religion, or express opinions regarding religious and political issues.[24]

The government defendants sought to dismiss the suit at the outset by arguing that the plaintiffs did not have standing to bring the suit because no one had actually suffered a concrete and actual or imminent injury caused by the government's conduct and it was not likely that a favorable decision could provide relief for the alleged injuries suffered. The government also argued that the plaintiffs' claims were not ready for judicial review and that section 215 otherwise complied with the First Amendment.[25] Addressing the standing issue first, the court found that the plaintiffs had sufficiently alleged that they and their individual members may have been or were currently subject to a section 215 order and that they and their members' right to speech was being threatened by section 215. Finally, in concluding that they could bring their claims, though not reaching the merits of their allegations

concerning First Amendment violations, the court found that the plaintiffs had sufficiently alleged that their members were afraid to attend mosque, practice their religion, and express their opinions on religion and political issues.[26]

The litigation also drew together the American Booksellers Foundation for Free Expression, Association of American Publishers, Association of American University Presses, Center for First Amendment Rights, Comic Book Legal Defense Fund, Electronic Frontier Foundation, Feminists for Free Expression, First Amendment Project, Freedom to Read Foundation, and the PEN American Center to file a brief in support of the plaintiffs.[27] The brief endeavored to "to highlight the severe threat to First Amendment protections posed by Section 215." The brief raised two major objections. First, the Patriot Act permitted the government "to obtain records—including bookstore and library patron records—that lie at the heart of the First Amendment." This was of concern because "[b]ookstores and libraries serve as 'a mighty resource in the free marketplace of ideas.'" Furthermore, the groups argued that providing such records implicated "[t]he right to engage in expressive activities anonymously," which was "critical to the protection of First Amendment rights because of the inherent chilling effect of such disclosures." The groups' second major objection focused on the disclosure prohibition in section 215. The groups argued that the prohibition was a content-based restriction on speech and subject to strict scrutiny review, which requires the government to establish a compelling governmental interest and that the statute in question is narrowly tailored and the least restrictive means of serving the asserted interest.[28]

While the court's ruling was pending, Congress reauthorized the Patriot Act with amendments to section 215 in March of 2006. Therefore, the defendants argued that the Congressional enactments addressed the concerns raised by the plaintiffs, rendering their claims moot. However, the court denied the defendants' motion and gave the plaintiffs time to consider whether to amend their complaint and continue litigation.[29] Ultimately, the plaintiffs voluntarily dismissed their complaint.

The amendments referenced by the court followed a pitched battle for reauthorization of Patriot Act provisions, including section 215, as required by the sunset provision. Administration officials advocated for making permanent all the sections subject to sunsetting. As early as August of 2003, Atty. Gen. Ashcroft defended the need and efficacy of the Patriot Act in speeches around the country. His message reminded listeners of the challenges following September 11 and what the administration sought to do:

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> In the days after September 11th, we vowed to do everything within the law to prevent additional terrorist attacks. We talked to individuals like you: law enforcement officers, investigators and prosecutors. We asked you what tools you needed to preserve life and liberty.
>
> We then appealed to Congress to give us better tools to protect America, and Congress responded to our call. Democrats and Republicans united and they passed the USA Patriot Act with wide, bipartisan support. And while our job is not finished, we have used the tools provided in the Patriot Act to fulfill our first responsibility to protect the American people.

