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***The PATRIOT Act:  
The Friction Between Civil Liberties and National Security***

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The shock that followed the attacks of 9/11 prompted the American public to urge the United States government to increase the protection of national security. The PATRIOT Act was created in response to these demands and set out to detect and prevent acts of terrorism from recurring in the United States of America. Stemming from the framework of the Foreign Intelligence Surveillance Act, the PATRIOT Act seeks to gather foreign intelligence information for counterterrorism. At the same time, the Act has been seen as a step towards national security; many argue it has done so at the cost of civil liberties. Since the conception of the PATRIOT Act, privacy advocates and civil liberties groups have been protesting the Act's ability to *infringe* on American citizens' rights protected by the United States Constitution.

This article will respond to the question *to what degree does the Patriot Act infringe upon civil liberties?* To begin, the essay will briefly explain the United States' approach to counterterrorism before the PATRIOT Act. It will also look at the Foreign Intelligence Surveillance Act, which was coined as the foundation for the PATRIOT Act. Regarding civil liberties, the American Civil Liberties Union (ACLU) has been one of the most prominent opponents of the Act, arguing that it violates individual privacy rights and infringes on their First and Fourth Amendments. The ACLU argues that four intelligence searches permitted within several sections of the PATRIOT Act are the most significant threats to Americans' Constitutional Amendments. These searches, found in Sections 213, 215, 214, and 218, will be the main focus of the following essay.

While this article aims to respond to the question previously stated, there is no definitive answer to the extent to which the PATRIOT Act infringes upon civil liberties; in essence, the Act is still a heavily debated form of legislation in which there are ongoing arguments about the constitutionality of specific provisions embedded within it. While many privacy advocates and civil liberty groups argue that there is a clear violation of an individual's First and Fourth Amendments, many government agencies argue that these provisions are necessary for the state's security and have embedded safety nets to uphold the Constitution. Ultimately, the degree to which the PATRIOT Act infringes upon civil liberties depends on the individual's interpretation of the Act and their understanding of the Constitution.

## Counterterrorism Investigations Prior To The PATRIOT Act

In the 1950s, the Federal Bureau of Investigation (FBI) expanded the use of warrantless surveillance, given that it was justified for the security of national interests.<sup>2</sup> These new provisions were later challenged in *Olmstead v. United States* when the FBI carried out wiretapping without a warrant. The main argument was that this surveillance violated the Fourth Amendment and was therefore considered unconstitutional.<sup>3</sup> However, the Supreme Court held that because the seizure was gathering intelligence through a phone call, instead of material items such as documents, the individual's Fourth Amendment rights were never infringed upon, which later became a precedent.<sup>4</sup> The issue of infringing individual's constitutional rights in pursuit of intelligence surveillance and collection has been a historical debate at the forefront of the U.S.'s measures in protecting national interests. As technology and security threats have evolved, revisions to these surveillance and intelligence-gathering methods have caused them to become more "invasive." Throughout these changes in procedure, there has been an ongoing argument that these investigation methods are unconstitutional. With the creation of the PATRIOT Act, these debates have only become more intensified.

Prior to the creation of the PATRIOT Act, all criminal and intelligence investigations regarding terrorism were conducted by the FBI and its 56 field offices.<sup>5</sup> Within the different field offices, only specific squads were equipped with the resources to handle terrorism investigations; however, some larger offices had squads designated to investigations regarding only cases of international terrorism.<sup>6</sup> During these investigations, cases had to be opened as either an intelligence investigation or a

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<sup>2</sup> Cedric Logan, "The FISA Wall and Federal Investigations," *Law NYU* (New York: New York University Journal of Law & Liberty), accessed 16 March 2024, [https://www.law.nyu.edu/sites/default/files/ECM\\_PRO\\_062708.pdf](https://www.law.nyu.edu/sites/default/files/ECM_PRO_062708.pdf), p. 212.

<sup>3</sup> Logan, "The FISA Wall and Federal Investigations," p. 212.

<sup>4</sup> Logan, "The FISA Wall and Federal Investigations," p. 212.

<sup>5</sup> Department of Justice, "Special Report: A Review of the FBI's Handling of Intelligence Information prior to the September 11 Attacks," *oig.justice.gov* (Office of the Inspector General, 11 September 2023), <https://oig.justice.gov/sites/default/files/archive/special/0506/chapter2.htm#:~:text=Prior%20to%20September%2011%2C%202001%2C%20FBI%20counterterrorism%20investigations%2C%20whether.>

<sup>6</sup> Department of Justice, "Special Report."

criminal investigation, in which Attorney General Guidelines were then used to approve the cases.<sup>7</sup>

In 1972, the *Keith* case, formally referred to as the case of *United States v. United States District Court*, considered “the legality of an Attorney General authorized warrantless electronic surveillance of a US citizen accused of bombing a CIA building.”<sup>8</sup> Even though the surveillance was conducted for national security purposes, the court held that a judicial warrant was still legally required.<sup>9</sup> This case, then, opened up debates for the use of warrantless searches and revealed that this was not the first operation that had been conducted in this manner.<sup>10</sup> In response to these issues, Congress created the Foreign Intelligence Surveillance Act.

### **FISA and The Wall**

The FISA statute was first enacted in 1978 and has since been crucial to intelligence investigations, especially regarding counterterrorism efforts. FISA is often seen as the foundation of the PATRIOT Act, as the Act builds off of the statute’s framework. However, the debate about constitutional infringements has also been at the core of this legislation. The purpose of FISA was to create and codify regulations that pertained to both physical and electronic surveillance and searches, and foreign intelligence collection.<sup>11</sup> The FISA court was also formed as a mechanism to ensure that intelligence collection is conducted in accordance with the statute.<sup>12</sup>

While FISA had been used as the primary tool for the FBI regarding terrorist investigations, the statutes also faced issues that created hurdles for intelligence

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<sup>7</sup> Department of Justice, “Special Report.”

<sup>8</sup> James McAdams III, “Foreign Intelligence Surveillance Act (FISA): An Overview,” *Fletc.gov* (Federal Law Enforcement Training Centers, 2009), [https://www.fletc.gov/sites/default/files/imported\\_files/training/programs/legal-division/downloads-articles-and-faqs/research-by-subject/miscellaneous/ForeignIntelligenceSurveillanceAct.pdf](https://www.fletc.gov/sites/default/files/imported_files/training/programs/legal-division/downloads-articles-and-faqs/research-by-subject/miscellaneous/ForeignIntelligenceSurveillanceAct.pdf), p. 2.

<sup>9</sup> George Croner, “The FISA Court’s Essential Purpose - Foreign Policy Research Institute,” *www.fpri.org* (Foreign Policy Research Institute, 16 August 2018), <https://www.fpri.org/article/2018/08/the-fisa-courts-essential-purpose/>.

<sup>10</sup> Croner, “The FISA Court’s Essential Purpose.”

<sup>11</sup> National Security Agency, “Foreign Intelligence Surveillance Act of 1978 (FISA).”

<sup>12</sup> National Security Agency, “Foreign Intelligence Surveillance Act of 1978 (FISA).”

gathering. One of the most prominent issues with FISA is that it does not supersede regulations that prevent criminal investigators from cooperating with intelligence investigators, a policy often referred to as “The Wall.”<sup>13</sup>

Prior to the wall being created, the only way to pass intelligence information regarding investigations to the Criminal Division was through the Office of Intelligence Policy and Review (OIPR).<sup>14</sup> While the OIPR never had explicit provisions to control what information was passed on, “the Office threatened that if it could not regulate the flow of information to criminal prosecutors, it would no longer present the FBI’s warrant requests to the FISA Court.”<sup>15</sup> Not sharing information between criminal and intelligence investigators then became a customary practice; however, the Department of Justice formalized these practices into a policy in 1995, which is what formalized the wall.<sup>16</sup> Initially, the wall prohibited the sharing of information between agents and criminal prosecutors; however, due to being overcautious, this eventually led to different intelligence groups believing that no information could ever be shared with any agents working in criminal investigations.<sup>17</sup> As time went on, the wall referred to “the inability of federal law enforcement officials and intelligence officials to coordinate, advise, and share information with each other.”<sup>18</sup> One of the main reasons for having this wall was to create a balance between the government’s interest in accessing information and protecting American citizens’ privacy rights.<sup>19</sup> However, many have argued that the policies put in place as a result of the wall caused the stifling of investigations from 1995 until the creation of the PATRIOT Act. One of the primary examples often used of this is the events of 9/11.

