“It's not a thoughtful piece of legislation,” said Geoffrey Stone, ’71. “It was enacted in haste and was launched in a heavy-handed propaganda campaign. It’s not as bad as some critics would have you believe, but it is certainly problematic.”

Stone was speaking of the 2001 USA Patriot Act, one of the most controversial acts of the current Bush administration. It is seen by some as a necessary, if imperfect, tool to prevent future terrorist attacks; by others as a symbol of government excess, and of dubious constitutionality as well. With certain of its provisions up for legislative review, interest in the USA Patriot Act is as high as ever, which is why 330 people crowded into the Celeste Bartos Forum at the New York Public Library on September 20, 2005 to hear what Judge Richard Posner and Professor Geoffrey Stone had to say about it.

One of the more controversial parts of the USA Patriot Act is Section 215, which allows the government to obtain records from libraries, educational institutions, hospitals, businesses (including bookstores), and other organizations, without first making any showing that unlawful activity may be afoot. The government is under no obligation to reveal that it is collecting this information and, furthermore, record-keepers, such as librarians, are prohibited from revealing these requests.

Some argue that this type of snooping should violate the Fourth Amendment, but Stone explained that, “in a series of troubling decisions, the Burger and Rehnquist Courts had held that the Fourth Amendment generally doesn’t protect against government demands for information from third parties. The aspect of Section 215 that has riled civil libertarians—rightly, in my view—is its application to libraries and bookstores, because in this context the government is intruding not only upon individual privacy, but upon privacy in the special setting of an individual’s reading, political beliefs, and religious associations. The government should not gather information about an individual’s First Amendment activities without some showing that he has done something wrong. On this point, critics of the USA Patriot Act are completely right.”

Richard Posner, on the other hand, is concerned that critics are focused on the USA Patriot Act’s costs to the exclusion of its benefits. Worries that Section 215 does not require probable cause suggest to Posner that civil libertarians do not fully understand the new threat of terrorism, and that they are caught up in a “police-oriented view”—that the purpose of the security arms of the state is to identify criminal activity and punish it. “That is the old problem—criminals,” he said. “Terrorism is a new problem with completely different
requirements concerning the scope of inquiry. We need to know who the terrorists are and what they are doing so that future acts can be prevented, the argument goes. To do this, we must gather intelligence widely. The idea is that small bits of information from a variety of different sources contribute to understanding the larger picture, which should help prevent future terrorist acts.

"I don't defend the particulars of Section 215," Posner continued. "But the notion that the government can compel repositories of information-documents, email, what have you—to give it access is potentially quite important to preventing terrorist acts. In the course of implementing such a power, there are going to be some invasions of privacy, including political privacy, and there is going to be some dampening effect on the exercise of free speech. Those are costs."

But how great are the benefits of this "information dragnet," and are they worth its costs?

"It is very unlikely that we can actually penetrate terrorist cells," Posner said. "What we can do is find hangers-on, allies, associates, financial angels—peripheral people. The peripheral people may eventually lead us to the core. Most of these peripheral people will not be engaged in criminal activity at all. Requiring probable cause to believe that someone is engaged in unlawful activity before he can be investigated will deny access to a range of information that could be critical in detecting terrorist activities."

Stone pointed out that by eliminating a reasonable suspicion requirement the government had effectively cut the judiciary out of the process and given the executive branch unreviewable authority to pry into an individual's constitutionally protected political and religious activities. "By denying the courts any role in this process, the USA Patriot Act vitiates any executive branch accountability in this most sensitive area."

"I know you don't have as much confidence in judges as I do," Stone chided.

"It's true," Posner replied, amid laughter from the audience. "I'm on the inside."

Stone argued that even the most casual student of United States history can recall the government's information-gathering abuses of the 1950s, 1960s, and early 1970s. During the Vietnam War, under the pretext of national security, officials gathered private information on more than half a million United States citizens, information that was used, in various ways, against people who stood in opposition to government policies. "Our track record on this," Stone added, "is not good."

To address this problem in the years following the Nixon Administration, Stone explained, Attorney General Edward Levi, '35, put in place a series of guidelines designed to prevent such abuses by requiring reasonable suspicion, oversight, and accountability in government investigations of constitutionally protected activities. The Bush administration eliminated these guidelines, allowing the government to engage in virtually unlimited surveillance and infiltration of First Amendment activities and associations.

"The Levi guidelines," countered Posner, "were entirely oriented toward criminal investigation. They did not take terrorist threats, of whatever gravity, into account."

Stone doesn't disagree with that, but notes, "We have a long history in this country of overreacting in the name of national security. Restricting civil liberties in general and free speech in particular should be a last and not a first resort. We have done these sorts of things in the past and come to regret them."

"In my view," Posner said, "if you can head off a terrorist attack, a minor infringement of civil liberties is worth it."

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Posner and Stone continued their conversation on the difficulties of balancing civil liberties and security measures in a lively online debate hosted by Legal Affairs. An archived version of this exchange can be found at: http://legalaffairs.org/webexclusive/debateclub_patact1005.msp

Richard Posner is a judge on the United States Court of Appeals for the Seventh Circuit and a Senior Lecturer at the Law School. His most recent book is Preventing Surprise Attacks: Intelligence Reform in the Wake of 9/11. Geoffrey Stone, '71, is the Harry Kalven, Jr. Distinguished Service Professor of Law at the Law School. His most recent book is Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism.