USA PATRIOT ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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SEPTEMBER 22, 2009

USA PATRIOT ACT

TUESDAY, SEPTEMBER 22, 2009

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 11:15 a.m., in room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

Present: Representatives Nadler, Conyers, Johnson, Sensenbrenner, Rooney, King, Gohmert, and Smith.

Staff Present: David Lachmann, Majority Subcommittee Chief of Staff; Stephanie Pell, Detailee (DOJ); Caroline Lynch, Minority Counsel; and Turner Letter, Staff for Ranking Member Sensenbrenner.

Mr. NADLER. The hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties will come to order. We will begin with—I will recognize myself for an opening statement.

Today's hearing gives the Members of the Committee the opportunity to review the USA PATRIOT Act, three provisions of which are scheduled to expire later this year. These three provisions—dealing with roving wiretap authority; expansion of definition of an agent of a foreign power to include so-called lone wolfs; and section 215, which allows the government to obtain business records using an order from the Foreign Intelligence Surveillance, or FISA, Court—have aroused a great deal of controversy and concern.

While some have argued that each of these authorities remain necessary tools in the fight against terrorism and that they must be extended without any modifications, others have counseled careful review and modification. Some have even urged that we allow some or all of these authorities to sunset.

Additionally, I believe that we should not miss the opportunity to review the act in its entirety: to examine how it is working, where it has been successful, and where it may need improvement.

For example, I have introduced for the last few years the National Security Letters Reform Act, which would make some vital improvements to the current law in order better to protect civil liberties while ensuring that NSLs remain a useful tool in national security investigations. And section 215 must be amended to conform to the changes we seek to make to the NSL provisions.

I have long believed that civil liberties and national security need not be in conflict, and I hope to work with my colleagues to strike that balance in a responsible and effective manner.

We have some outstanding witnesses today with a great deal of experience and knowledge in this area. I am especially pleased that the Administration has sent a witness to assist the Committee in its work and to explain the Administration's views.

I would note that Mr. Hinnen's testimony states at the very outset, and I think it merits repeating, that the Administration is, quote, "ready and willing to work with Members on any specific proposals we may have to craft legislation that both provides effective investigative authorities and protects privacy and civil liberties," close quote.

Whatever disagreements we may have on any particular provision or approach, I want to note that this attitude is a refreshing break with recent practice. We take the Administration at its word, and I, for one, intend to hold it to that. I look forward to working with the Administration and with my colleagues to craft legislation that protects our national security and our fundamental values.

I look forward to the testimony, and I thank our witnesses for being here today.

I yield back. And I now recognize the distinguished Ranking Member of the Subcommittee for 5 minutes for an opening statement.

Mr. SENSENBRENNER. Thank you, Mr. Chairman.

Two weeks ago, this country honored the 3,000 innocent people killed in the 9/11 terrorist attacks. In 100 days, the tools to prevent another horrific attack on America will expire. While I appreciate the Chairman holding this hearing today, it is long overdue. Congress must reauthorize the expiring provisions of the PATRIOT Act before December 31st of this year, and the clock is ticking.

In 2001, the USA PATRIOT Act was passed with wide bipartisan support. And in this Committee, I would remind the Members and everybody else that we spent a month considering it. We had two hearings, and we had a markup.

In 2005, I again spearheaded the effort to reauthorize the PATRIOT Act. Recognizing the significance of the act to America's counterterrorism operations and the need for thorough oversight, this Committee held 9 Subcommittee hearings, 3 days of full Committee hearings, and completed its markup of the reauthorization all before the August recess—hardly a procedural rush job.

I am deeply concerned that we are weeks away from adjourning this legislative session and we are now only beginning the process of reviewing the act.

During a Senate confirmation hearing in January, Attorney General Holder said he wanted to examine the expiring provisions of the PATRIOT Act, talk to investigators and lawyers and get a sense of what has worked and what needs to be changed. In May, General Holder appeared before this Committee, and I asked him about the Department's position on reauthorizing the act. Again he said he needed to examine how the expiring provisions had been used and to gather more empirical information. He assured me that the Department would express its views with sufficient time to reauthorize the act.

Just last week, the Obama administration finally made public its views on the three expiring provisions. I am dismayed as to why it took 9 months to assess just three measures, but I commend the Administration for recognizing the value of these important national security tools and rightly encouraging Congress to reauthorize each of them.

The Administration has also promised to reject any changes to these or other PATRIOT Act provisions that would undermine their effectiveness.

Of particular importance to me is the lone wolf provision, which closes a gap in the Foreign Intelligence Surveillance Act, that, if allowed to expire, could permit an individual terrorist to slip through the cracks and endanger thousands of innocent lives.

When FISA was originally enacted in the 1970's, terrorists were believed to be members of an identified group. This is not the case today. Many modern-day terrorists may subscribe to a movement or certain beliefs, but they don't belong to or identify themselves with a specific terrorist group. Allowing the lone wolf provision to expire could impede our ability to gather intelligence about perhaps the most dangerous terrorists operating today.

Section 206 of the PATRIOT Act authorizes the use of roving wiretaps for national security and intelligence investigations. The roving wiretap allows the government to use a single wiretap order to cover any communications device that the target uses or may use. Without roving wiretap authority, investigators would be forced to seek a new court order each time they need to change the location, phone, or computer that needs to be monitored. Director Mueller testified before the Committee in May that this provision has been used over 140 times and is exceptionally useful for facilitating FBI investigations.

Section 215 of the act allows the FBI to apply to the FISA Court to issue orders granting the government access to any tangible items in foreign intelligence, international terrorism, or clandestine intelligence cases. The PATRIOT Improvement and Reauthorization Act of 2005 significantly expanded the safeguards against potential abuse of section 215 authority, including additional congressional oversight, procedural protections, application requirements, and judicial review. According to Director Mueller, this provision has been used over 230 times.

The terrorist threat did not end on September 11, 2001. Just last week, Federal authorities disrupted a potential al-Qaeda bombing plot that stretched from New York City to Denver and beyond. It is time for this Committee to act. We must not allow these critical counterintelligence tools to expire.

And I look forward to hearing from today's witnesses and yield back the balance of my time.

Mr. NADLER. Thank you.

I must say, I wish I was as confident as the gentleman from Wisconsin that this session has only weeks to go.

I now recognize the distinguished Chairman of the full Committee, Mr. Conyers, for an opening statement.

Mr. CONYERS. Thank you, Chairman Nadler.

And I wanted to thank Jim Sensenbrenner for his recapitulation of those days in the Judiciary Committee, where so much happened.

I also am pleased to see Tom Evans, our former colleague from Delaware, back on the Hill.

Now, the PATRIOT Act is nearly 8 years old. After many hearings and multiple inspector general reports of the use and abuse of this law, and after much work by scholars in the field, we have learned that, since this law was rushed through Congress in the weeks after the 9/11 attack—we have to recall this with some specificity.

The hearings that then-Chairman Sensenbrenner referred to were leading up to a bill that was sent to Rules Committee that never got out of Rules Committee. And that bill that the Chairman and me, the Ranking Member, worked on so carefully was unanimously reported out of the House Judiciary Committee—record vote. And then the bill went to the Rules Committee. And then-Chairman Dreier, under Lord knows whose instructions, substituted that bill for another bill that we in Judiciary had never seen.

And so we come here today now to consider what we do with those parts that are expiring. And so I wanted to make a couple ideas, give you a couple ideas about what might have happened if the bill that we debated and voted out—and Chairman Nadler was there; Ranking Member Lamar Smith was there.

And the bill that we voted out required that targets of so-called roving wiretaps be identified in a FISA Court order to prevent the John Doe roving wiretaps that some experts and many commentators consider abusive. That was our bill—bipartisan, 100 percent.

Another feature of that bill required extensive and robust oversight of the executive branch's use of surveillance powers, which might have headed off the 2004 crisis at the Department of Justice caused by then-President Bush's warrantless domestic surveillance program.

Also in the bill was a requirement for extensive reporting and certification requirements, and created clear avenues for people affected by PATRIOT Act violations to claim redress, which may have eliminated, or certainly simplified, the extensive litigation about the PATRIOT abuses that continue to this day.

And, finally, the current Administration has recommended reviewing these provisions that are expiring, and they have supported their simple extension. I disagree. And I want to hear some more detail about these, especially the infamous lone wolf statute, which has never been used and which there is some question as to whether it is necessary at all.

Now, the Administration has stated that the protection of privacy and civil liberties is of deep and abiding concern. And they are willing to work on legislation that provides effective investigative authorities the power they need but, at the same time, protects the rights and civil liberties and privacy of the people that are under investigation. And so I think it is critical that every Member of this Committee has accepted this invitation to work with the Administration.

So now is the time to consider improving the PATRIOT Act, not to simply extend the three expiring provisions, which is a point of view that is no less valid than any other. But, please, Judiciary Committee, let's consider what we have done, let's consider what was done to us, and let's consider where we go from here.

And I thank you for your time, Chairman Nadler.

Mr. NADLER. I thank the Chairman.

I now recognize for an opening statement the distinguished Ranking Member of the full Committee, the gentleman from Texas, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

America is fortunate not to have experienced a terrorist attack since 2001, but we must not be lulled into a false sense of security. The threat from terrorists and others who wish to kill Americans remains high.

In the 8 years since the attacks of September 11, 2001, al-Qaeda and other terrorist organizations have continued their war against innocent civilians worldwide. In 2004, 191 people were killed in the Madrid train bombings. In 2005, 52 innocent civilians were killed when suicide bombers attacked the London subway. And last year, 164 people were killed in Mumbai by a Pakistan-based terrorist organization.

Counterterrorism tools helped British and American authorities foil the 2006 plot to attack as many as 10 airplanes flying from Great Britain to the U.S. Two weeks ago, three of the plotters were convicted of planning to blow up passenger planes using liquid explosives. According to British prosecutors, if the terrorists had been successful, they would have killed thousands of innocent passengers.

In 2007, Federal authorities thwarted two terrorist attempts on U.S. soil: a plot to kill U.S. soldiers at the Fort Dix Army base and a plot to bomb JFK International Airport by planting explosives around fuel tanks and a fuel pipeline. Again, surveillance and investigative techniques saved lives.

Many of these plots would not have been thwarted, the terrorists would not have been convicted, and thousands of lives would not have been saved without the PATRIOT Act. The PATRIOT Act gives intelligence officials the ability to investigate terrorists and prevent attacks. We cannot afford to let these life-saving provisions expire.

Last March, I introduced the Safe and Secure America Act of 2009 to extend for 10 years sections 206 and 215 of the U.S. PATRIOT Act and section 6001 of the Intelligence Reform and Terrorism Prevention Act of 2004, which were scheduled to sunset on December 31st.

For years the PATRIOT Act has been subject to misinformation, rumors, and innuendos about how intelligence officials can use its provisions. As Congress once again considers these provisions, we must ensure that the debate is about facts, not fiction. The expiring provisions we are considering today are designed to be used only by intelligence officials investigating terrorists and spies in cases involving national security.

Despite allegations that the PATRIOT Act is unconstitutional, these provisions have been upheld in court and are similar to those

used in criminal investigations. The PATRIOT Act simply applies the same provisions to intelligence gathering and national security investigations.