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<sup>13</sup> Logan, “The FISA Wall and Federal Investigations,” p. 212.

<sup>14</sup> National Commission on Terrorist Attacks, “The 9/11 Commission Report,” *9-11 Commission* (The National Commission on Terrorist Attacks Upon the United States, 22 July 2004), <https://www.9-11commission.gov/report/911Report.pdf>, p. 79.

<sup>15</sup> National Commission on Terrorist Attacks, “The 9/11 Commission Report,” p. 79.

<sup>16</sup> McAdams III, “Foreign Intelligence Surveillance Act (FISA)” p. 2.

<sup>17</sup> National Commission on Terrorist Attacks, “The 9/11 Commission Report,” p. 79.

<sup>18</sup> Logan, “The FISA Wall and Federal Investigations,” p. 223.

<sup>19</sup> Logan, “The FISA Wall and Federal Investigations,” p. 251.

## The Events of 9/11

The horrific events that took place in the US on 11 September 2001, created a massive shift in the way the American public and governmental agencies viewed their protection of national security. The public could not understand how such a deadly act of terrorism could have been perpetrated in the US. Prior to 9/11, US law enforcement primarily focused on tackling crimes such as bank robbery, money laundering, international drug trade, and murder.<sup>20</sup> Additionally, when governmental agencies did respond to issues of terrorism, they mainly focused on domestic cases.<sup>21</sup>

9/11, however, was not the first terrorist attack that had been launched on the World Trade Center. On 26 February 1993, a bomb was set off in the underground parking lot of the Twin Towers, which resulted in 6 deaths and around a thousand injuries.<sup>22</sup> Similar to the events of 9/11, many questioned how government agencies were not aware that this attack was being planned. The issue of the wall, however, is often used in academia as a retrospective answer to this question. Due to the separation of legal and national security matters, the transfer of intelligence was never permitted.<sup>23</sup> Additionally, the Department of Justice had been receiving all information on investigations and, as a result, did not pass on any information to the national security bureaucracies.<sup>24</sup>

Louis Freeh, the Director of the FBI in 1993, argued that the lack of coordination between different intelligence agencies was a failure of US security policy.<sup>25</sup> He advocated for the cooperation between different intelligence agencies and legal attaches, and additionally, felt that more focus and resources needed to be allocated towards counterterrorism efforts.<sup>26</sup> Moreover, Bill Clinton, the President at the time, immediately demanded that the National Security Council devise a plan to find those responsible for

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<sup>20</sup> Brett Burney, "The PATRIOT Act," *GPSolo* 24, no. 5 (2007): 27, <http://www.jstor.org/stable/23673431>.

<sup>21</sup> Federal Bureau of Investigation, "World Trade Center Bombing 1993 | Federal Bureau of Investigation," [fbi.gov](https://www.fbi.gov/history/famous-cases/world-trade-center-bombing-1993) (Federal Bureau of Investigation, 2016), <https://www.fbi.gov/history/famous-cases/world-trade-center-bombing-1993>.

<sup>22</sup> National Commission on Terrorist Attacks, "The 9/11 Commission Report," p. 71.

<sup>23</sup> Laurie Mylroie, "The World Trade Center Bomb: Who Is Ramzi Yousef? And Why It Matters," *The National Interest*, no. 42 (1995): p.4, <https://www.jstor.org/stable/42895058>.

<sup>24</sup> Mylroie, "The World Trade Center Bomb," p. 4.

<sup>25</sup> National Commission on Terrorist Attacks, "The 9/11 Commission Report," p. 77.

<sup>26</sup> National Commission on Terrorist Attacks, "The 9/11 Commission Report," p. 77.

the attack.<sup>27</sup> An FBI task force was quickly built. Within two years, the main perpetrators of the attack were captured.<sup>28</sup> Due to the success of this investigation, the impression of US investigative measures was that they were effective and cohesive.<sup>29</sup> This resulted in little to no policy changes being made to the transferring and collecting of intelligence domestically and internationally, and the policies stayed the same until after 9/11.

Many Americans came to learn of the wall following the events of the attack in 2001.<sup>30</sup> It was clear that the wall had a role in the government's inability to prevent 9/11, and this was made even more apparent when the Department of Justice immediately sought out Congress to eliminate one of the primary purpose test within FISA. This test allowed certain FISA information to be used in a criminal case, given that the information was used for intelligence gathering rather than a criminal investigation.<sup>31</sup> Additionally, under the restrictions of FISA, the government was unable to use FISA surveillance for the prosecution of "foreign agents for past crimes," or gather intelligence for "past involvement in [the] attacks."<sup>32</sup>

It was clear that the barriers posed by the wall had some level of responsibility for 9/11 and also created hurdles for the gathering of intelligence to prosecute those who were responsible for the attacks.<sup>33</sup> In efforts to quickly address these issues, the Bush administration proposed extensive revisions to the existing legislation that aimed to grant law and intelligence agencies the necessary means to detect and deter terrorist activity within the US.<sup>34</sup> These amendments were proposed under the title of "Uniting and

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<sup>27</sup> National Commission on Terrorist Attacks, "The 9/11 Commission Report," p. 71.

<sup>28</sup> Federal Bureau of Investigation, "World Trade Center Bombing 1993."

<sup>29</sup> National Commission on Terrorist Attacks, "The 9/11 Commission Report," p. 71.

<sup>30</sup> Richard Henry Seamon and William Dylan Gardner, "The Patriot Act and the Wall between Foreign Intelligence and Law Enforcement," *SSRN Electronic Journal*, no. 319 (2004): p. 324, <https://doi.org/10.2139/ssrn.581162>.

<sup>31</sup> Department of Justice, "Special Report: A Review of the FBI's Handling of Intelligence Information prior to the 11 September, Attacks," [oig.justice.gov](https://oig.justice.gov/sites/default/files/archive/special/0506/chapter2.htm) (Office of the Inspector General, 11 September 2023), <https://oig.justice.gov/sites/default/files/archive/special/0506/chapter2.htm> - :~:text=Prior to September 11, 2001, FBI counterterrorism investigations, whether

<sup>32</sup> Seamon and Gardner, "The Patriot Act and the Wall," p. 325.

<sup>33</sup> Seamon and Gardner, "The Patriot Act and the Wall," p. 325.

<sup>34</sup> Sharon H Rackow, "How the USA PATRIOT Act Will Permit Governmental Infringement upon the Privacy of Americans in the Name of 'Intelligence' Investigations," *University of Pennsylvania Law Review* 150, no. 5 (2002): p. 1651-52. <https://doi.org/10.2307/3312949>. (28/01/24).

Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism," more commonly known as the USA PATRIOT Act (PATRIOT Act).

### The USA PATRIOT Act

Six weeks after the attack on 9/11, Congress created the PATRIOT Act. The Act was passed almost unanimously by the Senate 98-1, and 357-66 in the House, with the support of members across the political spectrum.<sup>35</sup> It was then formally signed by President George W. Bush on 26 October 2001.<sup>36</sup> The PATRIOT Act is broken into ten sections and spans 132 pages. The Act amends approximately 15 statutes within the Immigration and Nationality Act, the Electronic Communications Privacy Act and the Foreign Intelligence Surveillance Act. The primary purpose of these amendments was to deter and prevent terrorist attacks in the US through increased investigative powers and cooperation with law enforcement.<sup>37</sup> These increased powers referred to the security agency's abilities to obtain wiretaps, personal records, and search warrants.<sup>38</sup> Additionally, the Act creates new provisions for the Immigration and Nationality Act. Also, it widens the parameters of the definition of terrorism.<sup>39</sup> While this new definition of terrorism was brought by overwhelming pressure on Congress to respond to the acts of 9/11, the new definition has been criticized for being too broad in scope and containing too much uncertainty on what can and cannot be categorized as 'terrorism.'<sup>40</sup>

The Act also made significant strides in taking down 'the wall' by allowing the transfer of information about terrorist threats between both intelligence and criminal investigators.<sup>41</sup> The ability to freely share information was seen as a massive

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<sup>35</sup> Department of Justice, "The USA PATRIOT Act: Preserving Life and Liberty," *Justice.gov* (United States Department of Justice, 2001), p.1. [https://www.justice.gov/archive/ll/what\\_is\\_the\\_patriot\\_act.pdf](https://www.justice.gov/archive/ll/what_is_the_patriot_act.pdf).

<sup>36</sup> Burney, "The PATRIOT Act," p. 27.

<sup>37</sup> Jennifer Evans, "Hijacking Civil Liberties: The USA PATRIOT Act Of," *Loyola University Chicago Law Journal* 33, no. 4 (2002): p, 966.

<sup>38</sup> Department of Justice, "The USA PATRIOT Act: Preserving Life and Liberty," pp.2-3.

<sup>39</sup> Burney, "The PATRIOT Act," p. 29-30.

<sup>40</sup> Sudha Setty, "Country Report on Counterterrorism: United States of America," *The American Journal of Comparative Law* 62 (2014): p. 646. <http://www.jstor.org/stable/26425413>.

<sup>41</sup> Robert Mueller, "FBI - USA PATRIOT Act," Testimony, *FBI* (May 2004), <https://archives.fbi.gov/archives/news/testimony/usa-patriot-act>.

advancement in counter-terrorism policy, which the Department of Justice referred to as the ability to "connect the dots."<sup>42</sup> With this barrier now gone, prosecutors were able to use information obtained by FISA to indict individuals associated with terrorism in the US.<sup>43</sup> When speaking on the benefits of the Act, former Director of the FBI, Robert Mueller stated that:

prior to 11 September criminal and intelligence investigators were attempting to put together a complex jigsaw puzzle at separate tables. The PATRIOT Act has fundamentally changed the way we do business. Today, those investigators sit at the same table and work together on one team... they are fully integrated into one joint investigation.<sup>44</sup>

In addition to removing the wall, the Act enhanced and expanded intelligence surveillance procedures. One of the most controversial aspects of the PATRIOT Act was its increased surveillance measures. These measures authorized the interception of any oral, wire, or electronic communication that had any evidence of terrorism, computer fraud, or chemical weapons.<sup>45</sup> Prior to the PATRIOT Act, a federal agent needed to follow specific guidelines under FISA to receive authorization to carry out surveillance for "foreign intelligence purposes," The primary method used for this surveillance was wiretaps limited to a set phone.<sup>46</sup>

While the PATRIOT Act was seen as a significant advancement in national security policy, it received mass backlash from the general public due to the invasive nature of the Act and its intelligence gathering. Many civil liberty groups have argued that the PATRIOT Act directly violates American citizens' constitutional rights and infringes on the First and Fourth Amendments. Ongoing debate since the conception of the Act has been about the constitutionality and legality of the Act itself. While the US government and intelligence agencies have been in favour of the amendments made by the Act, many

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<sup>42</sup> Department of Justice, "The USA PATRIOT Act: Preserving Life and Liberty," p.3.

<sup>43</sup> Department of Justice, "The USA PATRIOT Act: Preserving Life and Liberty," p. 3.

<sup>44</sup> Robert Mueller, "FBI - USA PATRIOT Act."

<sup>45</sup> Evans, "Hijacking Civil Liberties," p. 968.

<sup>46</sup> Amitai Etzioni, "How Patriotic Is the Patriot Act? : Freedom versus Security in the Age of Terrorism." (New York: Routledge) p.29.

American citizens feel as though their government is spying on them and breaching their right to privacy.<sup>47</sup>

### **Civil Liberties and the ACLU**

According to the U.S. Department of Defence, civil liberties refer to “fundamental rights and freedoms protected by the Constitution of the United States.”<sup>48</sup> In the United States, civil liberties essentially ensure that citizens are safeguarded from undue government action and interference.<sup>49</sup> In reference to the PATRIOT Act, many citizens feel that the Act is not only insufficient at protecting these liberties but also that it actively infringes on them.

The American Civil Liberties Union (ACLU) is a not-for-profit organization that has been very vocal in championing the PATRIOT Act. The organization has had a long history dealing with the advocacy of minority groups, women’s rights, and social justice issues.<sup>50</sup> The primary purpose of their platform is to protect and defend citizens’ rights and liberties outlined in the American Constitution.<sup>51</sup>

In regard to the PATRIOT Act, the ACLU has been working to oppose specific policies within the act that they deemed ‘unconstitutional.’<sup>52</sup> The organization has not only petitioned against the act through websites and newsletters but has also organized rallies demanding that Congress enact reforms to the act.<sup>53</sup> While many people disagree with the policies put in place by the act, the ACLU have by far been the leader in this movement. The ACLU has classified its issues with the act into four categories of

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<sup>47</sup> American Civil Liberties Union, “Surveillance under the USA/PATRIOT Act,” ACLU (American Civil Liberties Union, 23 October 2001), <https://www.aclu.org/documents/surveillance-under-usapatriot-act>.

<sup>48</sup> U.S. Department of Defense, “Civil Liberties: Principles,” Privacy, Civil Liberties, and Freedom of Information Directorate (U.S. Department of Defense), accessed 16 March 2024, <https://dpcl.d.defense.gov/Civil-Liberties/#:~:text=Civil%20liberties%20are%20fundamental%20rights>.

<sup>49</sup> U.S. Department of Defense, “Civil Liberties: Principles.”

<sup>50</sup> Cornell Law School, “American Civil Liberties Union,” LII / Legal Information Institute (Cornell Law School), accessed 16 March 2024, [https://www.law.cornell.edu/wex/american\\_civil\\_liberties\\_union](https://www.law.cornell.edu/wex/american_civil_liberties_union).

<sup>51</sup> Cornell Law School, “American Civil Liberties Union.”

<sup>52</sup> American Civil Liberties Union, “ACLU History,” ACLU History (American Civil Liberties Union, 2009), <https://www.aclu.org/about/aclu-history>.

<sup>53</sup> American Civil Liberties Union, “Patriots Say No to the Patriot Act,” ACLU (American Civil Liberties Union, 22 July 2005), <https://www.aclu.org/news/national-security/PATRIOTS-say-no-PATRIOT-act>.

surveillance searches, deeming these to be the basis for constitutional infringements against Americans. This essay will discuss these four categories, which are record searches, secret searches, 'trap and trace' searches, and intelligence searches.<sup>54</sup> While the ACLU argues that these searches have massive breaches of individuals' rights to privacy, they also argue that they have massive infringements on individuals' First Amendment. Additionally, they also call attention to infringements on an individual's Fourth Amendment, arguing that it is one of the most "cherished and threatened" amendments in the Constitution.<sup>55</sup>

### The Fourth Amendment and Privacy Rights

The Fourth Amendment protects the "full enjoyment of the rights of personal security, personal liberty, and private property."<sup>56</sup> As written in the Constitution, the Fourth Amendment refers to:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>57</sup>

The amendment applies equally to criminal and civil law enforcement and covers all government search and seizure matters.<sup>58</sup> The main goal of the Fourth Amendment is to

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<sup>54</sup> American Civil Liberties Union, "Surveillance under the USA/PATRIOT Act."

<sup>55</sup> American Civil Liberties Union, "Search and Seizure," Search and Seizure | ACLU (American Civil Liberties Union), accessed 20 March 2024, <https://www.aclu.org/issues/criminal-law-reform/reforming-police/search-and-seizure#:~:text=While%20traditional%20Fourth%20Amendment%20violations.>

<sup>56</sup> Constitution Annotated, "Overview of Fourth Amendment, Searches and Seizures," Constitution Congress (Constitution Annotated), accessed 16 March 2024, [https://constitution.congress.gov/browse/essay/amdt4-1/ALDE\\_00000055/](https://constitution.congress.gov/browse/essay/amdt4-1/ALDE_00000055/).

<sup>57</sup> Constitution Annotated, "U.S. Constitution - Fourth Amendment | Resources | Constitution Annotated | Congress.gov | Library of Congress," constitution.congress.gov (Constitution Annotated, 2022), <https://constitution.congress.gov/constitution/amendment-4/>.