In direct response to criticisms of the use of the Patriot Act, he argued that the administration "used these tools to prevent terrorists from unleashing more death and destruction on our soil. We have used these tools to save innocent American lives. We have used these tools to provide the security that ensures liberty."[30]

The theme of providing security to protect liberty was a recurring one and a counterpoint to opponents to reauthorization who argued that the infringement on civil liberties was not justified by the assertions of enhanced security. Other arguments in favor of reauthorization, especially with respect to access to business records, noted that the section mirrored the types of records available to a grand jury and that previous restrictions on the target of an investigation, limiting a section 215 order to an agent of a foreign power, failed to account for the nature of the threat from nonstate terror organizations and individuals that law enforcement now had to contend with.[31]

In a letter to Congressional leaders, the Coalition for Security, Liberty and the Law argued for the reauthorization of the entirety of the Patriot Act and for making permanent the provisions set to expire.[32] The letter also quoted then Senator Biden who had observed that "the FBI could get a wiretap to investigate the mafia, but they could not get one to investigate terrorists. To put it bluntly, that was crazy! What's good for the mob should be good for terrorists." Accordingly, the Coalition underscored that the tools provided by the Patriot Act for investigating threats of terrorism were no different from those used by law enforcement to investigate organized crime and drug trafficking.[33]

Following John Ashcroft as attorney general, Alberto Gonzalez testified before the Senate Select Committee on Intelligence in April of 2005 and pressed for reauthorization as he argued the continuing need for the tools

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provided by the Patriot Act, including section 215, for "the government's ability to successfully prosecute the war on terrorism and prevent another attack like that of September 11 from ever happening again."[34] Additionally, Atty. Gen. Gonzalez provided details on section 215 orders and shared that from the operative date of section 215 to March 30, 2005, the FISA court had issued 35 such orders but that "[n]one of those orders was issued to libraries and/or booksellers, and none was for medical or gun records." Instead, the records sought to date were only for "driver's license records, public accommodation records, apartment leasing records, credit card records, and subscriber information, such as names and addresses, for telephone numbers captured through court-authorized pen register devices."[35]

Congress ultimately reauthorized the Patriot Act via the USA Patriot Improvement Reauthorization Act of 2005[36] ("Reauthorization Act") and the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006 ("Amendments Act").[37] Although the Reauthorization Act made many provisions permanent, it set a new sunset date of December 31, 2009, for section 215. It also amended the section to provide additional civil liberties protections, taking into account issues since initial passage of the Patriot Act.[38] It added the requirement that the FBI director, FBI deputy director, or the executive assistant director for National Security had to personally approve an application for a 215 order for library, bookstore, firearm sales, tax return, educational, or medical records. This requirement was included to address concerns that federal authorities were abusing section 215 authority to obtain sensitive types of records.[39]

With respect to the section's nondisclosure provision, the Reauthorization Act expressly permitted a recipient of a 215 order to disclose its existence to an attorney to obtain legal advice, as well as to other persons approved by the FBI. The recipient was not required to inform the FBI of the intent to consult with an attorney to obtain legal assistance; however, upon the request of the FBI Director (or his designee), the recipient had to disclose the identity of the person to whom the disclosure was or would be made. However, the Amendments Act explicitly exempted from any identification disclosure requirement the name of the attorney from whom a recipient sought to obtain legal advice with respect to a Section 215 production order. The Amendments Act also provided for judicial review wherein the recipient could challenge a nondisclosure order one year from the date it was issued by petitioning the Foreign Intelligence Surveillance Court to modify or set aside the nondisclosure requirement.[40]

Last, to address issues related to congressional oversight of the use of section 215 and the previous limited public nature of DOJ disclosures, the Reauthorization Act directed the attorney general to submit an annual report to Congress on the use of section 215 authority in the preceding year. Specifically, the attorney general was required to provide information on the total number of applications made and the number of requests approved for section 215 orders to produce tangible things; the total number of such orders granted as requested, modified, or denied; and the number of 215 orders either granted, modified, or denied for the production of particular types of records. The specific information sought for record types consisted of library circulation records, library patron lists, book sales records, or book customer lists; firearms sales records; tax return records; educational records; and medical records containing information that would identify a person. Prior to the Act, the law had required public disclosure of only the first two items listed.[41] The Reauthorization Act also continued to express the sense of Congress that the federal government should not conduct criminal investigations of Americans based solely on their membership in nonviolent political organizations or their participation in other lawful political activity.[42]