The director of the FBI, Robert Mueller, in testimony before the House and Senate Judiciary Committees earlier this year, urged Congress to renew what he called "exceptional intelligence-gathering tools." The Obama administration decided last week that it agrees with Director Mueller and finally called for reauthorization of the three expiring PATRIOT Act provisions.

America is safe today not because terrorists and spies have given up trying to destroy us and our freedoms. Just this past week, three individuals with links to al-Qaeda were arrested in connection with a plot to set off bombs in New York City. America is safe today because the men and women of the intelligence community use the PATRIOT Act to protect us.

The threat to America from terrorists, spies, and enemy countries will not sunset at the end of this year, and neither should America's anti-terrorism laws. The PATRIOT Act works exceedingly well. If the PATRIOT Act expires or is weakened, American lives will be put at risk.

Thank you, Mr. Chairman. I will yield back.

Mr. NADLER. Thank you.

[Disturbance in the hearing room.]

Mr. NADLER. If you insist on talking, you will be escorted from the room. Sit down, please.

Escort him from the room, please. Do we have a Sergeant at Arms here?

[Disturbance in the hearing room.]

Mr. NADLER. In the interest of proceeding to our witnesses and mindful of our busy schedules, I ask that other Members submit their statements for the record.

Without objection, all Members will have 5 legislative days to submit opening statements for inclusion in the record.

Without objection, the Chair will be authorized to declare a recess of the hearing.

We will now turn to our first panel of witnesses.

As we ask questions of our witnesses, the Chair will recognize Members in the order of their seniority on the Subcommittee, alternating between majority and minority, provided that the Member is present when his or her turn arrives. Members who are not present when their turns begin will be recognized after the other Members have had the opportunity to ask their questions.

The Chair reserves the right to accommodate a Member who is unavoidably late or only able to be with us for a short time.

Our first panel consists of one witness. Todd Hinnen is the Deputy Assistant Attorney General for law and policy in the Department of Justice's National Security Division. Prior to rejoining the Justice Department, Mr. Hinnen was the chief counsel to then-Senator Joseph Biden, now Vice President, of course.

Mr. Hinnen served from 2005 to 2007 as the director for combatting terrorism at the National Security Council, where his responsibilities included coordinating and directing the United States Government's response to terrorist finance and terrorist use of the Internet.

Prior to serving on the NSC, Mr. Hinnen was a prosecutor in the Department of Justice's computer crimes section and a clerk for the Honorable Richard Tallman, United States Court of Appeals for the Ninth Circuit.

Mr. Hinnen is a graduate of Amherst College and Harvard Law School.

Welcome. Your written statement in its entirety will be made part of the record. I would ask you to summarize your testimony in 5 minutes or less.

To help you stay within that time, there is a timing light at your table. When 1 minute remains, the light will switch from green to yellow, and then red when the 5 minutes are up.

Before we begin, it is customary for the Committee to swear in its witnesses. If you would please stand and raise your right hand to take the oath.

[Witness sworn.]

Mr. NADLER. Let the record reflect that the witness answered in the affirmative.

We will now hear your statement, sir.

Mr. HINNEN. Thank you.

[Disturbance in the hearing room.]

Mr. NADLER. The gentleman will be removed.

The witness will proceed.

TESTIMONY OF TODD M. HINNEN, DEPUTY ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. HINNEN. Thank you.

Chairman Nadler, Ranking Member Sensenbrenner, full Committee Chairman Conyers, full Committee Chairman Smith, and Members of the House Judiciary Committee's Subcommittee on Constitution, Civil Rights, and Civil Liberties, thank you for inviting me to speak to you today on behalf of the Justice Department about the three intelligence authorities scheduled to expire this December.

My written testimony sets forth the affirmative case for renewal for each of these three important authorities. Mindful of the Subcommittee's time and of the importance of discussion, my remarks today will touch briefly on the importance of each authority.

At the outset, it is important to recognize that these authorities exist as part of a broader statutory scheme, authorized by Congress and overseen by the FISA Court, that supports foreign intelligence collection and thereby protects national security.

The lone wolf provision allows the government to conduct surveillance pursuant to a FISA Court order on a non-U.S. person if the government demonstrates probable cause that the individual is engaged in international terrorism activities or preparation therefor.

Although this provision has never been used, it is essential to the government's ability to thwart an international terrorist plotting to attack the United States who has no established connection to a recognized terrorist organization, either because he has broken ties with such an organization or because he has been recruited and trained via information posted to the Internet.

Analysis suggests that, as the international coalition dedicated to combatting terrorism puts increasing pressure on terrorist groups and safe havens diminish, individuals who share the destructive goals of these groups but have no formal connection to them will pose an increasing threat.

The roving wiretap authority allows the government to maintain surveillance of a target who has been identified or specifically described and who attempts to thwart surveillance by rapidly changing cell phones or other facilities. The government must demonstrate probable cause that the target is an agent of a foreign power and that that target is using or will use the cell phone. The government must also make a specific showing that the target will attempt to thwart surveillance. And if the government uses a roving wiretap order, it must notify the court within 10 days of that use and demonstrate the specific facts that demonstrate that the target is using the new cell phone.

This authority is critical to efforts to collect intelligence on and protect against terrorists and foreign intelligence officers who have received countersurveillance training—our most sophisticated adversaries. The government has sought and been granted the authority in an average of 22 cases per year. The government has had occasion to use that authority granted by the court far more seldom than that.

The business records provision allows the government to obtain any tangible thing it demonstrates to the FISA Court is relevant to a counterterrorism or counterintelligence investigation. This provision is used to obtain critical information from the businesses unwittingly used by terrorists in their travel, plotting, preparation for, communication regarding, and execution of attacks. It also supports an important sensitive collection program, about which many Members of the Subcommittee or their staffs have been briefed.

All applications of this authority are subject to FISA Court approval, minimization procedures, and robust oversight. Each of these authorities meets an important investigative need. The Department and the Administration are firmly committed to ensuring that they are used with due respect for the privacy and civil liberties of Americans.

We welcome discussion with the Subcommittee directed toward ensuring that these authorities are renewed in a form that maintains their operational effectiveness and protects privacy and civil liberties.

Finally, I would like to address national security letters. A number of bills have recently been introduced, on both sides of the Hill, that amend the five statutes governing this investigative authority. I appreciate the careful thought and hard work that went into those legislative proposals.

The Department looks forward to engaging regarding them with Members of the Subcommittee. The Administration has not taken an official position on any particular provision on NSLs, so my ability to respond to questions regarding them today will be limited.

I appreciate the Subcommittee's understanding in this regard and its recognition that today's hearing is only the beginning of a process of working closely together to create legislation that main-

tains the operational effectiveness of these important investigative tools and protects the privacy and civil liberties of Americans.

Thank you.

[The prepared statement of Mr. Hinnen follows:]

PREPARED STATEMENT OF TODD M. HINNEN

Department of Justice

STATEMENT OF

TODD M. HINNEN
DEPUTY ASSISTANT ATTORNEY GENERAL

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

ENTITLED

"THE USA PATRIOT ACT"

PRESENTED

SEPTEMBER 22, 2009

Statement of
Todd M. Hinnen
Deputy Assistant Attorney General
Before the
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Committee on the Judiciary
United States House of Representatives
For a Hearing Entitled
"The USA PATRIOT Act"
Presented
September 22, 2009

Chairman Nadler, Ranking Member Sensenbrenner, and Members of the House Judiciary Constitution Subcommittee, thank you for inviting me to speak to you today about the Administration's position regarding three Patriot Act Provisions that will, by their terms, expire on December 31, 2009. We believe that the best legislation will emerge from a careful and collaborative examination of these matters. As you know, today's hearing has been preceded by extensive discussion and deliberation within the legislative and executive branches, and constructive discussions have recently begun between Administration officials and Congressional staff. I would like to extend the Attorney General's gratitude for providing the Department with this opportunity to present the Administration's views formally to the Members of this Subcommittee today.

Before I address each of the three expiring authorities, I would like to address a concern raised often during our discussions with congressional staff. The Department understands that Members of Congress may propose modifications to the legislation governing the three expiring authorities and other related authorities with the goal of providing additional protection for the privacy of law abiding Americans. The protection of privacy and civil liberties is of deep and abiding concern to the Department of Justice, and to the Administration as a whole. We are ready and willing to work with Members on any specific proposals you may have to craft legislation that both provides effective investigative authorities and protects privacy and civil liberties.

With respect to the three expiring authorities, we recommend reauthorizing section 206 of the USA PATRIOT Act, which provides for roving surveillance of targets who take measures to thwart FISA surveillance. It has proven to be an important intelligence-gathering tool in a small but significant subset of FISA electronic surveillance orders.

This provision states that where the Government sets forth in its application for a surveillance order "specific facts" indicating that the actions of the target of the order "may have the effect of thwarting" the identification, at the time of the application, of third parties necessary to accomplish the ordered surveillance, the order shall direct such third parties, when identified, to furnish the Government with all assistance necessary to accomplish surveillance of the target

identified in the order. In other words, the "roving" authority is only available when the Government is able to provide specific information that the target may engage in counter-surveillance activity (such as rapidly switching cell phone numbers). The language of the statute does not allow the Government to make a general, "boilerplate" allegation that the target may engage in such activities; rather, the Government must provide specific facts to support its allegation.

There are at least two scenarios in which the Government's ability to obtain a roving wiretap may be critical to effective surveillance of a target. The first is where the surveillance targets a traditional foreign intelligence officer. In these cases, the Government often has years of experience maintaining surveillance of officers of a particular foreign intelligence service who are posted to locations within the United States. The FBI will have extensive information documenting the tactics and tradecraft practiced by officers of the particular intelligence service, and may even have information about the training provided to those officers in their home country. Under these circumstances, the Government can furnish specific facts in its application to the FISA Court that demonstrate that the actions of the individual may have the effect of thwarting the identification of third parties whose assistance is needed to conduct the surveillance.

The second scenario in which the ability to obtain a roving wiretap may be critical to effective surveillance is the case of an individual who actually has engaged in counter-surveillance activities or in preparations for such activities. In some cases, individuals already subject to FISA surveillance are observed to be engaging in counter-surveillance or instructing associates on how to communicate with them through more secure means. In other cases, non-FISA investigative techniques have revealed counter-surveillance preparations (such as buying "throwaway" cell phones or multiple calling cards). The Government then offers these specific facts to the FISA court as justification for a grant of roving authority.

Since the roving authority was added to FISA in 2001, the Government has sought to use it in a relatively small number of cases (on average, twenty-two applications annually for 2003-2008). We would be pleased to brief Members or staff regarding specific case examples in a classified setting. The FBI uses the granted authority only when the target actually begins to engage in counter-surveillance activity that thwarts the already-authorized surveillance, and does so in a way that renders the use of roving authority feasible.

Roving authority is subject to the same court-approved minimization rules that govern other electronic surveillance under FISA and that protect against the acquisition or retention of non-pertinent information. The statute generally requires the Government to notify the FISA court within 10 days of the date upon which surveillance begins to be directed at any new facility. Over the past seven years, this process has functioned well and has provided effective oversight for this investigative technique.