<sup>58</sup> Akhil Reed Amar, "Fourth Amendment First Principles," *Login.ezproxy.lib.ucalgary.ca* 107, no. 4 (1994): 759, [https://www-jstor-org.ezproxy.lib.ucalgary.ca/stable/pdf/1341994.pdf?refreqid=fastly-default%3A99cc8ba01ab3ded69436873b4a64f35c&ab\\_segments=0%2Fbasic\\_search\\_gsv2%2Fcontrol&origin=&initiator=&acceptTC=1](https://www-jstor-org.ezproxy.lib.ucalgary.ca/stable/pdf/1341994.pdf?refreqid=fastly-default%3A99cc8ba01ab3ded69436873b4a64f35c&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&origin=&initiator=&acceptTC=1).

protect American citizens from unreasonable government intrusion and uphold their right to privacy.<sup>59</sup> While the Fourth Amendment does not have any explicit mention of the right to privacy, traditionally, it has been held that the amendment applies a certain level of privacy that each citizen shall enjoy. Additionally, it has been legally acknowledged in the US that citizens have the freedom from unlawful intrusions into personal privacy.<sup>60</sup> The amendment was set out to protect citizens' privacy rights by outlining the parameters of reasonable searches and seizures; it is often highly debated for how it has been interpreted, often being criticized as being distorted by the legal system.<sup>61</sup>

The most significant issue that arises with the Fourth Amendment is its different interpretations. One of the most prominent issues with the Fourth Amendment and its relation to the PATRIOT Act is how different groups and legal institutions interpret and infer the amendment. While many civil liberty groups, like the ACLU, interpret the amendment literally, others take different legal interpretations that allow the amendment to become more forgiving of the different provisions of the PATRIOT Act.

Historically, the readings of the amendments have had two legal approaches. The first approach is referred to as the "Per Se approach," in which the amendment is read, meaning that searches and seizures must have a warrant under all circumstances.<sup>62</sup> Through this approach, it is determined if something is against the Fourth Amendment within itself, without looking to the circumstances of searches or justification provided by law enforcement. Under this approach, all warrantless searches and seizures are seen as unreasonable and, therefore, unconstitutional. This approach is often how groups lobbying against the PATRIOT Act infer the amendment when looking at sections 213, 214, 215, and 218. In addition, the US Supreme Court has traditionally also taken this approach toward the interpretation of the Fourth Amendment.<sup>63</sup>

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<sup>59</sup> Cornell Law School, "Fourth Amendment," LII / Legal Information Institute (Cornell Law School, 5 June 2019), [https://www.law.cornell.edu/wex/fourth\\_amendment](https://www.law.cornell.edu/wex/fourth_amendment).

<sup>60</sup> U.S. Customs and Border Protection, "What Are Civil Rights and Civil Liberties?," [www.cbp.gov](https://www.cbp.gov/employee/eo/faqs/what-are-civil-rights-and-civil-liberties) (U.S. Customs and Border Protection, 2014), <https://www.cbp.gov/employee/eo/faqs/what-are-civil-rights-and-civil-liberties>.

<sup>61</sup> Reed Amar, "Fourth Amendment First Principles," p. 759.

<sup>62</sup> Reed Amar, "Fourth Amendment First Principles," p. 762.

<sup>63</sup> Reed Amar, "Fourth Amendment First Principles," p. 762.

The second approach is known as the "Modified Per Se Approach." This approach is a looser reading of the amendment that uses "common-sense exceptions to a strict warrant rule."<sup>64</sup> This approach examines the amendment section that focuses on a person's protection against unreasonable searches and seizures, and examines the reasonableness of warrantless searches and seizures. So, while specific actions may initially seem unconstitutional, certain justifications or circumstances may make it reasonable under this approach. This is often the approach taken by government and intelligence agencies to justify collecting information and performing searches and seizures without a warrant for the sake of national security under the PATRIOT ACT.

### **Secret Searches: Section 213**

According to the ACLU, Secret searches refer to searches that the government can carry out without first notifying the individual of the search, which have been made permissible under the PATRIOT Act.<sup>65</sup> The most significant issue that the organization has with this is that they believe it infringes on individuals' Fourth Amendment, and disregards the common law that has been practiced in the US for centuries, in which a knock and announce principle has always been required for searches.<sup>66</sup> Section 213 of the PATRIOT Act has been a massive "lightning rod for criticism on the Fourth Amendment Grounds."<sup>67</sup> The main provisions for Section 213 are that they allow for two forms of delayed-notification searches referred to as sneak-and-peek and "sneak-and-steal" searches.<sup>68</sup> These two forms of searches essentially refer to the use of warrantless investigations under specific circumstances. Initially, FISA had these provisions within its Act that identified that federal security officers should have more leeway when investigating foreign actors that aimed at posing harm to US national security and, therefore, should be allowed to engage in actions relating to *sneak-and-peek* warrants that

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<sup>64</sup> Reed Amar, "Fourth Amendment First Principles," p. 762.

<sup>65</sup> American Civil Liberties Union, "Surveillance under the USA/PATRIOT Act."

<sup>66</sup> American Civil Liberties Union, "Surveillance under the USA/PATRIOT Act."

<sup>67</sup>Brett Shumate, "From 'Sneak and Peak' to 'Sneak and Steal': Section 213 of the USA PATRIOT Act," *Regent.edu* (Virginia: Regent University, 2006), p.203.

[https://www.regent.edu/acad/schlaw/student\\_life/studentorgs/lawreview/docs/issues/v19n1/05Shumatevol19.1.pdf](https://www.regent.edu/acad/schlaw/student_life/studentorgs/lawreview/docs/issues/v19n1/05Shumatevol19.1.pdf).

<sup>68</sup>Shumate, "From 'Sneak and Peak' to 'Sneak and Steal,'" p. 203.

do not require granting notice to individuals.<sup>69</sup> The PATRIOT Act then built off of the FISA model and expanded the exceptions to the use of warrantless searches.

Not only was Section 213 built on the provisions in FISA, but it also amended a section in the U.S. Criminal Procedure that authorised federal agents to use delayed-notice search warrants when collecting evidence for specific federal crimes.<sup>70</sup> With the different existing legislation on delayed-notice search and seizures, the PATRIOT Act extended these methods by giving looser guidelines for their use in order to protect national interests. While civil liberties were brought up in the debate of this section, it was ultimately found that within this exception, the balance was in favour of protecting the greater society in exchange for fewer civil liberties.<sup>71</sup>

Under the PATRIOT Act, governmental authorities can conduct surreptitious searches and only need to notify the individual "within a reasonable period of the warrant's execution."<sup>72</sup> Sneak-and-peek warrants outlined under Section 213 allow law enforcement agents to enter private property, look around and photograph the site, and leave without providing a copy of the warrant.<sup>73</sup> Typically, these searches take place when the owner is away, and will later apply for a conventional search warrant when they have found evidence that needs to be seized.<sup>74</sup> Additionally, under specific circumstance, officers may also be allowed to perform sneak-and-steal seizures, in which a court finds it reasonable and necessary for the seizure to take place without notifying the owner beforehand.<sup>75</sup>

While the government found that this section of the PATRIOT Act was necessary for securing national interests, even if that meant limiting civil liberties, many groups and individuals found Section 213 to be unconstitutional. The ACLU argues that this section of the Act provides the government with new radical powers that allow it to enter your

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<sup>69</sup>Burney, "The PATRIOT Act," p. 27.

<sup>70</sup> Congressional Research Service, "The USA PATRIOT Act at 20: Sneak and Peek Searches," *Crsreports* (Congressional Research Service, October 2021), p.2.

<https://crsreports.congress.gov/product/pdf/LSB/LSB10652>,

<sup>71</sup> Burney, "The PATRIOT Act," p. 27.

<sup>72</sup> Burney, "The PATRIOT Act," p. 28.

<sup>73</sup>Shumate, "From 'Sneak and Peak' to 'Sneak and Steal,'" p. 203.

<sup>74</sup>Shumate, "From 'Sneak and Peak' to 'Sneak and Steal,'" p. 203.

<sup>75</sup>Shumate, "From 'Sneak and Peak' to 'Sneak and Steal,'" p. 229.

home and seize your personal belongings secretly.<sup>76</sup> They argue that this provision is a direct infringement of an individual's Fourth Amendment and argue that the protection of this amendment has "fallen short" when in relation to section 213.<sup>77</sup>

Another significant issue for the ACLU is the lack of digital warrants. While Section 213 traditionally refers to the use of sneak-and-peek searches regarding physical locations, it also allows these warrants to be applied to any electronic communication or information that the courts find reasonable.<sup>78</sup> Even though electronic devices are protected under the Fourth Amendment, the use of Section 213 has given law enforcement the increased ability to search phone communication, financial and medical records, and emails.<sup>79</sup> The ACLU argues that in a modern society that relies on digital information, warrants need to be provided to protect the *overboard access* to this information.<sup>80</sup> The ACLU has not been the only group to be vocal against this section of the act. Many privacy advocates argue that Section 213 has expanded the use and range of surreptitious searches and seizures that harm individuals' rights to privacy and security. Their first argument is that it has broadened the circumstances in which police can use a delay notice of warrants. Prior to section 213, delayed notice warrants were only permitted to protect people from harm and prevent the destruction of evidence.<sup>81</sup> Privacy advocates argue that with these new parameters, there is greater flexibility for the infringement of the Fourth Amendment and, therefore, also on an individual's privacy rights.

While many groups find this section unconstitutional and a clear violation of an individual's privacy, others believe that the provisions in Section 213 are consistent with

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<sup>76</sup> American Civil Liberties Union, "Surveillance under the USA/PATRIOT Act."

<sup>77</sup> American Civil Liberties Union, "The Warrant Clause in the Digital Age," ACLU (American Civil Liberties Union), accessed 2024, <https://www.aclu.org/cases/digital-age-warrants>.

<sup>78</sup> 107th Congress, "Uniting And Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act Of 2001," Congress.gov (U.S. Government Printing Office, 2001), <https://www.congress.gov/107/plaws/publ56/PLAW-107publ56.htm>.

<sup>79</sup> Cornell Law School, "Fourth Amendment."

<sup>80</sup> American Civil Liberties Union, "The Warrant Clause in the Digital Age."

<sup>81</sup> Alan Rubel, "Privacy and the USA Patriot Act: Rights, the Value of Right, and Autonomy," *Law and Philosophy* 26, no. 2 (2007): p. 122, [https://www-jstor-org.ezproxy.lib.ucalgary.ca/stable/pdf/27652613.pdf?refreqid=fastly-default%3Ad3b2a7b0833099e438675f5e69da4522&ab\\_segments=&origin=&initiator=&acceptTC=1](https://www-jstor-org.ezproxy.lib.ucalgary.ca/stable/pdf/27652613.pdf?refreqid=fastly-default%3Ad3b2a7b0833099e438675f5e69da4522&ab_segments=&origin=&initiator=&acceptTC=1).

the Fourth Amendment; many agree that Section 213 made significant changes to the law. However, they find that these changes are not necessarily unconstitutional. One argument is that the delayed notice provision is constitutional based on precedential cases such as *Richards v. Wisconsin*, where it was determined that no-knock searches were held as constitutional.<sup>82</sup> The key notion taken away from this case is that presenting a warrant after a search has been conducted is similar to not providing immediate notice of your presence and intruding on someone's property to search it. While this argument could easily be debated based on individuals' different interpretations of "no-knock " searches compared to sneak-and-peek searches, there is also considerable legal debate about the constitutionality of section 213.

*United States v. Freitas* is often used as a precedential legal case for the use and constitutionality of delayed notification search warrants and their application to the Fourth Amendment. To summarize, in 1986, California, the US Drug Enforcement Agency (DEA) had been informed of a methamphetamine lab in the home of Raymond Freitas.<sup>83</sup> The DEA applied for a surreptitious entry warrant for Freitas' home in order to determine if this lab really existed.<sup>84</sup> The magistrate issued the warrant that authorized agents to enter the home when it was unoccupied, and search the premises without seizing anything, additionally, the warrant had no notice requirement.<sup>85</sup> When this case was taken to the district court, it was found that the warrants were not "constitutionally permissible," and violated Rule 41(Federal Rule of Criminal Procedure) and the Fourth Amendment.<sup>86</sup> The United States Court of Appeals for the Ninth Circuit also determined that the warrant violated both Rule 41 and the Fourth Amendment.<sup>87</sup> However, the Ninth Circuit found that the warrant violated the Fourth Amendment because the officers had failed to provide any notice within seven days after the search.<sup>88</sup> It was explicitly the

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<sup>82</sup> Rubel, "Privacy and the USA Patriot Act," p. 123.

<sup>83</sup>Shumate, "From 'Sneak and Peak' to 'Sneak and Steal,'" p. 212.

<sup>84</sup>Shumate, "From 'Sneak and Peak' to 'Sneak and Steal,'" p. 212.

<sup>85</sup>Shumate, "From 'Sneak and Peak' to 'Sneak and Steal,'" p. 212.

<sup>86</sup>Shumate, "From 'Sneak and Peak' to 'Sneak and Steal,'" p. 212.

<sup>87</sup> *U.S. v. Freitas*, 856 F.2d 1425 (9th Cir. 1988), <https://casetext.com/case/us-v-freitas/case-details>

<sup>88</sup>Shumate, "From 'Sneak and Peak' to 'Sneak and Steal,'" p. 212.

"omission of any provision in the warrant for notifying Freitas of the search" that violated the Fourth Amendment, and not the fact that notice was not given beforehand.<sup>89</sup>

While this case was decided in 1986, it has significant weight when used to interpret the constitutionality of Section 213 of the PATRIOT Act. Courts have typically found that section 213 requires law enforcement agencies to provide notice of searches and seizures, but does not require them to give explicit notice before these actions are carried out.<sup>90</sup> As in *United States v. Freitas*, the level of constitutionality relies on notice eventually being given to the individual. However, privacy advocates have an issue with the length of time officers can wait before giving notice to individuals. Initially, delayed-notice warrants required notice within a reasonable time that would not go past seven days.<sup>91</sup> While the *United States v. Freitas* determined that seven days was needed to provide notice to the individual, Section 213 amends this time frame. Section 213 requires notice to be given within a "reasonable" period after the search execution, but allows for this time to be extended for an indefinite period, so long as it is proved to the courts that this is for a good cause.<sup>92</sup> While this provision technically remains constitutional due to the necessity to eventually provide notice, many people disagree with the extension time frame, as it is seen as prolonging the infringement on their right to privacy.<sup>93</sup>

Section 213 of the PATRIOT Act is arguably one of the most debated and opposed sections in the entire Act due to its impact on an individual's Fourth Amendment and privacy rights. However, there is no clear answer to the degree to which this section is unconstitutional. In the eyes of privacy and civil liberty advocates like the ACLU, sneak-and-peek searches infringe on the Constitution due to their literal interpretation of the Fourth Amendment. However, in terms of the legal system, many courts and actors have had mixed perspectives on Section 213 and its applicability to the law. For instance, many criminal defence attorneys have argued that the expansion of the government's authority through the PATRIOT Act has caused significant threats to their defendant's

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<sup>89</sup>*U.S. v. Freitas*, 856 F.2d 1425 (9th Cir. 1988), <https://casetext.com/case/us-v-freitas/case-details>

<sup>90</sup>Rubel, "Privacy and the USA Patriot Act," p. 120.

<sup>91</sup>Rubel, "Privacy and the USA Patriot Act," p. 122.

<sup>92</sup> 107th Congress, "Uniting And Strengthening America."

<sup>93</sup>Rubel, "Privacy and the USA Patriot Act," p. 121.

constitutional rights.<sup>94</sup> Conversely, many courts have found that the section is still in alignment with the Constitution, based on how they interpret the Fourth Amendment. Through this research, it becomes evident that the use of Section 213 can and cannot be unconstitutional based on the circumstances of the search and interpretation of the Constitution. Nevertheless, it has become increasingly clear that the general public feels this provision is a massive intrusion on their privacy and right to security.

### **Trap and Trace' Searches: Section 214**

Section 214 of the PATRIOT ACT refers to the trap and trace searches that allow for the collection of information about the destination and origin of electronic communication.<sup>95</sup> This section amends FISA to allow the use of trap and trace devices and pen registers for any investigations that obtain foreign intelligence information.<sup>96</sup> Trap and trace devices refer to a device that can record the "sources of incoming signals to a specific phone or computer" and can then identify the phone numbers or internet addresses of the recorded signals.<sup>97</sup> Similarly, pen registers are devices that can trace outgoing signals from a phone or computer and trace it to their intended destination.<sup>98</sup> While the devices that are used do not explicitly reveal the content of the communications, they do reveal locations. Based on what some say are invasive techniques used for intelligence gathering, there is a lot of disagreement on the extent to which these devices should be used in investigations or if they should even be acceptable.

The ACLU believes that issuing warrants for the use of these devices is far too lax, as the requirements for getting approval are "essentially non-existent."<sup>99</sup> Prior to the PATRIOT Act, the government was able to use these devices by FISA order in situations where they were being used to monitor an international terrorist or spy, or a foreign

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<sup>94</sup> Alison Siegler, "The Patriot Act's Erosion of Constitutional Rights," *Litigation* 32, no. 2 (2006): p. 21, <https://www.jstor.org/stable/29760549>.