CONTINUING CONTROVERSY

Given that section 215 faced a new sunset date of December 31, 2009, Congress continued to scrutinize the use and scope of the section and entertained a number of proposals that would have further restricted or outright ended its investigative authority. However, none were successful and Congress simply continued to extend the effective date of section 215 to February of 2010, then to February 2011, and then to May of 2011. Eventually, section 215 authority was extended to June 1, 2015, pursuant to the PATRIOT Sunsets Extension Act of 2011, which President Obama signed into law on May 26, 2011.[43]

Controversy over section 215 would come to a head in 2013 with revelations that the provision had been used by the NSA since May of 2006 through a surveillance program named Prism to engage in bulk collection of metadata from millions of phone calls, as well as collecting information from audio and video chats, photographs, e-mails, documents, and connection logs from the servers of Microsoft, Yahoo, Google, Facebook, PalTalk, AOL, Skype, YouTube, and Apple.[44] The ACLU brought a First Amendment challenge to the program on June 11, 2013, in *American Civil Liberties Union v. Clapper*.[45] The plaintiffs argued that the bulk collection and surveillance program

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operated to chill free speech rights under the First Amendment by, among other things, making it less likely that potential whistleblowers of government misconduct would come forward. The Second U.S. Circuit Court of Appeals concluded that the bulk collection program exceeded the authority provided by section 215. Therefore, the court declined to address the free speech claims.[46] Nevertheless, the concerns raised by the ACLU and other civil liberties groups were echoed by President Obama's Review Group on Intelligence and Communications Technologies[47] and the Privacy and Civil Liberties Oversight Board ("PCLOB").[48]

EXECUTIVE BRANCH FOCUS ON CIVIL LIBERTIES

Of particular note in reviewing the government's attention to civil liberties and the First Amendment is the very existence of the PCLOB.[49] The PCLOB is charged with the duty to "analyze and review actions the executive branch takes to protect the Nation from terrorism, ensuring that the need for such actions is balanced with the need to protect privacy and civil liberties."[50] President Bush established its forerunner, creating a President's Board on Safeguarding Americans' Civil Liberties by executive order in 2004 in response to recommendations made by the 9/11 Commission.[51]

The 9/11 Commission had specifically acknowledged the need to protect civil liberties in its final report. The Commission was aware that a consequence of its work would result in a greater government presence in the lives of Americans "for example, by creating standards for the issuance of forms of identification, by better securing our borders, by sharing information gathered by many different agencies." The Commission observed that "[t]he Patriot Act vest[ed] substantial powers in our federal government" and that "[e]ven without the changes we recommend, the American public has vested enormous authority in the U.S. government." The Commission went on to state that from its first public meeting,

> [W]e noted the need for balance as our government responds to the real and ongoing threat of terrorist attacks. The terrorists have used our open society against us. In wartime, government calls for greater powers, and then the need for those powers recedes after the war ends. This struggle will go on. Therefore, while protecting our homeland, Americans should be mindful of threats to vital personal and civil liberties.[52]

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The Intelligence Reform and Terrorism Prevention Act of 2004 replaced the President's Board with the PCLOB.[53] The Implementing Recommendations of the 9/11 Commission Act then made it an independent executive branch agency.[54] No similar organization has ever been created by Congress in any preceding era involving existential threats to American security. It is further notable that, despite concerns that the agency would be a captive and deferential agency in the executive branch, it explicitly stated in its report on the NSA program that

> The NSA's bulk collection of telephone records … directly implicates freedom of speech …. The readiness with which individuals engage in certain political and social activities understandably may be chilled by knowledge that the government collects a record of virtually every telephone call made by every American …. Among the important freedoms that may be threatened by this chilling effect are the rights to participate in political activism, communicate with and benefit from the press, and promote novel or unpopular ideas.[55]

The PCOLB concluded in its report that "[t]he [s]ection 215 bulk telephone records program is not sustainable from a legal or policy perspective. As outlined in this Report, the program lacks a viable legal foundation under [s]ection 215, implicates constitutional concerns under the First and Fourth Amendments, raises serious threats to privacy and civil liberties as a policy matter, and has shown only limited value. For these reasons, the government should end the program."[56] Under the weight of continued criticism, the revelations of the bulk collection effort by the NSA and the finding by the court in *ACLU v. Clapper*, Congress ended the investigative authority under section 215 provided by the Patriot Act with passage of the USA FREEDOM Act of 2015.[57]

SECTION 805, ADVOCACY, AND FREE SPEECH

The only challenge to the Patriot Act reviewed by the US Supreme Court was *Holder v. Humanitarian Law Project* (*HLP*).[58] The Supreme Court reviewed section 805 of the Patriot Act's prohibition on providing material support to designated terrorist organizations in the context of free speech protections for advocacy under the First Amendment. Section 805 amended the definition of what constituted "material support or assistance" in section 2339A of Title

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18 to include "expert advice or assistance." In turn, section 2339B of Title 18 prohibited persons from knowingly providing "material support or resources to a foreign terrorist organization."[59] This last prohibition would prove to be a critical tool for prosecuting individuals for engaging in terrorist-related conduct.[60]

Holder v. Humanitarian Law Project involved two individuals and several groups, comprising two sets of plaintiffs that challenged the constitutionality of the prohibition on providing "material support or assistance" through "expert advice or assistance" to designated terrorist organizations.[61] The plaintiffs argued that the provision as it would be applied to them violated First Amendment protections of their right to freedom of speech. In particular, one set of plaintiffs wanted to provide (1) training to members of the Partiya Karkeran Kurdistan (PKK) on the peaceful resolution of disputes through the use of humanitarian and international law, (2) advocate politically for Turkish Kurds, and (3) teach PKK members how to petition for relief from entities such has the United Nations. The other group of plaintiffs, by the time the case was before the Supreme Court, wanted to "support the [Liberation Tigers of Tamil Eelam (LTTE)] 'as a political organization outside Sri Lanka advocating for the rights of Tamils.'" [62]

In a 6-3 opinion by Chief Justice Roberts, the Court held that, given the activities the plaintiffs wished to engage in, the statute was constitutional as applied to them. It observed that "Section 2339B does not criminalize mere membership in a designated foreign terrorist organization. It instead prohibits providing 'material support' to such a group."[63] The Court underscored this distinction in rejecting the argument "that Congress ha[d] banned their 'pure political speech'":

> It has not. Under the material-support statute, plaintiffs may say anything they wish on any topic. They may speak and write freely about the PKK and LTTE, the Governments of Turkey and Sri Lanka, human rights, and international law .... As the Government states: "The statute does not prohibit independent advocacy or expression of any kind." Section 2339B also "does not prevent [plaintiffs] from becoming members of the PKK and LTTE or impose any sanction on them for doing so." Congress has not, therefore, sought to suppress ideas or opinions in the form of "pure political speech." Rather, Congress has prohibited "material support," which most often does not take the form of speech at all. And when it does, the statute is

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> carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.[64]

In similarly rejecting the broad argument that only conduct was in question, the Court concluded that because a violation of the statute depended on what plaintiffs said to the PKK and LTTE, it was a content-based regulation of speech. The Court explained that "[i]f plaintiffs' speech to those groups imparts a "specific skill" or communicates advice derived from 'specialized knowledge'… then it is barred. On the other hand, plaintiffs' speech is not barred if it imparts only general or unspecialized knowledge."[65] Accordingly, the issue was "whether the Government may prohibit … material support to the PKK and LTTE in the form of speech."[66]

The Court proceeded to use a strict scrutiny standard of review applicable to statutes infringing free speech rights. Accordingly, the government had to establish that it had a compelling interest and that section 2339B was narrowly tailored to accomplish that interest. With respect to the compelling interest, "[e]veryone agree[d] that the Government's interest in combating terrorism is an urgent objective of the highest order."[67]