We believe that the basic justification offered to Congress in 2001 for the roving authority remains valid today. Specifically, the ease with which individuals can rapidly shift

between communications providers, and the proliferation of both those providers and the services they offer, almost certainly will increase as technology continues to develop. International terrorists, foreign intelligence officers, and espionage suspects — like ordinary criminals — have learned to use these numerous and diverse communications options to their advantage. Any effective surveillance mechanism must incorporate the ability to address rapidly an unanticipated change in the target's communications behavior. The roving electronic surveillance provision has functioned as intended and has addressed an investigative requirement that will continue to be critical to national security operations. Accordingly, we recommend reauthorizing this feature of FISA.

We also recommend reauthorizing section 215 of the USA PATRIOT Act, which allows the FISA court to compel the production of "business records." The business records provision addressed a gap in intelligence collection authorities that had previously existed and has proven valuable in a number of contexts.

The USA PATRIOT Act made the FISA authority relating to business records roughly analogous to that available to FBI agents investigating criminal matters through the use of grand jury subpoenas. The original FISA language, added in 1998, limited the business records authority to four specific types of records, and required the Government to demonstrate "specific and articulable facts" supporting a reason to believe that the person to whom the requested records pertain was a foreign power or an agent of a foreign power. In the USA PATRIOT Act, the authority was changed to encompass the production of "any tangible things" and the legal standard was changed to relevance to an authorized investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities.

The Government first used the USA PATRIOT Act business records authority in 2004 after extensive internal discussions over its proper implementation. The Department's inspector general evaluated the Department's implementation of this new authority at length, in reports that are now publicly available. Other parts of the USA PATRIOT Act, specifically those eliminating the "wall" separating intelligence operations and criminal investigations, also had an effect on the operational environment. The greater access that intelligence investigators now have to criminal tools (such as grand jury subpoenas) reduces but does not eliminate the need for intelligence tools, such as the business records authority. The operational security requirements of most intelligence investigations still require the secrecy afforded by the FISA authority.

For the period 2004-2008, the FISA court has issued about 236 orders to produce business records. Of these, 173 orders were issued in 2004-06 in combination with FISA pen register orders to address an anomaly in the statutory language that prevented the acquisition of subscriber identification information ordinarily associated with pen register information. Congress corrected this deficiency in the pen register provision in 2006 with language in the USA PATRIOT Improvement and Reauthorization Act. Thus, this use of the business records authority became unnecessary.

The remaining business records orders issued between 2004 and 2007 were used to obtain transactional information. As many Members are aware, some of these orders were used to support important and highly sensitive intelligence collections. The Department can provide additional information to Members or their staff in a classified setting.

It is noteworthy that no recipient of a FISA business records order has ever challenged the validity of the order, despite the availability, since 2006, of a clear statutory mechanism to do so. At the time of the USA PATRIOT Act, there was concern that the FBI would exploit the broad scope of the business records authority to collect sensitive personal information on constitutionally protected activities, such as the use of public libraries. This simply has not occurred, even in the environment of heightened terrorist threat activity. The oversight provided by Congress since 2001, the specific oversight provisions added to the statute in 2006, and the requirement that the government make a specific showing to the FISA Court in each application have helped to ensure that the authority is being used as intended.

Based upon this operational experience, we believe that the FISA business records authority should be reauthorized. There will continue to be instances in which FBI investigators need to obtain transactional information that does not fall within the scope of authorities relating to national security letters and are operating in an environment that precludes the use of less secure criminal authorities. Moreover, in some instances, such as counterintelligence investigations, the use of criminal authorities may be inappropriate because the investigation is not focused on a violation of criminal law. Many of these instances will be mundane (as they have been in the past), such as the need to obtain driver's license information that is protected by State law. Others will be more complex, such as the need to track the activities of intelligence officers through their use of certain business services. In all these cases, the availability of a generic, court-supervised FISA business records authority is the best option for advancing national security investigations in a manner that protects privacy and civil liberties. The absence of such an authority could force the FBI to sacrifice key intelligence opportunities, to the detriment of the national security.

Finally, the Department recommends reauthorizing Section 6001 of the Intelligence Reform and Terrorism Prevention Act of 2004, which defines a "lone wolf" agent of a foreign power and allows a non-United States person who "engages in international terrorism activities" to be considered an agent of a foreign power under FISA.

Enacted in 2004, this provision arose from discussions inspired by the Zacarias Moussaoui case. The basic idea behind the authority was to cover situations in which information linking the target of an investigation to an international group was absent or insufficient, although the target's engagement in "international terrorism" was sufficiently established. The definition is quite narrow: it applies only to non-United States persons; the activities of the person must meet the FISA definition of "international terrorism"; and the information likely to be obtained must be foreign intelligence information. What this means, in practice, is that the Government must know a great deal about the target, including the target's purpose and plans for terrorist activity (in order to satisfy the definition of "international

terrorism"), but still be unable to connect the individual to any group that meets the FISA definition of a foreign power.

To date, the Government has not encountered a case in which this definition was both necessary and available, *i.e.*, the target was a non-United States person. Thus, the definition has never been used in a FISA application. We do not believe, however, that this means the authority is now unnecessary. Subsection 101(b) of FISA provides ten separate definitions for the term "agent of a foreign power" (five applicable only to non-United States persons, and five applicable to all persons). Some of these definitions cover the most common fact patterns; others describe narrow categories that may be encountered rarely. Although the latter group may be rarely encountered, it includes legitimate targets that cannot be accommodated under the more generic definitions and will escape surveillance but for the more specific definitions.

We believe that the "lone wolf" provision falls squarely within this class. While we cannot predict the frequency with which it may be used, we can foresee situations in which it would be the only avenue to effect surveillance. For example, we could have a case in which a known international terrorist affirmatively severs his connection with his group, perhaps following some internal dispute. Although the target still would be an international terrorist and an appropriate target for intelligence surveillance, the Government could no longer represent to the FISA court that he is currently a member of an international terrorist group or acting on its behalf. In the absence of the "lone wolf" definition, the Government would have to postpone FISA surveillance unless and until the target could be linked to another group. The absence of a known connection would not, however, necessarily mean that the individual did not pose a real and imminent threat. The lone wolf provision may also be required to conduct surveillance on an individual who "self-radicalizes" by means of information and training provided via the Internet. Although this target would have adopted the aims and means of international terrorism (and therefore be a legitimate national security target), he would not actually be acting as an agent of a terrorist group. Without the lone wolf definition, the Government might be unable to establish FISA surveillance.

These scenarios are not remote hypotheticals; they are based on trends we observe in current intelligence reporting. We cannot determine how common these fact patterns will be in the future or whether any of the targets will so completely lack connections to groups that they cannot be accommodated under other definitions. The continued availability of the lone wolf definition eliminates any gap. The statutory language of the existing provision ensures its narrow application, so the availability of this potentially useful tool carries little risk of overuse. We believe that it is essential to have the tool available for what we believe will be the rare situation in which it is necessary rather than to delay surveillance of a terrorist in the hopes that the necessary links are established or even to forego it entirely because such links cannot be established.

In short, the Department and the Administration believe that each of these three provisions provides important and effective investigative authorities. We believe that the current statutory scheme, together with the rules, guidelines, and oversight mechanisms observed by the

Executive branch with respect to these authorities, safeguard Americans' privacy and civil liberties. We look forward to working with the Subcommittee to reauthorize these important authorities in a manner that continues to protect both national security and privacy and civil liberties.

Mr. NADLER. I thank the gentleman.

I will begin the questions by recognizing myself for 5 minutes.

Mr. Hinnen, with respect to the so-called lone wolf authority, since terrorism is obviously a crime, why do we need this provision? Why not use ordinary Article 3 warrants? What additional powers does this provision give beyond the normal Article 3 warrant, and why are those powers necessary?

Mr. HINNEN. Thank you, Mr. Chairman.

The distinction, I think, between Article 3 powers and FISA powers are the factors recognized by Congress when enacting FISA in the first place, the needs of the government in conducting intelligence investigations.

Whereas when using Article 3 authorities you are investigating the violation of one of the criminal laws, in an intelligence investigation or a counterterrorism investigation the government is often not intending to investigate a violation of the criminal law and often doesn't have prosecution as its end goal.

Mr. NADLER. Regardless, can you get a lone wolf warrant in a circumstance where you couldn't get an Article 3 warrant?

Mr. HINNEN. I think it is the conditions under which you can get the authority that are important. The additional secrecy that it provides that protects an ongoing intelligence investigation——

Mr. NADLER. The additional secrecy? Aren't Article 3 warrants under seal?

Mr. HINNEN. They may be under seal, but those orders are eventually unsealed, as are the applications that underlie them. And often the predicate facts that support the issuance of such an order are of sufficient sensitivity that the government does not want them——

Mr. NADLER. So if Article 3 warrants had the authority to keep certain things, what you are talking about, secret, then that would be an adequate substitute for that?

Mr. HINNEN. I think still the important distinction between the requirement under FISA that the government demonstrate that the individual is an agent of a foreign power and the requirement under Title III that the government demonstrate——

Mr. NADLER. In the roving wiretap they don't have to demonstrate that—I am sorry, in the lone wolf they don't have to——

Mr. HINNEN. Under the lone wolf, the government still has to demonstrate that the target is an agent of a foreign power under the definitions in——

Mr. NADLER. So you are telling me it is harder to get because they have to demonstrate something that they don't have to demonstrate for an Article 3.

So my question then is, assuming you took care of the problem of potentially unsealing records eventually, because you wanted to keep certain things secret, what advantage is there to the government, in terms of an investigation, aside from having to jump through additional hoops to get the warrant in the first place, which is not an advantage, to using this as opposed to an Article 3 warrant?

Mr. HINNEN. Mr. Chairman, I didn't mean to imply that it was more difficult to get a FISA Court order, simply that the government had to make a different showing.

Mr. NADLER. Fine. But let's assume—never mind that. Why is it to the government's advantage, other than the question of declassifying information eventually—let's assuming we amended that—what is the advantage of a roving wiretap as opposed to an Article 4 wiretap?

Mr. HINNEN. That the showing that the government has to make in order to get a FISA wiretap is more closely tailored to an intel-

ligence investigation, that it focuses on an agent of a foreign power rather than a violation of the criminal laws.

Mr. NADLER. So you could get it under certain circumstances when you couldn't get an Article 3 wiretap?

Mr. HINNEN. The government gets it by making a different showing.

Mr. NADLER. And the facts are such that there are cases in which you could make the showing necessary for a roving wiretap but couldn't make the showing in the same case necessary for an Article 3 wiretap warrant?

Mr. HINNEN. I believe that there is some overlap but not complete——

Mr. NADLER. I would ask then that you, after today—because I want to go to two other questions in the minute I have left—give us specific information on how it would be advantageous to the government and, assuming we plug that secrecy problem, why Article 3 warrants wouldn't suffice. I mean, how does it really differ?

The Administration has noted in its support for the reauthorization that it is willing to consider proposals to better protect privacy as well as efficacy. Given their position in the context of section 215 orders, would the Administration support returning to a standard that required specific facts showing that the records sought are related to a foreign power rather than the current "relevant" standard? And, if not, why not?