<sup>95</sup> American Civil Liberties Union, "Surveillance under the USA/PATRIOT Act."

<sup>96</sup> Burney, "The PATRIOT Act," p. 29.

<sup>97</sup> Cornell Law School, "Trap and Trace Device," LII / Legal Information Institute (Cornell Law School, n.d.), [https://www.law.cornell.edu/wex/trap\\_and\\_trace\\_device#:~:text=Often%20used%20by%20law%20enforcement](https://www.law.cornell.edu/wex/trap_and_trace_device#:~:text=Often%20used%20by%20law%20enforcement)

<sup>98</sup> Cornell Law School, "Pen Register," LII / Legal Information Institute (Cornell Law School, n.d.), [https://www.law.cornell.edu/wex/pen\\_register](https://www.law.cornell.edu/wex/pen_register).

<sup>99</sup> American Civil Liberties Union, "Surveillance under the USA/PATRIOT Act."

power or actors relating to criminal activities associated with a terrorist or spy.<sup>100</sup> With Section 214, the standards for the use of these devices were significantly lowered. Under Section 214, FISA now permits orders to use these devices in any investigation that is gathering foreign intelligence information.<sup>101</sup> There is also no “probable cause” requirement that needs to be met in order for warrants to be approved by courts.<sup>102</sup> The only requirements are that these investigations do not include persons of the United States, or if they do include US persons if for the protection “against international terrorism or clandestine intelligence activities.”<sup>103</sup>

In response to claims about the ease of warrant access, the Department of Justice has argued that Section 214 has preserved many of the guidelines that were in FISA and followed a similar structure in which law enforcement still needs approval from the FISA Court. Furthermore, Section 214 did not modify any of the definitions that were initially outlined in FISA. The argument here is that the words outlined in FISA helped narrow the scope of approving surveillance orders.<sup>104</sup> By keeping the same definitions and applying them to the PATRIOT Act, it is argued that they actually act as stricter guidelines to the expansive provisions within the Act and therefore ensure checks and balances to the approval of orders and warrants.

The ACLU is also concerned with the broad use of pen register warrants permitted under Section 214. They argue that pen register exceptions have been broadened in two ways. The first applies to “nationwide” pen register warrants, in which a judge can issue a pen register warrant that is valid outside of their jurisdiction, which can be effective at any location within the U.S.<sup>105</sup> The biggest issue with this is that it violates the Fourth Amendment that requires warrants to be written. In the case of nationwide pen register warrants, judges issue the warrant without writing down a specific location, and agents can use that at their locational discretion.<sup>106</sup> The second exception refers to pen register

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<sup>100</sup> McKinney, “Section 215 Expired: Year in Review 2020.”

<sup>101</sup> Mary WS Wong, “Electronic Surveillance and Privacy in the United States after September 2001: The USA PATRIOT Act,” *Singapore Journal of Legal Studies*, 2002, p. 254, <https://www.jstor.org/stable/24868173>.

<sup>102</sup> Wong, “Electronic Surveillance and Privacy in the United States,” p. 254.

<sup>103</sup> Wong, “Electronic Surveillance and Privacy in the United States,” p. 254.

<sup>104</sup> Wong, “Electronic Surveillance and Privacy in the United States,” p. 254.

<sup>105</sup> American Civil Liberties Union, “Surveillance under the USA/PATRIOT Act.”

<sup>106</sup> American Civil Liberties Union, “Surveillance under the USA/PATRIOT Act.”

searches applied to the Internet. With internet searches, the PATRIOT Act has distinguished between transaction and content-oriented wiretaps. However, the standards for accessing the transaction data and applying it to communications are somewhat weak and therefore, things that are being interpreted as “transactional” are more than simply addresses or locations.<sup>107</sup> The lack of defined measures placed on internet searches results in more information being used and revealed as opposed to phone searches that reveal locations of communication, which is seen to be a considerable threat to an individual’s privacy.

The Department of Justice, however, argues that “section 214 goes further to protect privacy than the Constitution requires.”<sup>108</sup> Their main argument to support this is that the Supreme Court has historically held that it is not a constitutional requirement for law enforcement to obtain approval prior to installing pen register devices.<sup>109</sup> Additionally, the department argues that pen registers do not apply to the term ‘search’ that is found in the Fourth Amendment, and further to that claim that Section 214 actually protects Americans’ fundamental freedoms as it prohibits any investigation to be conducted solely on “the basis of activities protected by the First Amendment.

The use of trap and trace and pen register devices has been highly debated, as it raises concerns about privacy rights infringements and the extent to which investigative tools can be used to gather foreign intelligence. Many believe that the methods utilized to gather this information heavily undermine the Constitution. However, governmental agencies hold that the PATRIOT Act has enough embedded safety measures to uphold its constitutionality. Nevertheless, the use of these devices continues to be at the forefront of the debate on the balance between national security and civil liberties.

### **Intelligence Searches: Section 218**

The final type of search outlined by the ACLU is intelligence searches, found in Section 218 of the PATRIOT Act. Section 218 outlines the expansion of the intelligence

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<sup>107</sup> American Civil Liberties Union, “Surveillance under the USA/PATRIOT Act.”

<sup>108</sup> Department of Justice, “Dispelling the Myths,” [www.justice.gov](http://www.justice.gov) (U.S. Department of Justice, n.d.), [https://www.justice.gov/archive/ll/subs/add\\_myths.htm#s214](https://www.justice.gov/archive/ll/subs/add_myths.htm#s214).

<sup>109</sup> Department of Justice, “Dispelling the Myths.”

exception found in the law.<sup>110</sup> As previously discussed, government authorities had relatively unchecked power regarding intelligence collection before FISA was established. However, once FISA was enacted, specific guidelines were created and put in place to balance the collection of intelligence for investigation and the protection of civil liberties. Section 218 has loosened some of these guidelines and has caused strife among privacy advocates and civil liberty supporters.

Under the guidelines of FISA, sharing collected information could be done so long as that information was related to international terrorism.<sup>111</sup> Under Section 218, however, the law was changed to establish that FISA could be used whenever “foreign intelligence is a significant purpose of a national security investigation.”<sup>112</sup> This resulted in the ability to share information among different intelligence actors and law enforcement officers. These new provisions mean that collection-sharing is not limited to the same constraints as before; for example, the Department of Justice is now required to give the Central Intelligence Agency any information related to foreigners or any information regarding American citizens’ contact without outside government or organizations.<sup>113</sup>

Section 218 is often seen as one of the main provisions that worked towards bringing down “the wall.” This is because it finally took down the barriers that limited the coordination of information between law enforcement and intelligence agencies. This sharing of information permitted under Section 218 was seen as a significant success as it opened several criminal investigations, resulted in numerous criminal charges, disrupted terrorist plots and also convicted several individuals linked to terrorism cases.<sup>114</sup> One of the most prominent examples of this success was the dismantling of the “Portland

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<sup>110</sup> American Civil Liberties Union, “Surveillance under the USA/PATRIOT Act.”

<sup>111</sup> John Podesta, “USA Patriot Act: The Good, the Bad, and the Sunset,” *Human Rights* 29, no. 1 (2002): p. 5, <https://www.jstor.org/stable/27880293>.

<sup>112</sup> Larry Thompson, “9/11 Commission Findings: Sufficiency of Time, Attention, and Legal Authority,” (Brookings Institution, 2004), <https://www.brookings.edu/articles/911-commission-findings-sufficiency-of-time-attention-and-legal-authority/#:~:text=Section%20218%20of%20the%20Patriot%20Act%2C%20however%2C%20changed%20the%20law>

<sup>113</sup> Podesta, “USA Patriot Act: The Good, the Bad, and the Sunset,” p. 5.

<sup>114</sup> U.S. Department of Justice, “Report from the Field: The USA Patriot Act at Work,” *Justice.gov* (U.S. Department of Justice, 2004), p.2 [https://www.justice.gov/archive/olp/pdf/patriot\\_report\\_from\\_the\\_field0704.pdf](https://www.justice.gov/archive/olp/pdf/patriot_report_from_the_field0704.pdf).