As to whether the law was narrowly tailored, the plaintiffs' argued that prohibiting the type of advice and assistance they wanted to offer was not necessary to further the interest in combatting terrorism and did not justify violating their freedom of speech.[68] Specifically, the plaintiffs argued that their efforts would not further terrorist activities of the organizations they wanted to help but only legitimate ones. On this score, the Court confessed that it did not "rely exclusively on our own inferences drawn from the record evidence." It also considered an affidavit from the State Department providing that "[t]he experience and analysis of the U.S. government agencies charged with combating terrorism strongly suppor[t]" Congress's finding that all contributions to foreign terrorist organizations further their terrorism. Thus, the Court concluded that in the Executive's view, "[g]iven the purposes, organizational structure, and clandestine nature of foreign terrorist organizations, it is highly likely that any material support to these organizations will ultimately inure to the benefit of their criminal, terrorist functions—regardless of whether such support was ostensibly intended to support non-violent, non-terrorist activities."[69]

The Court took a deferential approach in assessing this information, acknowledging that the "litigation implicate[d] sensitive and weighty interests of national security and foreign affairs."[70] The Court also observed that it had

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previously "noted that neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people."[71] Therefore, it was vital in this context "not to substitute … our own evaluation of evidence for a reasonable evaluation by the Legislative Branch."

Importantly, the Court invoked a strong caveat to forestall overreading any deference on its part by stating that its "precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role. We do not defer to the Government's reading of the First Amendment, even when such interests are at stake." Notably, for examining the treatment of free speech during this period, the Court considered the actions of the other two branches in this context:

> We also find it significant that Congress has been conscious of its own responsibility to consider how its actions may implicate constitutional concerns. First, [section] 2339B only applies to designated foreign terrorist organizations. There is, and always has been, a limited number of those organizations designated by the Executive Branch, … and any groups so designated may seek judicial review of the designation. Second, in response to the lower courts' holdings in this litigation, Congress added clarity to the statute by providing narrowing definitions of the terms "training," "personnel," and "expert advice or assistance," as well as an explanation of the knowledge required to violate [section] 2339B. Third, in effectuating its stated intent not to abridge First Amendment rights, … Congress has also displayed a careful balancing of interests in creating limited exceptions to the ban on material support. The definition of material support, for example, excludes medicine and religious materials… . Finally, and most importantly, Congress has avoided any restriction on independent advocacy, or indeed any activities not directed to, coordinated with, or controlled by foreign terrorist groups.[72]

The last sentence was a crucial point, and the Court emphasized it further by warning,

> All this is not to say that any future applications of the material-support statute to speech or advocacy will survive First Amendment scrutiny …. In particular, we in no way suggest that a regulation of

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> independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations. We also do not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations. We simply hold that, in prohibiting the particular forms of support that plaintiffs seek to provide to foreign terrorist groups, § 2339B does not violate the freedom of speech.[73]

It is worth further observing that the majority opinion never mentioned the case of *Brandenburg v. Ohio*,[74] which the dissent cited in making the point that "the First Amendment protects advocacy even of *unlawful* action so long as that advocacy is not 'directed to inciting or producing *imminent lawless action* and … *likely to incite or produce* such action.'"[75] Although the Supreme Court in *HLP* may have found the prohibitions on advocacy constitutional, it did so in a very limited way by focusing on conduct that provided material support, and the Court clearly advised that restrictions on individual advocacy would not pass constitutional muster. Thus, a traditional strict scrutiny approach to First Amendment free speech concerns provided a sufficient and consistent framework in which to account for legitimate national security concerns while also adhering to First Amendment principles, and no circumstantial distinction was necessary. Accordingly, there was no need to look to *Brandenburg*, and the Court likewise had no need to distinguish it from the circumstances in *HLP*.