Mr. HINNEN. Thank you, Mr. Chairman. That is an interesting question, whether the Administration would support a return to this "specific and articulable" standard which existed before the PATRIOT Act, as opposed to the "relevant" standard. This, of course, is something that Congress changed in the original PATRIOT Act.

The Administration has not taken an official position on this yet. I would say, sitting here today, that it is not entirely clear to me that there is a substantive difference between the "specific and articulable" standard and the "relevant" standard.

If there is, in fact, not, then I would suggest that settled expectations militate in favor——

Mr. NADLER. Clearly, if there is no difference, it doesn't matter. But everybody seems to have said for the last 10 years that there is a big difference.

Mr. HINNEN. If, in fact, there is a difference, I think the presumption would be against change.

Mr. NADLER. Say it again? I am sorry.

Mr. HINNEN. The presumption would be against change, against returning——

Mr. NADLER. Because?

Mr. HINNEN. In part because Congress recently made the change to the relevance factor; in part because a practice has developed around the current standard; and in part because Congress has added additional safeguards, including judicial review of orders, in 2006.

Mr. NADLER. Well, again, I would simply say this, and then my time will have expired: Saying that we shouldn't change something because Congress did it is never a good argument, because we are always changing something.

I would ask you, again, after today, to supply us, if you think we shouldn't change that, with specific reasons other than "we are already doing it this way," but specific reasons and illustrations of how that would affect intelligence gathering and why it would not be a good idea to change it.

Mr. HINNEN. Certainly.

Mr. NADLER. Thank you.

My time has expired. I now recognize the distinguished Ranking Member of the Subcommittee, Mr. Sensenbrenner.

Mr. SENSENBRENNER. Thanks very much, Mr. Hinnen. You are a breath of fresh air. And I would say that, in many cases, you have vindicated many of the assertions that I made, both as the author of the PATRIOT Act in 2001 as well as the author of the PATRIOT Act reauthorization, which was signed by the President in March of 2006.

The PATRIOT Act has been extensively litigated, and, in most cases, it has been held constitutional. Where there has been the biggest problems is relative to the national security letters issue.

And I would point out that if you look at the legislative history behind national security letters, that was not one of the expanded powers given to law enforcement by the PATRIOT Act, but was merely changing the position of another statute that was authored by one of the PATRIOT Act's biggest critics, Senator Leahy of Vermont, from one part of the criminal code to the other. And I can say that the reauthorization put significant additional civil-liberties protections into the use of national security letters that were not there in the original Leahy-Kastenmeier legislation of 1986.

Now, you know, all of that being said, given the debate over the PATRIOT Act, could you kind of give somewhat of an argument over why the Administration has come down in favor of extending the three expiring provisions of the PATRIOT Act without amendment?

Mr. HINNEN. Thank you, Mr. Ranking Member.

Just to clarify, the Administration's position is to reauthorize the three expiring provisions. And the Administration has indicated that it is open to discussion of amendments so long as those amendments both maintain the operational effectiveness of the authorities and protect privacy and civil liberties.

And I think the reason that has been the position of the Administration is because we recognize the need to strike this continuing balance between effective intelligence investigative authorities on the one hand and the privacy and civil liberties of Americans on the other. And we are anxious to work collaboratively with Congress to strike that balance.

Mr. SENSENBRENNER. Will the Administration put the heat on Congress? Because I fear what would happen if December 31st comes and goes and the three expiring provisions effectively do expire. What would be the consequence of Congress letting this slip through the cracks, in your opinion?

Mr. HINNEN. As I mentioned in my opening statement, Mr. Ranking Member, we feel that these are very important investigative authorities and that it would be very unfortunate to allow them to lapse. The Administration firmly supports renewal before

December 31 so that there is no gap in the investigative capabilities of the government.

Mr. SENSENBRENNER. Thank you.

I yield back the balance of my time.

Mr. NADLER. I thank the gentleman.

I now recognize for 5 minutes the distinguished Chairman of the full Committee, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

Welcome, Mr. Hinnen. Is this the first time you have testified before Judiciary?

Mr. HINNEN. Yes, it is.

Mr. CONYERS. How long have you been in the Department of Justice?

Mr. HINNEN. Since January 21, 2009, Mr. Chairman.

Mr. CONYERS. January 21. You know, you sound like a lot of people from DOJ that have come over here before, and yet you have only been there a few months. Do you think that is a good thing or a bad thing?

No, okay, you don't have to respond to that.

Let me ask you something. Do you know how many times the PATRIOT Act has been challenged in the Federal courts?

Mr. HINNEN. I have not counted, Mr. Chairman. I know that various provisions of it have been challenged a number of times.

Mr. CONYERS. Uh-huh. How about five?

Mr. HINNEN. I will take the Chairman's word for it.

Mr. CONYERS. All right. Thank you.

Now, I refer now to something I think you know about. The inspector general described an incident in which the Foreign Intelligence Surveillance Act Court refused to issue a 215 order because the request intruded on first amendment rights. Do you remember that case?

Mr. HINNEN. With due respect, Mr. Chairman, unless we are discussing one of the declassified opinions of the FISA Court, that is not something I am at liberty to discuss here in this setting.

Mr. CONYERS. You are not at liberty to discuss it? It has been in the newspapers. We are discussing it. I have had a secret clearance before you, longer than you.

Mr. HINNEN. I can readily believe that, Mr. Chairman. However, the fact that it has been published in the newspapers does not mean that it has been declassified and does not mean that it is appropriate for discussion in an open hearing here today.

Mr. CONYERS. Well, just a minute. Let me turn to the chief of staff of the House Judiciary Committee.

Well, would you say that the inspector general, who oversights intelligence, can refer to matters like this and have them published and made public without violating secrecy requirements?

Mr. HINNEN. When the inspector general for the Department of Justice or another part of the intelligence community desires to make part of a report public, he works closely with the intelligence community to ensure that the information is appropriately declassified before it is publicly released.

Mr. CONYERS. Well, the inspector general has had it redacted. Are you questioning the inspector general's knowledge of the law since January 21——

Mr. HINNEN. Certainly not.

Mr. CONYERS [continuing]. Of 2009?

Mr. HINNEN. Certainly not, Mr. Chairman. Merely proceeding out of an abundance of caution in light of the fact that inspectors general often issue both classified and unclassified versions of reports. And I don't have——

Mr. CONYERS. Well, have you ever seen the unclassified version of the inspector general's criticism of the fact that these orders were being issued and he refused to let it—you never heard of this ever happening before? There were several cases—there were several instances in the same case which this occurred.

Mr. HINNEN. I am familiar with the inspector general's report on 215 orders and familiar with the fact that the business records provision, like other parts of FISA, contain express protections for first amendment rights.

Mr. CONYERS. Okay. Now, what about the FBI? How do you consider their ability to handle classified, unclassified, and redacted information? Pretty good?

Mr. HINNEN. I think the FBI——

Mr. CONYERS. Okay. The FBI went and issued a national security letter for the same information, and the inspector general described it as "inappropriate." And I consider it much worse than that.

Here is the problem. It is very simple. What the court, the intelligence court, and what the inspector general were complaining about is that you could get around the court's refusal to issue an order in a terrorist investigation by merely going to the FBI, getting around them, and they issue a national security letter for the very same information. Problem: That means that the court and the inspector general found that there was an abuse of process in handling this terrorist investigation.

And I am going to have my staff supply you or your staff with all of this information, all of which is public.

Mr. HINNEN. Thank you, Mr. Chairman.

Now that I am clear on which reports we are referring to, if you will give me a moment to respond.

Mr. CONYERS. All right.

Mr. HINNEN. In 2007, the inspector general published its first report on national security letters, which found some sloppy record-keeping and administrative errors by the Federal Bureau of Investigation, in part because of the Byzantine nature and interaction of the five governing statutes.

In 2008, the inspector general issued a follow-up report that indicated that many of those issues had been fixed and provided recommendations for the government to make further improvements.

Since that time, the Federal Bureau of Investigation has put into place a new data subsystem governing NSLs that prevents many of the administrative errors and ensures much of the record-keeping that the inspector general found was in error in the 2007 report.

In addition, the National Security Division, where I work, has increased its oversight efforts and now does national security reviews of FBI field offices on an annual basis. And, of course, Congress and the inspector general maintain their oversight authority.

Mr. CONYERS. Well, I am glad your memory has been refreshed. That is wonderful.

What we have here are a whole series of problems. This is just one case that we have been discussing all this time. There are great privacy problems.

Have you ever examined, in the course of your official duties, the American Civil Liberties Union's comments about our discussion about privacy?

Mr. HINNEN. I am certainly familiar with many of their comments and with their testimony today, yes.

Mr. CONYERS. And do you find any serious disagreements with any parts of it?

Mr. HINNEN. I do find myself in disagreement with some parts of their testimony, yes, Mr. Chairman.

Mr. CONYERS. And some parts you find agreement with?

Mr. HINNEN. Certainly.

Mr. CONYERS. If I could indulge the Chairman's generosity for sufficient time——

Mr. NADLER. Without objection.

Mr. CONYERS [continuing]. To just identify the parts that you find yourself in agreement with and the parts that you may not be so enthusiastic about.

Mr. HINNEN. With due respect, Mr. Chairman, you have asked me about the ACLU's positions in general. I would——

Mr. CONYERS. No, not in general. No.

Mr. HINNEN. With respect to these provisions and with respect to the PATRIOT Act.

Mr. CONYERS. Yes.

Mr. HINNEN. I would note that their testimony on that subject today is 35 single-spaced pages. I would be happy to—I simply don't think that the Committee has——

Mr. CONYERS. No, I wouldn't want to do that. But, well, let's use numbers. Let's indicate to me how many things you agree with in that 35 single-spaced closed printing that you found agreement with and how many issues that you found some disagreement with.

Mr. HINNEN. Mr. Chairman, I didn't investigate the testimony with a mind to try and determine what percentage I agreed with and what I didn't.

Mr. CONYERS. Probably not. I can understand that.

Mr. HINNEN. The best that I can say is that I agree with some parts of it and disagree with others.

Mr. CONYERS. Uh-huh. And how will we find out which parts you agreed with and which parts you didn't?

Mr. HINNEN. Hopefully, Mr. Chairman, through the dialogue that the Subcommittee is embarking upon today——

Mr. CONYERS. Well, how about you sending us a memo identifying it in some detail, or as much or as little as you want since I will write you back if we need more?

Mr. HINNEN. I would be happy to take that back to the Department, Mr. Chairman.

Mr. CONYERS. Well, I am going to take it back to the Department with you. And thank you very much for your testimony.

Mr. HINNEN. Thank you for your questions.

Mr. NADLER. Thank you.

The gentleman from Florida is recognized for 5 minutes.

Mr. ROONEY. Thank you, Mr. Chairman.

Mr. Hinnen, I also started my current employment in January, so hopefully this question is fairly simple.

Last week, Senator Feingold introduced legislation that, amongst other things, repeals Title VIII of FISA, which provided civil liability protections to telecommunication carriers who assisted the government following the 9/11 terrorist attacks, a provision that President Obama voted for.

To your knowledge, does the Administration support this proposal?

Mr. HINNEN. Congressman Rooney, the Administration has taken no official position on this or any other provision of Senator Feingold's bill.