Seven,” which was a terror cell operating out of Portland, Oregon and had connections with the Taliban and al Qaeda.<sup>115</sup> While the taking down of the wall was seen as a considerable achievement for counterterrorism efforts, many people were upset with the other outcomes that this section permitted, such as the use of wiretaps and physical searches.

While Section 218 focuses on enhancing cooperation through transfers of information between intelligence agents and law enforcement, it does this by allowing “FISA wiretap or physical search order application even if the acquisition of foreign intelligence information is no more than a significant reason for the application.”<sup>116</sup> Rather than needing to prove the purpose for gathering foreign intelligence information, Section 218 only requires that you prove there is “a purpose” to gathering this information.<sup>117</sup> While this change was made with the intent of increasing coordination between criminal and intelligence institutions, the ACLU argues that these changes have resulted in explicitly violating individuals’ Fourth Amendment.

They claim that under Section 218, the FBI is now allowed to conduct secret searches or wiretaps on American citizens as a way to obtain criminal evidence without first having to prove probable cause for the approval of the search.<sup>118</sup> They argue that by allowing the law to conduct searches based on proving a purpose, the legal system can bypass the Constitution’s “probable cause” requirement.<sup>119</sup> Their fear with this provision is not only the effects it has on people’s privacy rights, but also that, with a lack of strict requirements for these searches, agents can easily apply for warrants under false and misleading information, which has already been noted as an issue by certain courts.<sup>120</sup>

Section 218 is challenging to analyze due to the arguments made on the national security and civil liberty sides. The fall of the wall was highly significant due to its impact on intelligence and criminal investigations and their role in countering terrorism. As

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<sup>115</sup> U.S. Department of Justice, “Report from the Field,” p. 5.

<sup>116</sup> Charles Doyle, “CRS Report for Congress USA PATRIOT Act Sunset: Provisions That Expire,” *Law.umaryland.edu* (Congressional Research Service, 2005), p.37.<https://www2.law.umaryland.edu/marshall/crsreports/crsdocuments/RL3218601272005.pdf>,

<sup>117</sup> Doyle, “CRS Report for Congress USA PATRIOT Act Sunset,” p. 37.

<sup>118</sup> American Civil Liberties Union, “Surveillance under the USA/PATRIOT Act.”

<sup>119</sup> American Civil Liberties Union, “Surveillance under the USA/PATRIOT Act.”

<sup>120</sup> American Civil Liberties Union, “Surveillance under the USA/PATRIOT Act.”

previously discussed, the lack of coordination between criminal and intelligence actors was seen as a significant oversight in 9/11 and criticized by the public. However, after the enactment of Section 218, it became clear to the American population that taking down *the wall*, while beneficial to national security, would adversely affect civil liberties. Despite national security being a primary concern for many, groups like the ACLU still argue that these provisions are unconstitutional and need more checks and balances.

### **The First Amendment**

The First Amendment refers to the fundamental freedoms provided to American citizens and states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.<sup>121</sup>

The First Amendment was initially designed as a mechanism to prevent the government from controlling and censoring the American people.<sup>122</sup> Additionally, it is often seen as a core principle of upholding US democracy and ensuring the freedom of expression, beliefs, and opinions.

However, the PATRIOT Act has been seen to infringe on these freedoms by trying to uphold national security. While the PATRIOT Act's primary focus is to deter and prevent terrorism, the measures that are permitted through it have often been contested to also infringe on individuals' civil liberties. Due to the investigative nature of the PATRIOT Act, such as intelligence searches and seizures, it can be seen that these provisions can have adverse effects on individuals' abilities to pursue their fundamental freedoms. With knowledge of potential surveillance, individuals may feel discouraged from engaging in certain activities or expressing certain opinions and views.

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<sup>121</sup>Cornell Law School, "First Amendment," LII / Legal Information Institute (Cornell Law School), accessed 2024, [https://www.law.cornell.edu/constitution/first\\_amendment](https://www.law.cornell.edu/constitution/first_amendment).

<sup>122</sup>Paul T. Jaeger et al., "The USA PATRIOT Act, the Foreign Intelligence Surveillance Act, and Information Policy Research in Libraries: Issues, Impacts, and Questions for Libraries and Researchers," *The Library Quarterly* 74, no. 2 (April 2004): p. 103, <https://doi.org/10.1086/382843>.

Additionally, the PATRIOT can also allow direct infringements on an individual's civil liberties, like freedom of speech, through sections like Section 215, based on the processes of record searches.

### **Record Searches: Section 215**

Another big issue with the PATRIOT Act is its provision of record searches and access to individuals' tangible information. According to the ACLU, record searches refer to the "expanded access to personal records held by third parties" granted to the government under the PATRIOT Act.<sup>123</sup> This expanded access to personal records is explicitly outlined in Section 215 of the Act and refers to the access of records and other items under FISA.

While Section 215 directly expands the Act's searching provisions, it also amends several measures within FISA. Section 215 amended the "business records" section of FISA, which outlined the procedures for the FBI when conducting foreign intelligence surveillance.<sup>124</sup> Additionally, it also amended FISA by striking out sections 501 to 503 and broadening the range of material objects that could be legally obtained under searches conducted by federal agents.<sup>125</sup> Under this section of the PATRIOT Act, the FISA court has to grant a subpoena for any "tangible things that the FBI requests."<sup>126</sup> These tangible things refer to books, financial institution records, papers, library records, documents, and other items.<sup>127</sup> Additionally, these records can be obtained from any third party, including doctors, universities, internet providers, and services that pertain to clients and customers.<sup>128</sup> Moreover, the collection of these records is permitted in investigations that seek to collect information on issues that do not concern US persons; however, in situations where the information investigated does pertain to a US person, it must be

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<sup>123</sup> American Civil Liberties Union, "Surveillance under the USA/PATRIOT Act."

<sup>124</sup> Rubel, "Privacy and the USA Patriot Act," p. 125.

<sup>125</sup> Emily Drabinski, "Librarians and the Patriot Act," *The Radical Teacher*, no. 77 (2006): p. 12-14, <https://www.jstor.org/stable/20710376>.

<sup>126</sup> Rubel, "Privacy and the USA Patriot Act," p. 125.

<sup>127</sup> Rubel, "Privacy and the USA Patriot Act," p. 125.

<sup>128</sup> American Civil Liberties Union, "Surveillance under the USA/PATRIOT Act."

done for the prevention of terrorism or espionage.<sup>129</sup> Additionally, in cases that pertain to US citizens, the investigation cannot be entirely based on an individual's activities, which their First Amendment safeguards.<sup>130</sup>

Another aspect of Section 215 that is often criticized is law enforcement's ability to quickly obtain a court order to access an individual's records or tangible things.<sup>131</sup> This section creates many controversies, as obtaining a court order does not need an "ordinary criminal subpoena or search warrant without probable cause."<sup>132</sup> Prior to this section, FBI agents needed to demonstrate that their suspicions were reasonable grounds for a search authorization; however, under Section 215, an agent only needs to prove that the search is part of a FISA-authorized investigation in order to get approval.<sup>133</sup>

Many privacy advocates and civil liberty groups take particular issue with this section due to its effect on the scope of intelligence gathering and its burden on privacy. Similar to Section 213, many argue that this section violates the Fourth Amendment due to the lack of search warrants used when gathering records and information.<sup>134</sup> Further to this, they argue that because the FBI does not need to show probable cause that the individual they are investigating has engaged in criminal activity, or is suspected of engaging in an illicit activity, the ease with which these searches can be performed poses a significant threat to individuals' privacy and data.<sup>135</sup> Additionally, Section 215 is often criticized because it has frequently been interpreted to "permit the bulk collection of telephony metadata."<sup>136</sup> Since this section permits access and collection of records and data from third parties, it has often been interpreted to include the mass collection of call-log information collected by telephone companies.<sup>137</sup> While this data does not reveal any

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<sup>129</sup> Scott Mann, "Fact Sheet: Section 215 of the USA PATRIOT Act," Csis.org (Center For Strategic & International Studies, 2014), <https://www.csis.org/analysis/fact-sheet-section-215-usa-patriot-act>.

<sup>130</sup> Mann, "Fact Sheet: Section 215 of the USA PATRIOT Act,"

<sup>131</sup> American Civil Liberties Union, "ACLU Applauds Introduction of Senate Bill to Fix Now Infamous 'Section 215' of the USA PATRIOT Act," ACLU (American Civil Liberties Union, 2003), <https://www.aclu.org/press-releases/aclu-applauds-introduction-senate-bill-fix-now-infamous-section-215-usa-patriot-act>.