That the deference due to government interests in combatting terrorism present in *HLP* did not eliminate free speech protections for advocacy was made clear a little less than two years later in *Al Haramain Islamic Foundation, Inc. v. U.S. Dept. of Treasury*.[76] The case concerned the designation of a foreign organization's domestic branch in Oregon as a terrorist organization. The underlying order and implementing regulations prohibited the provision of "services." Coplaintiff Multicultural Association of Southern Oregon (MCASO) challenged the designation on First Amendment grounds to the extent they could not engage in joint events with the Oregon branch.

The Ninth Circuit Court of Appeals saw no difference between the provision challenged in its case and the provision challenged in *HLP*, so it applied the same strict scrutiny review. Over the course of its analysis, the Ninth Circuit considered the government's basis for denying services to the domestic branch by MCASO. It concluded that there was "little evidence that the pure-speech activities proposed by MCASO on behalf of the domestic

branch will aid the larger international organization's sinister purposes. In these circumstances, we hold that [the] content-based prohibitions on speech violate the First Amendment."[77]

SECURING AMERICA, PRESERVING FREE SPEECH

What distinguishes the pursuit of security and the protection of free speech since Vietnam from previous eras may be that America was more aware of the lessons of the past and deliberately worked to avoid heightened restrictions on free speech rights during times of danger. At the same time, a rational approach to legislating and implementing needed tools for the fight against terrorists, especially at home, avoided treating the constitution as a suicide pact where the idea of civil liberties—writ large to encompass statutory and regulatory rights—is conflated with constitutional rights.[78]

The claims of limitations to and violations of the right to free speech were familiar following September 11 and passage of the Patriot Act, but the recognition by each branch of government of the need to protect free speech was not. The cautious use of rhetoric sought to avoid the type of broad ethnic and racial recriminations of the past and carefully described the threat of terrorism and terrorists. Congressional oversight and legislation, executive branch action, and judicial review more closely adhered to the principles of the First Amendment and were of a different kind and degree than that of the past. Although the next existential threat may bring another round of challenges, it can be said that America has thus far proved in the twenty-first century that security can be pursued and maintained without sacrificing liberty.

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NOTES

1. The United States ceased offensive operations with the signing of the Paris Peace Accords on January 27, 1973, and the last of American personnel left on April 30, 1975.

2. U.S. Library of Congress, Congressional Research Service, *Instances of Use of United States Armed Forces Abroad, 1798-2022*, R42738 (2022), 12–21. The most significant military operations involving ground combat consisted of Operation Urgent Fury in Grenada, 1983; Operation Just Cause in Panama, December 1989 to January 1990; and Operations Desert Shield and Desert Storm in Southwest Asia, August 1990 to February 28, 1991.

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3. U.S. Congress, Senate, Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Intelligence Activities and the Rights of Americans, Book II, 94 Cong., 2d Sess. (1976).

4. An Act to Authorize Electronic Surveillance to Obtain Foreign Intelligence Information, Pub. L. No. 95-511, 92 Stat. 1783 (1978).

5. National Commission on Terrorist Attacks. 2004. *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*, (New York: W. W. Norton, 2004), 393–94.

6. George W. Bush, "Address to a Joint Session of Congress and the American People," address delivered at the United States Capitol, Washington, DC, September 20, 2001, transcript, https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html.

7. Bush, "Address to a Joint Session of Congress and the American People."

8. Bush, "Address to a Joint Session of Congress and the American People."

9. The Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

10. George W. Bush, "Presidential Address to the Nation delivered at the White House, Washington, DC, October 7, 2001, transcript, https://georgewbush-whitehouse.archives.gov/news/releases/2001/10/20011007-8.html.

11. Floyd Abrams, *The First Amendment and the War Against Terrorism*, *University of Pennsylvania Journal of Constitutional Law* 5, no. 1 (2002). Not all of the recommendations originated with the Bush Administration. A number of them had been previously considered under the Clinton Administration as part of several counterterrorism reviews.

12. USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

13. Section 224 of the Act provided that "[e]xcept as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a), 203(c), 205, 208, 210, 211, 213, 216, 219, 221, and 222, and the amendments made by those sections) shall cease to have effect on December 31, 2005." Sec. 224(a) of USA PATRIOT Act. The specific temporary provisions consisted of sections 201 (wiretapping in terrorism cases), 202 (wiretapping in computer fraud and abuse felony cases), 203(b) (sharing wiretap information), 203(d) (sharing foreign intelligence information), 204 (Foreign Intelligence Surveillance Act (FISA) pen register/trap & trace exceptions), 206 (roving FISA wiretaps), 207 (duration of FISA surveillance of non-United States persons who are agents of a foreign power), 209 (seizure of voice-mail messages pursuant to warrants), 212 (emergency disclosure of electronic surveillance), 214 (FISA pen register/trap and trace authority), 215 (FISA access to tangible items), 217 (interception of computer trespasser communications), 218 (purpose for FISA orders), 220 (nationwide service of search warrants for electronic evidence), 223 (civil liability and discipline for privacy violations), and 225 (provider immunity for FISA wiretap assistance)."

14. ACLU, "Letter to the Senate Urging Rejection on The Final Version of The USA PATRIOT Act." December 6, 2022. https://www.aclu.org/letter/letter-senate-urging-rejection-final-version-usa-patriot-act.

15. ACLU Letter to Senate.

16. U.S. Congress, House. Judiciary Committee to Attorney General John Ashcroft, June 13, 2002. https://archive.ph/20070624190712/http://judiciary.house.gov/judiciary/ashcrofto61302.htm.

17. DOJ Response to House Judiciary Committee letter of June 13, 2002, July 26, 2002, 4. https://www.justice.gov/archive/ll/subs/congress/hjcpatriotactcombinedresponses3.pdf.

18. DOJ Response, July 26, 2002, 4.

19. American Civil Liberties Union v. United States Department of Justice, 265 F. Supp. 2d 20 (2003).

20. 265 F. Supp. 2d at 21.

21. 265 F. Supp. 2d at 21.

22. 265 F. Supp. 2d at 30.

23. Muslim Community Ass'n of Ann Arbor v. Ashcroft, 459 F. Supp. 2d 592, 594–95 (2006).

24. 459 F. Supp. 2d at 598–601.

25. 459 F. Supp. 2d at 596.

26. 459 F. Supp. 2d at 598, 601.

27. Brief of Amici Curiae First Amendment Organizations in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss, 2003 WL 23851858.

28. Brief of Amici First Amendment Organizations at 4.

29. 459 F. Supp. 2d at 601–2.

30. Ashcroft, John, "The Patriot Act," speech delivered at Boise, Idaho, August 25, 2003, transcript, https://www.justice.gov/archive/ag/speeches/2003/082503patriotactremarks.htm.

31. Heather MacDonald, "Patriot Act: Let Investigators Do Their Job," National Public Radio, July 20, 2005, https://www.npr.org/2005/07/20/4763326/patriot-act-let-investigators-do-their-job.

32. Coalition for Security, Liberty and the Law, "Letter to Congressional Leaders." *National Review*, September 23, 2004, https://www.nationalreview.com/2004/09/note-congress-nro-primary-document/.

33. Coalition for Security, Liberty and the Law, "Letter to Congressional Leaders."

34. U.S. Congress, Senate, Select Committee on Intelligence, *USA PATRIOT Act: Hearings Before the Select Committee on Intelligence*, 109th Cong., 1st Sess. 90 (2005).

35. U.S. Congress, Senate, Committee, USA PATRIOT Act, 93.

36. USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 197 (2006).

37. USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, Pub.L. No. 109-178, 120 Stat. 278 (2006).

38. Brian T. Yeh and Charles Doyle, *USA PATRIOT Improvement and Reauthorization Act of 2005: A Legal Analysis* (U.S. Library of Congress, Congressional Research Service, RL33332, updated December 21, 2006), 2.