As you noted in your question, the President did vote for the FISA Amendments Act as a Senator, and DOJ has defended the immunity provision in litigation. So, without forecasting an official position, as the President has suggested, it may be more productive to look forward to meet the challenges still before us than to reopen debates resolved in the past.

Mr. ROONEY. Thank you.

Thank you, Mr. Chairman.

Mr. NADLER. Thank you.

I now recognize the gentleman from Georgia for 5 minutes.

Mr. JOHNSON. Thank you, Mr. Chairman.

And I think this issue clearly draws a distinction between the two basic philosophies that the Supreme Court would use in solving the case. Would it be a strict construction kind of analysis, or would it be by chance the acknowledgment that the Constitution is a living and breathing document and has to be interpreted in accordance with the realities of the time?

And so it would be interesting to see how the United States Supreme Court handles this, whether or not it will be a strict construction or whether or not we will have Supreme Court justices legislating from the bench, as they like to call it.

But, at any rate, the issue on roving wiretaps enables the government to target persons rather than places. And "places" is the term used in the fourth amendment. Search warrants must, quote, "particularly describe the place to be searched," end quote.

Are there any other provisions of the United States Constitution or the Bill of Rights upon which the Administration would depend on for justifying the extension of the act with respect to roving wiretaps?

Mr. HINNEN. If I understand the question correctly, the Administration feels that the roving surveillance authority is fully constitutional. Although the fourth amendment text speaks specifically of places, the Supreme Court has recognized, going back to the Katz decision in which an individual using a telephone booth was found to be protected by the fourth amendment, that the fourth amendment protects persons as well as places.

And so, I think it is against that constitutional backdrop that consideration of the roving authority has to be undertaken. Having said that, I think that the provision readily meets constitutional scrutiny.

Mr. JOHNSON. Well, have there been any court decisions that have extended the definition, if you will, of place to be searched to be described in particularity?

Mr. HINNEN. I think the fourth amendment jurisprudence has applied the fourth amendment in a wide variety of places and contexts.

Mr. JOHNSON. Has it ever extended that particular provision of the fourth amendment?

Mr. HINNEN. I am not sure I understand how——

Mr. JOHNSON. In other words, have there been any cases where the issue was whether or not an extension of—this is not a very artfully posed question.

In other words, we have the fourth amendment that says search warrants must, quote, "particularly describe the place to be searched." Have there been any court rulings that you know of which have extended the plain intent of the Founders in that situation?

Mr. HINNEN. I think I understand, and I apologize. I think my answers have been inartful.

The FISA Court in the past has recognized that, given the specific needs of intelligence investigations, a probable-cause showing with respect to the fact that the individual is an agent of a foreign power is sufficient, regardless of the place to be searched or that kind of thing.

In the roving authority, it is important that the government has to demonstrate to the court probable cause that the identified or specifically described individual is an agent of a foreign power.

And I think it is that provision, together with the probable cause requirement that the government show that the cell phone or facility will be used by that target, that renders the roving authority constitutional. In other words, it is the specific description or identification of the target that renders it constitutional.

Mr. JOHNSON. One last question, if I may, Mr. Chairman.

Does the roving wiretap provision of the PATRIOT Act, does it allow U.S. citizens to be subject thereto?

Mr. HINNEN. The statutory definition that roving relies upon refers to both parts of the "foreign power" definition in the Foreign Intelligence Surveillance Act. So it can apply, if the other conditions of the statute are met, to a United States person who has demonstrated to be acting on or behalf of a foreign power; it can also apply in a circumstance where the target is a non-U.S. person but meets one of the other statutory definitions.

Mr. JOHNSON. And who would determine whether or not there is probable cause—that would be the standard that would apply—probable cause to believe that a United States citizen was cooperating or being a tool of a foreign power or terrorist organization?

Mr. HINNEN. The FISA Court—under the 1978 legislation that Congress passed, the FISA Court would exercise independent oversight of the government's showing with respect to whether there is probable cause that an individual is an agent of a foreign power.

Mr. JOHNSON. And that would take place before or after the wiretap, if you will, were instituted?

Mr. HINNEN. With respect to the fact that the individual is an agent of a foreign power, that probable-cause showing is made before the wiretap order is granted by the court.

Mr. JOHNSON. Say that again?

Mr. HINNEN. With respect to the probable-cause requirement that the individual targeted is an agent of a foreign power, that determination is made by the FISA Court before surveillance is authorized.

Mr. JOHNSON. Is that just limited to U.S. citizens, or does it also have to be shown by probable cause with respect to a non-U.S. citizen?

Mr. HINNEN. That is with respect to any target of surveillance under the Foreign Intelligence Surveillance Act.

And I should drop a footnote to that and mention that there is emergency authority provided by the statute pursuant to which the Attorney General can begin surveillance and demonstrate probable cause within 7 days afterwards.

But, in the vast majority of cases, in the standard FISA case, the government must always demonstrate probable cause to the FISA Court before surveillance begins that the individual is an agent of a foreign power.

Mr. JOHNSON. Thank you, sir.

Mr. NADLER. The gentleman's time has expired.

I now recognize the gentleman from Iowa.

Mr. KING. I thank you, Mr. Chairman.

And I am plenty happy with the latitude given my friend, Mr. Johnson, because he doesn't have to speak as quickly as I have to in the environment that I originate in. Neither would it be the case for the New Yorkers, who can get it out pretty quickly as well.

Mr. NADLER. Nobody speaks as quickly as the gentleman from Massachusetts.

Mr. KING. That is well made.

And I thank the witness for his testimony here.

And I just ask if you are familiar with the case that has unfolded in New York, the plot against Grand Central Terminal, and the transfer of information and people from Denver to New York, the communications that are the background of that, and if the gentleman can advise this Committee as to whether the PATRIOT Act was utilized in any of that investigation.

Mr. HINNEN. Thank you for the question.

I am familiar, obviously, with the case. As we have discussed today, and as the Supreme Court, the FISA Court, and Congress have repeatedly emphasized, secrecy is often critical to the success of national security investigations. And it is unfortunate when those investigations are jeopardized by a leak, as was the case, and has resulted in those articles.

I am afraid that, because the authorities used to investigate that case or that may have been used to investigate that case are authorities before the FISA Court, I am not at liberty to discuss them in an open hearing here today.

Mr. KING. Would you care to reclarify that statement, "was or may have been used"?

Mr. HINNEN. May have been used, yes.

Mr. KING. I thought you might want to reiterate——

Mr. HINNEN. Thank you, Congressman.

Mr. KING [continuing]. That, Mr. Hinnen.

And nothing prevents me from speculating or speaking in terms of hypotheticals. And I will just ask you to go to wherever your limit is, and we will accept that.

As I read the news on this particular case, and I can only contemplate as to what might have happened if the case hadn't been broken, and that then we can imagine that there may have been an attack that took place already or one that was unfolding that we would have no knowledge of that could have detonated one or more devices at Grand Central Terminal or around the various locations in New York City. I am very grateful that there have been a significant number of plots that have been, that have been broken open on the part of our security personnel all the way across the spectrum of our law enforcement from top to bottom, and sometimes we got lucky when we got a regular American citizen that weighed in on it, that little tip was handled well, we have been safe for a long time.

But if one were to try to imagine a case that would have similarities to this one, or maybe one that you can testify on, can you paint a scenario by which we would have not have been able to gather the data necessary to break a terrorist plot without the PATRIOT Act?

Mr. HINNEN. If I understand the question correctly, yes, I think there are circumstances that are not difficult to imagine, some of which I referred to in my opening testimony in which the absence of any of the three investigative authorities that are up for renewal this year would hamper the government's ability to effectively investigate an imminent plot.

Mr. KING. Let me pose the question this way, as I listened to Chairman Conyers talk about it and ask you to go on record as to parts of the report that you agree and the ones you disagree with, is it possible for you to present to this Committee as a matter of a formal request, a list of the plots that have been broken since the PATRIOT Act was passed and the successes of the PATRIOT Act, and then, point to the sections in the code that were utilized among those that are not currently under investigation so that you could divulge that information in a public fashion?

As this Committee weighs the idea of reauthorizing the PATRIOT Act, I would think that we should be able to weigh the successes of the PATRIOT Act, as well as be able to point to the calamities that might have taken place had we not had the PATRIOT Act? Would that be possible, Mr. Hinnen?

Mr. HINNEN. I certainly think that something along those lines would be possible and I'll take that request back to the Department.*

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*The expiring USA PATRIOT Act provisions are all Foreign Intelligence Surveillance Act (FISA) tools designed to collect foreign intelligence information and as such are not commonly used to build criminal cases. If information obtained through FISA is used in a criminal proceeding, it is acknowledged and handled under the rules of discovery and statutory requirements. However, because the protection of sources and methods is paramount, any specific surveillance techniques (such as roving wire taps) used to obtain such information would not ordinarily be revealed. *See generally* 50 U.S.C. § 1806. Thus, even if there were cases where these techniques were used, such techniques would not have been publicly disclosed and the Department cannot provide unclassified examples.

Mr. KING. I expect that given their interest in this reauthorization, that they'll be eager to provide that information. And without belaboring the point, but watching the clock, I would just, I would point out that as I sit here and listen to the cross examination and the discussion that's taken place, I can't help but think what if this hearing were taking place in the middle of smoke and dust coming out of the ground at Grand Central Terminal? Wouldn't there be an entirely different tone to this discussion today? If the PATRIOT Act has saved at this point hypothetically but uncountable American lives. We have been able to avoid a domestic attack of any significant success in the United States since September 11, 2001, and so I'd just ask when you contemplate if they had been successful, how the tone of this discussion might have changed.

Mr. HINNEN. Well, I would hope, Congressman, that the tone of the discussion would be careful and deliberative and designed to ensure that the intelligence investigative authorities that resulted were effective and gave intelligence officers the tools that they need to do their jobs, while, at the same time, protecting American's privacy and civil liberties. So I hope that, although we would all have reason to grieve or mourn if that were the case, that the tone of the debate and the substance of the debate would be very similar to the one that we are having right now, and that I expect the other witnesses will have when they have an opportunity to testify as well.

Mr. KING. And then in conclusion, and I thank the witness. I'd just point out that because we don't have a calamity to discuss this, we need to make sure that we evaluate it within the light of what might have happened. I urge that consideration to the panel. And I would thank the witness and yield back the balance of my time.

Mr. NADLER. The gentleman's time has expired. I thank the gentleman, and I thank the witness. We look forward to your providing us with the information that you have said you would. I thank you. We will now proceed with our second panel. And I would ask the witnesses to take their places. In the interest of time, I will introduce them while they are taking their seats. Suzanne Spaulding is currently a principal in Bingham Consulting Group and of counsel to Bingham McCutchen, where she advises clients on issues related to national security. Ms. Spaulding was Democratic Staff Director for the U.S. House of Representatives Permanent Select Committee on Intelligence. She had started working on terrorism and other national security issues 20 years earlier in 1983 as Senior Counsel, and later Legislative Director for Senator Arlen Specter. After 6 years at the Central Intelligence Agency where she was Assistant General Counsel and the Legal Adviser to the Director of Central Intelligence's Nonproliferation Center, she returned to the Hill as general counsel for the Select Committee on Intelligence.

She served as the executive director of two Congressionally-mandated commissions: The National Commission on Terrorism, chaired by Ambassador L. Paul Bremer, III, and the Commission to Assess the Organization of the Federal Government to Combat the Proliferation of Weapons of Mass Destruction, chaired by former Secretary of Defense and CIA Director John Deutch. She advised both the Advisory Panel to assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction,

the Gilmore Commission, and President George W. Bush's Commission on the Intelligence of the United States regarding weapons of mass destruction, the Robb/Silberman commission.

She is currently a member of the CSIS Commission on cybersecurity for the 44th presidency. In 2002, she was appointed by then-Virginia Governor Mark Warner to the Secure Commonwealth Panel established after the attacks of September 11 to advise the governor and the legislature regarding preparedness and response issues in the Commonwealth of Virginia. She received her undergraduate and law degrees from the University of Virginia.

Tom Evans represented Delaware in the House of Representatives from 1977 to 1983. He served as co-Chairman and operating head of the Republican National Committee, Deputy Chairman of the Republican National Finance Committee and the Republican National Committeemen from Delaware. He was also Chairman of the Congressional Steering Committee of the Reagan for President Committee, served on the executive committee of the Reagan Bush campaign and was vice chairman of the congressional campaign committee with responsibility for White House liaison. Tom Evans also served as a member of an informal group known as the Reagan kitchen cabinet that directly and regularly advised the President on a broad range of issues.

In Congress he was a Member of the House Banking Committee and the Merchant Marines and Fisheries Committee. He has a BA and an LLD from the University of Virginia.

Ken Wainstein, and I hope I pronounced that correctly, is a partner in O'Melveny's Washington, D.C. Office and a member of the White Collar Defense and Corporate Investigations Practice. He focuses his practice on handling civil and criminal trials and corporate internal investigations. Mr. Wainstein spent 19 years in the Department of Justice, from 1989 to 2001. He served as Assistant U.S. attorney in both the Southern district of New York and the District of Columbia. In 2001, Mr. Wainstein was appointed director of the executive office for U.S. attorneys. The next year, Mr. Wainstein joined the Federal Bureau of Investigation to serve as general counsel and later as Chief of Staff to Director Robert S. Mueller. Two years later he was appointed and later confirmed as U.S. Attorney for the District of Colombia.

In 2006, he became the first Assistant Attorney General forNationaal security at the Justice Department. In 2008, Mr. Wainstein was named President Bush's homeland security adviser, with a portfolio covering the coordination of the Nation's counterterrorism, homeland security, infrastructure protection and disaster response and recovery efforts. He has a BA from the University of Virginia and a JD from the University of California at Berkeley.

Mike German is a policy counsel for the American Civil Liberties Union's Washington legislative office. Prior to joining the ACLU, Mr. German served 16 years as a special agent with the FBI, where he specialized in domestic terrorism and covert operations. Mr. German served as an adjunct professor for law enforcement and terrorism at the National Defense University and is senior fellow of globalsecurity.org. He has a BA in Philosophy from Wake

Forest University and a JD from Northwestern University law school.

I am pleased to welcome all of you. Your written statements will be made part of the record in their entirety. I would ask each of you to summarize your testimony in 5 minutes or less. To help you stay within that time, there is a timing light at your table. When 1 minute remains the light will switch from green to yellow and then red when the 5 minutes are up.

Before we begin, it is customary for the Committee to swear in its witnesses.

[Witnesses sworn.]

Mr. NADLER. Let the record reflect that the witnesses answered in the affirmative. You may be seated. Our first witness is Susan Spaulding who is recognized for 5 minutes.

TESTIMONY OF SUZANNE E. SPAULDING, FORMER STAFF DIRECTOR, HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE

Ms. SPAULDING. Thank you, Subcommittee Chairman Nadler, full Committee Chairman Conyers, and Members of the Committee. Thank you for inviting me to participate in today's hearing on the USA PATRIOT Act and related provisions. Earlier this month, we marked another anniversary of the attacks of September 11. In the 8 years since that indelible manifestation of the terrorist threat, we've come to better understand that respect for the Constitution and the rule of law is a source of strength and can be a powerful antidote to the twisted lure of the terrorist's narrative. In fact, after spending 20 years working terrorism and national security issues for the government, I am convinced that this approach is essential to defeating the terrorist threat. Given this national security imperative, Congress should use this opportunity to more broadly examine ways to improve our overall domestic intelligence framework, including a comprehensive review of the FISA, National Security Letters, attorney general guidelines and applicable criminal investigative authorities, and I would encourage the Administration to do the same.

This morning, however, I will focus on the sunsetting provisions that are the focus of this hearing. Sections 215 and 206 both have corollaries in the criminal code. Unfortunately, important safeguards were lost in the translation as these moved into the intelligence context. Section 206, for example, was intended to make available in intelligence surveillance the roving wire tap authority that criminal investigators had. This was an essential update.

However, there are specific safeguards in the criminal title three provisions that were not carried over to FISA, requirements that provided significant safeguards designed to protect fourth amendment rights of innocent people. Their absence in section 206 increases the likelihood of mistakes and the possibility of misuse. In addition, in the criminal context where the focus is on successful prosecution, the exclusionary rule serves as an essential deterrent against abuse, one that is largely absent in intelligence investigations where prosecution may not be the primary goal. This highlights the care that must be taken when importing criminal authorities into the intelligence context and why it may be necessary

to include more vigorous standards or safeguards, and I have suggested some in my written testimony.

Similarly, section 215, governing orders for tangible things, attempted to mimic the use of grand jury or administrative subpoenas in the criminal context. However, criminal subpoenas require some criminal nexus. FISA's section 215 does not. Moreover, the PATRIOT Act amendments broadened this authority well beyond business records to allow these orders to be used to obtain any tangible things from any person.

This could include an order compelling you to hand over your personal notes, your daughter's diary or your computer, things to which the fourth amendment clearly applies. Again, in my written testimony I have tried to suggest ways to tighten the safe guards for section 215 without impairing the national security value of this provision. In the interest of time, however, I will move to the lone wolf provision.

Four years ago, I urged Congress to let this provision sunset and I reiterate that plea today. The Administration admits that the lone wolf authority has never been used, but pleads for its continuation just in case. The problem is that this unnecessary provision comes at a significant cost, the cost of undermining the policy and constitutional justification for the entire FISA statute, a statute that is an extremely important tool for intelligence investigations. The legislative history in court cases before and after the enactment of FISA, including two cases from the FISA court itself make clear that this extraordinary departure from the normal fourth amendment warrant standards is justified only by the unique complications inherent in investigating foreign powers and their agents.

Unfortunately, instead of repealing or fixing the lone wolf provision, Congress expanded it by adding a person engaged in the international proliferation of weapons of mass destruction. There's no requirement that this person even knows that they are contributing to proliferation. A non U.S. person working for an American company whose involved in completely legal sales of dual use goods that unbeknownst to her are being sold to a front company for use in the development of chemical weapons, for example, could be considered to be engaged in the proliferation of WMD and thereby have all of her communications intercepted and home secretly searched by the U.S. Government. As the former legal adviser for Intelligence Community's nonproliferation center and executive director of a congressionally mandated WMD Commission, I fully understand the imperative to stop the spread of these dangerous technologies. However, there are many tools available to investigate these activities without permitting the most intrusive techniques to be used against people who are unwittingly involved and whose activity is perfectly legal.

Let me close by commending the Committee for its commitment to ensuring that the government has all appropriate and necessary tools at its disposal in this vitally important effort to counter today's threats, and that these authorities are crafted and implemented in a way that meets our strategic goals as well as our tactical needs. With a new Administration that provokes less fear of the misuse of authority, it may be tempting to be less insistent

upon statutory safeguards. On the contrary, this is precisely the time to seize the opportunity to work with the Administration to institutionalize appropriate safeguards in ways that will mitigate the prospect of abuse by future Administrations or by this Administration in the aftermath of an event. Thank you very much.

Mr. NADLER. Thank you.

[The prepared statement of Ms. Spaulding follows:]

PREPARED STATEMENT OF SUZANNE E. SPAULDING

Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Judiciary Committee

United States House of Representatives

Hearing on the USA PATRIOT Act

Tuesday, September 22, 2009

Testimony
of
Suzanne E. Spaulding, Esq.

Chairman Nadler, Ranking Member Sensenbrenner, and members of the Committee, thank you for inviting me to participate in today's hearing on the USA PATRIOT Act and related provisions. Four years ago, I testified in Congress, including in front of the House Judiciary Committee, regarding the provisions of the PATRIOT Act that were designated to sunset in 2005. A number of the concerns with the original language in the Act were addressed in the Reauthorization Act of 2006. However, some remain, particularly some of the overarching issues, and some were compounded in subsequent legislation.

As I attempt to address these issues this morning, I am mindful that we recently marked another anniversary of the attacks of September 11, 2001. This indelible manifestation of the terrorist threat continues to fuel our determination to ensure that those in our government who work so tirelessly to protect us from another attack have the tools they need and that we are not undermining their efforts by failing to consider strategic as well as tactical objectives. In the eight years since 9/11, we have learned a great deal about the nature of the terrorist threat and the best ways to combat it. Armed with that wisdom, and with determination rather than fear, it is appropriate--and important for our national security-- that we continue to reexamine our response.

We have to demonstrate that we still believe what our founders understood; that respect for civil liberties is not a luxury of peace and tranquility. Instead, in a time of great peril, it was seen as the best hope for keeping this nation strong and resilient. The men who signed the Constitution and those who developed the Bill of Rights were not fuzzy-headed idealists but individuals who had fought a war and knew that they faced an uncertain and dangerous time. Respect for the Constitution and careful efforts to ensure that our laws protect the rights enshrined therein are a source of strength and can be a powerful antidote to the twisted lure of the terrorist's narrative. In fact, after spending nearly 20 years working terrorism issues for the government, I am convinced that this approach is essential to defeating the terrorist threat.

With this understanding of the national security imperative, I support this committee's intention not to limit its review to those few provisions that are scheduled to sunset. Instead, Congress should use this opportunity to examine ways to improve other domestic intelligence laws as well, such as the various provisions for national security letters. As I have urged before, Congress should undertake a comprehensive review of domestic intelligence activities, and I would encourage the Administration to do the same.

The legal framework for domestic intelligence has come to resemble a Rube Goldberg contraption rather than the coherent foundation we expect and need from our laws. The rules that govern domestic intelligence collection are scattered throughout the US Code and in a multitude of internal agency policies, guidelines, and directives, developed piecemeal over time, often adopted quickly in response to scandal or crisis and sometimes in secret. They do not always reflect a firm understanding of why intelligence collection needs to be treated differently than law enforcement investigations, the unique intelligence requirements for homeland security, the impact of dramatic changes in technology, and the degree to which respect for civil liberties, fundamental fairness, and the rule of law is essential to winning the battle for hearts and minds--and, therefore, essential to our homeland security.

The various authorities for gathering information inside the United States, including the authorities in FISA, need to be considered and understood in relation to each other, not in isolation. For example, Congress needs to understand how FISA surveillance authority relates to current authorities for obtaining or reviewing records, such as national security letters, Section 215, the physical search and pen register/trap and trace authorities in FISA, and the counterparts to these in the criminal context, as well as other law enforcement tools such as grand juries and material witness statutes.[1]

Executive Order 12333, echoed in FISA, calls for using the "least intrusive collection techniques feasible." The appropriateness of using electronic surveillance or other intrusive techniques to gather the communications of Americans should be considered in light of other, less intrusive techniques that might be available to establish, for example, whether a phone number belongs to a suspected terrorist or the pizza delivery shop. Electronic surveillance is not the "all or nothing" proposition often portrayed in some of the debates.

In addition, President Obama has already committed to asking his Attorney General to conduct a comprehensive review of domestic surveillance. If that review is not already underway, Congress should encourage its initiation. The IG Report on the Terrorist Surveillance Program clearly indicated that there were programs beyond its scope. These need to be examined and a report made to Congress and, to the maximum extent possible, to the public.

I understand that today's hearing, however, is particularly focused on the provisions that will sunset at the end of this year, so the balance of my testimony will address those.

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[1] See, for example, the May 2008 OIG Report on Section 215, which cites concerns about the FBI's use of NSLs to get information "after the FISA Court, citing First Amendment concerns, had twice declined to sign Section 215 orders in the same investigation." The IG questioned the appropriateness of this "because NSLs have the same First Amendment caveat as Section 215 requests and the FBI issued the NSLs based on the same factual predicate, without further reviewing the underlying investigation to ensure that it was not premised solely on protected First Amendment conduct." OIG Report at 5.

Distinguishing between domestic intelligence operations and criminal law enforcement investigations

Sections 215 and 206 of the PATRIOT Act, like most domestic intelligence authorities, both have corollaries in the criminal context. This was often cited as justification for providing for these authorities in the intelligence context: "if we can do these kinds of things when investigating drug dealers, certainly we should have this authority for intelligence operations against terrorists." It's a compelling argument. But sometimes important elements get lost in the translation from the criminal to intelligence realm.

Intelligence operations are often *wide-ranging* rather than specifically focused—creating a greater likelihood that they will include information about ordinary, law-abiding citizens; they are conducted in *secret*, which means abuses and mistakes may never be uncovered; and they *lack safeguards* against abuse that are present in the criminal context where inappropriate behavior by the government could jeopardize a prosecution. These differences between intelligence and law enforcement help explain this nation's long-standing discomfort with the idea of a domestic intelligence agency.

Because the safeguards against overreaching or abuse are weaker in intelligence operations than they are in criminal investigations, powers granted for intelligence investigations should be no broader or more inclusive than is absolutely necessary to meet the national security imperative and should be accompanied by rigorous oversight within the executive branch, by Congress and, where appropriate, in the courts.

Unfortunately, this essential caution was often ignored in the FISA amendments contained in the PATRIOT Act. The authority actually became *broader* as it moved into the intelligence context and oversight was not always accordingly enhanced.

Section 206: Roving Wiretaps

Section 206 was intended to bring the roving wiretap authority that is available in criminal investigations into the realm of intelligence surveillance under FISA. This was an essential update but some important safeguards in the criminal provisions were lost in the transition.

In a criminal investigation, under Title III, roving wiretap applications must definitively identify the target of the surveillance. FISA roving wiretaps need only provide "a description of the target" if the identity is not known. This less rigorous standard increases the prospect that the government may wind up mistakenly intercepting communications of innocent persons.

In addition, Title III permits surveillance only when it is reasonable to assume that the suspect is "reasonably proximate" to the instrument that is being tapped--and only one instrument can be tapped at a time. This requirement, like the requirement to identify the target, was designed to reduce the likelihood that communications of innocent persons would be intercepted. This requirement is not in section 206.

Title III also differs from the FISA roving wiretap in requiring that the target be notified of the surveillance, generally 90 days after the surveillance ends. This notice requirement is understandably absent in the intelligence context but so, too, is the safeguard that notice provides as a mechanism to deter and detect mistakes or abuses.

Deterrence is also weakened in the intelligence context because prosecution is usually not the goal. In the criminal context, where the focus is on successful prosecution, the exclusionary rule serves an essential function, one that is largely absent in intelligence operations. As the Supreme Court explained in *Terry v. Ohio*, 392 U.S. 1 (1968):

> Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging

> lawless police conduct. *See Weeks v. United States*, 232 U.S. 383, 391-393 (1914). Thus, its major thrust is a deterrent one, *see Linkletter v. Walker*, 381 U.S. 618, 629-635 (1965), and experience has taught that it is the only effective deterrent to police misconduct in the criminal context, and that, without it, the constitutional guarantee against unreasonable searches and seizures would be a mere "form of words." *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).
>
> ...
>
> Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.

Combine this with a statutory standard that is less rigorous than the criminal standard, both as regards the identity of the target and the proximity to the instrument, and you compound the risk of mistake or abuse. This highlights the care that must be taken when importing criminal authorities into the intelligence context, and why it may be necessary to include more rigorous standards and/or other safeguards.

For example, Congress should consider tightening the language to require the judge to determine that the target has been described with sufficient particularity to distinguish him or her from other potential users of the instrument or facility being surveilled.

Similarly, while it is possible that the proximity requirement is somehow included in the minimization procedures that are called for in section 206, Congress may want to consider explicitly including this requirement in the statute, as it is in Title III.

Finally, perhaps the FISA judge should have the discretion to impose a time limit on the lack of notice, giving the government an opportunity to argue for an extension if circumstances warrant it.

Section 215: Tangible Things Orders

Section 215 of FISA also imported into the intelligence realm authority similar to that traditionally exercised in criminal investigations, in this case attempting to mimic the use of grand jury or administrative subpoenas.

However, the criminal investigative tools require some criminal nexus. Not necessarily that a crime has already been committed, but that the activity that is being investigated would violate a criminal statute. Under our constitution, criminal activity must be well defined so that individuals are clearly on notice with regard to whether their actions may violate the law and thus invite government scrutiny.

When the authority moved into the intelligence context, however, the requirement for a criminal nexus was dropped. Instead, section 215 orders require only that the information demanded by the government is "relevant to an authorized investigation (other than a threat assessment) … to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities"

Consider this language. It does not say "an investigation into international terrorism activities"—which would at least mean there was some specific international terrorism activity being investigated. Instead, it says "an investigation *to protect against* international terrorism." This very broad language may or may not involve criminal activity and provides potentially far greater flexibility than criminal subpoenas. Again, this may be appropriate for the wide-ranging nature of intelligence collection-- but it also provides greater opportunity for abuse and mistakes. Amending the language to read "an investigation of international terrorism activities" should meet the national security imperative and provide better protection for innocent persons.

The Reauthorization Act of 2006 attempted to address this concern by adding a provision that the things being sought are "presumptively relevant to an authorized investigation if the applicant shows in the statement of the facts that they pertain to **(i)** a foreign power or an agent of a foreign power; **(ii)** the activities of a suspected agent of a

foreign power who is the subject of such authorized investigation; or **(iii)** an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of such authorized investigation."[2]

The impact of this added language is not entirely clear. First, the third category, which includes anyone "known to" a suspected agent of a foreign power, is extremely broad and clearly could include completely innocent Americans. David Kris and Doug Wilson cite the example of the bank records of a grade-school teacher of the child of a suspected agent of a foreign power.[3] But it could also apply to your daughter's diary if she is in that child's class and known to the parent.

Moreover, this provision does not preclude the issuance of orders pursuant to facts that do not fall within any of these three categories. In other words, this language, by creating a presumption rather than a requirement, does not restrict the extremely broad scope of the term "relevant to" an investigation.

The weak safeguard provided by the "presumptively relevant" language also stems from the context in which Section 215 orders are considered. Creating a "presumption" generally implies a shift in the burden of proof from one party to another in an adversarial proceeding. Section 215 orders are considered in an ex parte proceeding, not in an adversarial context. Once served, an order can be challenged by the recipient but, if served on a third-party record holder, there is very little incentive for that record holder to challenge the order. In fact, the letter from the Department of Justice concedes that "no recipient of a FISA business records order has ever challenged the validity of the order." These record holders cannot be considered as fully representing the interests of the individual whose records are being sought.

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[2] 50 USC 1861(b)(2).

[3] *National Security Investigations & Prosecutions*, David S. Kris and J. Douglas Wilson, Thomson West (2007) at 18:3.

Congress should consider changing the language to remove the presumption and make it clear that the tangible things being sought must be relevant to an authorized investigation *and* fall into one of these three categories.

The Reauthorization Act also added a requirement that the Section 215 application include "*a statement of facts* showing that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation." (Emphasis added.) The requirement to provide facts to back up the government's assertion was an improvement over the PATRIOT Act language, but pre-PATRIOT Act language in this section required the government to provide "specific and articulable facts." This is the standard normally used[4] and should be restored. The "specific and articulable" language may have been dropped in a mistaken belief that Section 215 does not implicate Fourth Amendment or other constitutional concerns. While this argument may have carried weight before the PATRIOT Act changes, it is certainly not valid today.

Section 215 as originally adopted by Congress in 1998 applied only to "records" from "a common carrier, public accommodation facility, physical storage facility or vehicle rental facility." This was properly entitled the "Business Records" provision. The PATRIOT Act amendments now allow the orders to be issued to obtain "any tangible things" from any person. This could include your personal notes, your daughter's diary, or your computer.

Congress should change the title of this provision to "Access to tangible things," to more accurately reflect the broad scope of items now susceptible to such orders. It is certainly not limited to 3rd party records, for example. Thus, even if you accept as still valid the "3rd-party-record rule," a premise that needs serious re-evaluation in light of data aggregation/data mining technology, this section would still include things to which the Fourth Amendment clearly applies. Moreover, as the OIG Report concluded, Section 215

[4] See, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968).

orders can also raise issues related to the Fifth and First Amendments. (See IG Report at 81.)

Finally, Section 215 also puts the burden on the recipient of order to challenge a gag order before the government even has to certify that there would be any harm from disclosure. Congress should consider requiring the government to set forth in the initial application the grounds upon which it believes disclosure will be harmful.[5] And the one-year time frame should apply to the duration of all gag orders, perhaps with the FISA judge having discretion to impose a shorter time frame, renewable indefinitely.

Lone Wolf

Four years ago I urged Congress to let the Lone Wolf provision sunset. I reiterate that plea today.

The Foreign Intelligence Surveillance Act (FISA) is an extremely important and extraordinary national security tool whose policy and constitutional justification is needlessly undermined by the Lone Wolf provision. The Administration's admission that they have never once used the authority seems to provide compelling evidence that it was not needed and is not an essential counterterrorism tool.

The common wisdom "if it ain't broke, don't fix it" was ignored when Congress enacted the "Lone Wolf" amendment to the Foreign Intelligence Surveillance Act (FISA), allowing its use against an individual acting totally alone, with no connection to any foreign power, so long as they are "engaged in international terrorism or activities in preparation therefor." Although the Lone Wolf provision is often referred to as the "Moussaoui fix," in fact, no "fix" was needed in the Moussaui case because it was not FISA's requirements that prevented the FBI from gaining access to his computer back in August of 2001. The problem was a misunderstanding of FISA. This conclusion is

[5] This would be consistent with the federal court decision that found national security letter gag orders that do not require the government to initiate judicial review of the order or provide facts to support its assertions of harm to be an unconstitutional infringement of the First Amendment. *Doe v. Muksasey*, 549 f3d 861 (2d cir. 2008).

supported by the findings of the Joint Congressional Intelligence Committee Inquiry into the 9/11 Attacks, an exhaustive Senate Judiciary Committee inquiry, and the 9/11 Commission.