<sup>132</sup> American Civil Liberties Union, "ACLU Applauds Introduction of Senate Bill."

<sup>133</sup> Rubel, "Privacy and the USA Patriot Act," p. 125.

<sup>134</sup> American Civil Liberties Union, "Surveillance under the USA/PATRIOT Act."

<sup>135</sup> American Civil Liberties Union, "Surveillance under the USA/PATRIOT Act."

<sup>136</sup> Mann, "Fact Sheet: Section 215 of the USA PATRIOT Act."

<sup>137</sup> Mann, "Fact Sheet: Section 215 of the USA PATRIOT Act."

information on personal identity, it does show time, date, and length of calls. The biggest argument against this intelligence-gathering method is that it affects large groups of individuals without them knowing that their data has been breached and violates their "Fourth Amendment protection against warrantless searches and seizures."<sup>138</sup>

The library community is another group that has taken massive issues with Section 215 of the PATRIOT Act. While not typically viewed as a civil liberties group, many librarians and library associations have been incredibly vocal on the infringement of privacy rights and individuals' First Amendment rights that are caused by Section 215. The provision of tangible record searches includes library information, specifically lists of books that individuals have checked out. While many librarians find this to be a clear violation of privacy, the Justice Department has justified these searches due to terrorists' historical use of libraries when planning out threatening activities.<sup>139</sup>

While Section 215 is aimed at protecting the country's national security, many librarians still believe they must protect individuals' right to knowledge and privacy. Libraries are seen as essential sources of information, and many librarians hold that all community members are free to access "the sum of human knowledge."<sup>140</sup> However, they find this access to be threatened when there is a possibility that an individual's book records may be searched. Additionally, they find these searches also violate an individual's First Amendment, as individuals should be able to read books freely without fear of government intrusion.<sup>141</sup> In response to these provisions, groups such as the American Library Association have lobbied and pursued legislative efforts to introduce bills that would remove library records from the list of documents that can be accessed under the PATRIOT Act; however, these efforts were not successful.<sup>142</sup> Another method that libraries have adopted is to consistently shred library records as a method to keep as little historical record information as possible on books that are signed out.<sup>143</sup> These

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<sup>138</sup> Mann, "Fact Sheet: Section 215 of the USA PATRIOT Act."

<sup>139</sup> Burney, "The PATRIOT Act," p. 29.

<sup>140</sup> Drabinski, "Librarians and the Patriot Act," p. 12.

<sup>141</sup> Jaeger et al., "The USA PATRIOT Act, the Foreign Intelligence Surveillance Act," p. 115.

<sup>142</sup> Drabinski, "Librarians and the Patriot Act," p.13.

<sup>143</sup> Drabinski, "Librarians and the Patriot Act," p. 13.

actions are seen as a fundamental form of resistance, as many librarians believe that they need to keep their consumers' privacy secure.

Section 215 has also expanded the use of National Security Letters (NSL). An NSL is "an administrative subpoena that requires certain persons, groups, organizations, or companies to provide documents about certain persons."<sup>144</sup> Typically, these documents refer to things like phone logs, email and financial records.<sup>145</sup> However, NSLs also contain a non-disclosure provision which is often referred to as the "gag rule."<sup>146</sup> This rule essentially prohibits the person who received an NSL from telling anyone that these records are being searched.<sup>147</sup> For example, if a librarian were to receive an NSL, they would be prohibited from informing the person whose record is being investigated and additionally, could not tell colleagues about the law enforcement's activities.

The most apparent argument against the gag rule is that it violates the First Amendment as it takes away an individual's freedom of expression. The simple explanation of this complaint is that this rule prohibits recipients of NSLs from telling anyone about the order, and therefore, that person's freedom of expression has been limited. Additionally, many maintain that this provision is useless because there is no real need for secrecy regarding these records searches. In certain instances, it is argued that the "gag-rule" can lead to faulty searches as record-keepers are not allowed to consult colleagues to confirm that all the information that is being disclosed is correct.<sup>148</sup> Furthermore, NSLs have also been accused of violating individuals' Fourth Amendment as these records searches fail to provide notice to those who have been investigated after the search has been conducted. Returning to the earlier section in the essay on warrantless searches, notice must be given to the search recipient after the fact. However, in this case, Section 215 enforces that "no person shall disclose to any other person" of said search, which results in individuals having their records investigated without ever knowing.<sup>149</sup>

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<sup>144</sup> Cornell Law School, "Fourth Amendment."

<sup>145</sup> Cornell Law School, "Fourth Amendment."

<sup>146</sup> Rubel, "Privacy and the USA Patriot Act," 127.

<sup>147</sup> American Civil Liberties Union, "ACLU Applauds Introduction of Senate Bill."

<sup>148</sup> Rubel, "Privacy and the USA Patriot Act," 127.

<sup>149</sup> Rubel, "Privacy and the USA Patriot Act," 128.

Section 215 has been an incredibly debated outcome of the PATRIOT Act and is often argued as being highly unconstitutional. Realizing the severity of the provisions within this section, it was set to sunset in December 2005; however, the House and Senate passed a bill that extended the sunset of selected provisions within the section.<sup>150</sup> Section 215 officially expired in March 2020.<sup>151</sup> Many groups like the ACLU and Non-for-profits like the Electronic Frontier Foundation have been vocal about the possibility that record searches are not completely obsolete, and point out that investigations that were ongoing at the time of the expiration are still currently permitted to use the provisions in Section 215.<sup>152</sup>

While many civil liberty organizations and communities such as librarians are pleased to see the section expire, others have argued that the extent to which records were searched were not that extraordinary, and instead had made positive strides in counterterrorism efforts. The Center for Strategic and International Studies has argued that while the breadth of data collected was large, rarely any of it was accessed and examined.<sup>153</sup> They stated that in 2012 alone, only 6000 phones had been collected to review, and from that only 288 were investigated.<sup>154</sup> Additionally, between 2001 and 2014, data collected under Section 215 contributed to 12 counterterrorism cases "with a potential homeland nexus."<sup>155</sup>

In terms of civil liberties, it is evident that many people in the public believed that Section 215 did have significant consequences on their First and Fourth Amendments. However, the extent of this is often contested and placed on a balancing scale with the protection of national security. While the Section is now expired, many are not confident that this section will not be re-enacted in the future.<sup>156</sup>

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<sup>150</sup> Charles Doyle and Brian Yeh, "Libraries and the USA PATRIOT Act," login.ezproxy.lib.ucalgary.ca (Congressional Research Service, 2006), p.1. <https://heinonline-org.ezproxy.lib.ucalgary.ca/HOL/Page?handle=hein.crs%2Fcrsaici0001&collection=congreg>,

<sup>151</sup> India McKinney, "Section 215 Expired: Year in Review 2020," EFF (Electronic Foundation Frontier, December 29, 2020), <https://www.eff.org/deeplinks/2020/12/section-215-expired-year-review-2020>.

<sup>152</sup> McKinney, "Section 215 Expired: Year in Review 2020."

<sup>153</sup> Mann, "Fact Sheet: Section 215 of the USA PATRIOT Act."

<sup>154</sup> Mann, "Fact Sheet: Section 215 of the USA PATRIOT Act."

<sup>155</sup> Mann, "Fact Sheet: Section 215 of the USA PATRIOT Act."

<sup>156</sup> McKinney, "Section 215 Expired: Year in Review 2020."

## Conclusion

Following 9/11, the US government needed to ensure that no act similar to that day could ever take place again on American soil. With the groundwork already in place from FISA, Congress was quick to come up with a radical response to this tragedy. While the PATRIOT Act has been seen as an unfavourable outcome from this event by many privacy and civil liberty advocates, many argue that these provisions are necessary to protect the country from acts of terrorism. While this essay aimed to address the extent to which the PATRIOT Act infringes upon civil liberties, it is essential to acknowledge that there is no definitive answer to this question, based not only on constitutional interpretation but also on an individual's relationship with their civil liberties.

Ultimately, the degree to which the PATRIOT Act encroaches upon civil liberties is subjective and varies depending on individual interpretations and the circumstances in which the Act is being applied. Nevertheless, the Act continues to be a subject of intense scrutiny and debate, which reflects the complex equilibrium between national security and individual civil liberties, particularly those granted under the First and Fourth Amendments.

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