39. *USA PATRIOT Improvement and Reauthorization Act of 2005: A Legal Analysis*, 6.

40. *USA PATRIOT Improvement and Reauthorization Act of 2005: A Legal Analysis*, 8.

41. *USA PATRIOT Improvement and Reauthorization Act of 2005: A Legal Analysis*, 5.

42. Pub. L. No. 109–177.

43. PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112–14, 125 Stat. 216 (2011).

44. Hayley Tsukayama, "Consumers, privacy advocates call for investigation into PRISM," *Washington Post*, June 7, 2013, https://www.washingtonpost.com/business/technology/consumers-privacy-advocates-call-for-investigation-into-prism/2013/06/07/9a8a869a-cfa6-11e2-8f6b-67f40e176f03_story.html.

45. American Civil Liberties Union v. Clapper, 785 F.3d 787 (2015).

46. 785 F.3d at 792. Similar cases were also brought in *Smith v. Obama*, 24 F. Supp. 3d 1005 (D.Idaho 2014) and *Klayman v. Obama*, 957 F. Supp. 2d 1 (D.D.C. 2013).

47. The President's Review Group on Intelligence and Communications Technologies, Liberty and Security in a Changing World (Washington, DC: Government Printing Office, 2013), 24–28, 94–129, https://obamawhitehouse.archives.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf.

48. Privacy and Civil Liberties Oversight Board, *Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court* (Washington, DC: Government Printing Office, 2014), https://documents.pclob.gov/prod/Documents/OversightReport/ec542143-1079-424a-84b3-acc354698560/215-Report_on_the_Telephone_Records_Program.pdf.

49. The PCLOB is currently chaired by Sharon Bradford Franklin, who previously served as Co-Director of the Security and Surveillance Project at the Center for Democracy & Technology. https://www.pclob.gov/Board/Index.

50. Privacy and Civil Liberties Officers, 42 U.S.C. § 2000ee(c)(1).

51. "Executive Order 13353 of August 27, 2004, Establishing the President's Board on Safeguarding Americans' Civil Liberties," *Code of Federal Regulations*, title 3 (2004): 53585–53587, https://www.govinfo.gov/content/pkg/FR-2004-09-01/pdf/04-20049.pdf.

52. *The 9/11 Commission Report*, 393–94.

53. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004).

54. Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No: 110-53, 121 Stat. 266 (2007).

55. *Report on the Telephone Records Program*, 161.

56. *Report on the Telephone Records Program*, 168.

57. Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015, Pub. L. No. 114–23, 129 Stat. 268 (2015).

58. Holder v. Humanitarian Law Project, 561 U.S. 1 (2010).

59. 561 U.S. at 12.

60. 561 U.S. at 16.

61. 561 U.S. at 10.

62. 561 U.S. at 14–15. As with the other cases discussed, the plaintiffs raised multiple constitutional claims. They also raised a Fifth Amendment Due Process claim on the basis that statutory terms were impermissibly vague and their First Amendment right to freedom of association was also violated.

63. 561 U.S. at 18.

64. 561 U.S. at 25–26.

65. 561 U.S. at 27.

66. 561 U.S. at 28.

67. 561 U.S. at 28.

68. 561 U.S. at 28–29.

69. 561 U.S. at 33.

70. 561 U.S. at 33–34.

71. 561 U.S. at 34.

72. 561 U.S. at 35–36.

73. 561 U.S. at 39.

74. Brandenburg v. Ohio, 395 U.S. 444 (1969).

75. *Humanitarian Law Project*, 561 U.S. at 43–44.

76. AL Haramain Islamic Foundation, Inc. v. U.S. Department of the Treasury, 686 F.3d 965 (2012).

77. 686 F.3d at 1001.

78. Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (New York: Oxford University Press, 2006), 149.

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