In order to obtain a FISA order authorizing access to Moussaoui's computer, the FBI needed to show probable cause to believe that Moussaoui was acting "for or on behalf of a foreign power." A foreign power is defined to include a group engaged in international terrorism. There is no requirement that it be a "recognized" terrorist organization. Two people can be "a group engaged in international terrorism." (See *FBI Oversight in the 107th Congress by the Senate Judiciary Committee: FISA Implementation Failures, An Interim Report* by Senators Patrick Leahy, Charles Grassley, & Arlen Specter (February 2003) at p. 17.)

Moreover, the government does not have to "prove" the target's connection to a terrorist group. They must merely meet the "probable cause" standard, which, as the Judiciary Committee Report points out, does not mean "more likely than not" or "an over 51% chance," but "only the probability and not a prima facie showing." The Report concluded that "there appears to have been sufficient evidence in the possession of the FBI which satisfied the FISA requirements for the Moussaoui application" (p. 23). Thus, no "fix" was required to search Moussaoui's computer.

Even if the FBI had not been able to meet the relatively low "probable cause" standard for showing that Moussaoui was working with at least one other person, the FBI could very likely have obtained a criminal warrant to search Moussaoui's computer. They did not pursue that because they were concerned that doing so would preclude them from getting a FISA warrant later if they were turned down for the criminal warrant or ultimately did develop what they thought was sufficient information linking him to a terrorist group. This concern was based on the "primary purpose" test—viewed as precluding the use of FISA if the primary purpose was criminal prosecution rather than intelligence collection—which was subsequently changed in the USA PATRIOT Act. Now

that this "primary purpose" test has been eliminated, and particularly in light of a subsequent opinion by the Foreign Intelligence Surveillance Court of Review, this would no longer be a concern and the government today could seek a criminal warrant without concern of precluding future use of FISA.

The Department of Justice in its letter to the Congress last week stated that this Lone Wolf authority had never been used but argued that we should keep it in FISA just in case. The problem with this reasoning is that it comes at a high cost. In addition to being unnecessary, the Lone Wolf provision—by extending FISA's application to an individual acting entirely on their own-- undermines the policy and constitutional justification for the entire FISA statute.

When Congress enacted FISA, according to the Senate Report, it carefully limited its application in order "to ensure that the procedures established in [FISA] are reasonable in relation to legitimate foreign counterintelligence requirements and the protected rights of individuals. Their reasonableness depends, in part, upon an assessment of the difficulties of investigating activities planned, directed, and supported from abroad ***by foreign intelligence services and foreign-based terrorist groups***." Senate Report 95-701, at 14-15 (emphasis added).

The Congressional debate, and the court cases that informed and followed it, clearly reflect the sense that this limited and extraordinary exception from the normal criminal warrant requirements was justified only when dealing with foreign powers or their agents. In 2002, the FISA Court of Review (FISCR) cited the statute's purpose, "to protect the nation against terrorists and espionage threats directed by foreign powers," to conclude that FISA searches, while not clearly meeting "minimum Fourth Amendment warrant standards," are nevertheless reasonable.[6] In its more recent case upholding the constitutionality of the Protect America Act *as applied*, the FISC again relied upon the

[6] *In re Sealed Case*, 310 F.3rd 717 (Foreign Intel. Surv. Ct. Rev. 2002).

government's decision to apply the authority only to *foreign powers or agents of foreign powers* reasonably believed to be outside the US.[7]

Individuals acting entirely on their own simply do not implicate the level of foreign and military affairs that courts have found justify the use of this extraordinary foreign intelligence tool. The FISA exception to the Fourth Amendment warrant standards was not based simply on a foreign nexus; it did not apply to every non-US person whose potentially dangerous activity transcended US borders. It was specifically limited to activities involving foreign powers.

The requirement that the Lone Wolf must be "engaged in international terrorism or acts in preparation therefore" does not solve this problem. Nowhere in FISA's definition of "international terrorism" is there any requirement for a connection to a foreign government or terrorist group. The definition of international terrorism merely requires a violent act intended to intimidate a civilian population or government that occurs totally outside the United States, or transcends national boundaries in terms of the means by which it is accomplished, the persons it appears intended to coerce or intimidate, or the locale in which the perpetrators operate or seek asylum. This would cover an individual inside the US who buys a gun from Mexico (in what would be an unusual reversal of the normal directional flow of guns) to threaten a teacher in a misguided attempt to get the government to change its policies on mandatory testing in schools.

Nor should we rely upon FISA judges to ensure that an overly broad standard is only applied in ways that are sensible, since the law makes clear that they must approve an application if the standards set forth in the statute are met.

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[7] *In re Directives [redacted text] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, No. 08-1, August 22, 2008.

While the Administration admits to never having used this provision, and concedes that they cannot determine "whether any of the targets will so completely lack connections to groups that they cannot be accommodated under other definitions," the letter from the Department of Justice offers a couple of hypotheticals to justify the "just in case" argument. Keep in mind, however, that even if FISA surveillance and secret search authority were not available, the government can still investigate and, at least in the case of the "known" terrorist, make an arrest. For example, the government can find out all the people with whom each of those individuals is communicating, get their credit card information to see where they are at various times through the day and what transactions they engage in, and put them under physical surveillance. Finally, if there is an urgent need to conduct electronic surveillance before any indicia can be gathered that the person is working with someone else, Title III is a viable option.

If the government can make a compelling case that these investigative tools are inadequate, Congress could consider allowing the government to use authorities in FISA other than the most intrusive authorities of electronic surveillance and physical search to investigate a suspected Lone Wolf. In this way, the government could use Section 215 (and pen register/trap & trace authority, which does not require that the target is an agent of a foreign power), with the attendant secrecy, in order to gather indicia that at least one other person is involved--at which point the electronic surveillance and physical search authorities would be available.

Congress should let the terrorism Lone Wolf provision sunset. By defining an individual acting totally alone, with no connection to any other individual, group, or government, as "an agent of a foreign power," Congress adopted the logic of Humpty Dumpty, who declared: "When I use a word, it means just what I choose it to mean." Unfortunately, this legislative legerdemain stretched the logic of this important statutory tool to a point that threatens its legitimacy. If its use against a true Lone Wolf is ever challenged in court, FISA, too, may have a great fall.

Expansion of Lone Wolf

Unfortunately, instead of repealing or fixing the Lone Wolf provision, Congress expanded it. The FISA Amendments Act enacted last year added to the "agent of a foreign power" definition a non-US person "engaged in the international proliferation of weapons of mass destruction." This not only repeats the error of targeting an individual acting alone, it compounds the concern by removing any requirement that the activity constitute a crime.

The definition of "international terrorism" at least includes a requirement that the activity "involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State." As noted in the discussion above regarding Sections 206 and 215, the requirement for a criminal predicate is significant because, in our system, individuals are held to be on notice, through the careful definitions in the criminal code, of when they are engaging in criminal activity and thereby risking government intrusion, such as electronic surveillance of their communications.

"International proliferation of weapons of mass destruction" is not defined in FISA. Instead, the amendments included a definition of "weapons of mass destruction." The activity that puts an individual at risk of government surveillance, however, is "proliferation" of those weapons. The innocent, unwitting sale of dual-use goods to a foreign front company could be considered proliferation. If so, a non-US person working for an American company who is involved in completely legal sales of such dual-use goods could have all of their communications monitored and their home secretly searched by the US government.

I served as the Legal Adviser for the intelligence community's Nonproliferation Center and as Executive Director of a Congressionally-created WMD commission, so I fully understand the imperative to stop the spread of these dangerous technologies.

However, there are many tools available to investigate these activities without permitting the most intrusive technique--listening to phone calls, reading emails, and secret physical searches--to be used against people who are unwittingly involved and whose activities are legal. This overly broad extension of FISA raises significant constitutional issues.

Congress should add a "knowing" requirement, just as there is for aiding and abeting clandestine intelligence activities. Alternatively, Congress should define "proliferation" to include only activity that would constitute a crime.

Conclusion

Let me close by commending the committee for its commitment to ensuring that the government has all appropriate and necessary tools at its disposal in this vitally important effort to counter today's threats and that these authorities are crafted and implemented in a way that meet our strategic goals as well as tactical needs. With a new Administration that provokes less fear of the misuse of authority, it may be tempting to be less insistent upon statutory safeguards. On the contrary, this is precisely the time to seize the opportunity to work with the Administration to institutionalize appropriate safeguards in ways that will mitigate the prospect for abuse by future Administrations, or even this Administration in the wake of some event.

Thank you.

Mr. NADLER. Congressman Evans, you are recognized for 5 minutes.

TESTIMONY OF THE HONORABLE THOMAS B. EVANS, JR., A FORMER REPRESENTATIVE IN CONGRESS

Mr. EVANS. Thank you, Mr. Chairman, for inviting me today. It's a pleasure to be here. It's always good to be back, and it's good to see my friend, the Chairman of the Judiciary Committee, the gentleman from Michigan, Mr. Conyers. And ladies and gentlemen of the Committee, it's a privilege to——

Mr. NADLER. Could you pull the mike a little closer, please.

Mr. EVANS. I still have 5 minutes?

Mr. NADLER. Yes, we're resetting the clock as we speak.

Mr. EVANS. Well, anyway, it a privilege to be here. I'm delighted to be invited. I'm delighted to see my friend, the Chairman of the Committee, the gentleman from Michigan, Mr. Conyers. And I'm honored to represent the Liberty and Security Committee of the Constitution Project today. You have my previously prepared statement, and attached to it is the Liberty and Security Committee's statement on reforming the PATRIOT Act. One word about the makeup of our Committee. It is truly bipartisan, bipartisan in nature. We address issues, not as Republicans or Democrats, but we need more of that, I think, in this country and here in Washington.

Our membership is broad based, and it includes a number of former U.S. attorneys, some distinguished judges, former judges, professors of law, a few deans of law schools, even a publisher, Mr. Conyers, who is a publisher of the Detroit Free Press, Mr. Lawrence. And I might add, foundation chairman and senior members of the Administration. And I also want you to know that there are a number of conservative Republicans. I am a moderate Republican, but there are a number of conservative Republicans on this Committee, including, several who were Members of this body, constitutional scholars both.

In the wake of the terrible tragedy it's been pointed out of the September 11, 2001, our Nation clearly needed to mobilize in order to respond with a new and powerful counter-terrorism strategy. However, our bipartisan committee believes that there was an over reaction, an over reaction in the super heated fear surrounding Washington and our country at that time, and we should strive never to let our fears lead us to over reaction. And whenever we grant powers to the executive branch of government, we must incorporate proper safeguards to protect individual rights and ensure proper oversight.

That's why I am especially heartened to see this Committee exercising its oversight responsibility which is such a critically important element in our system of checks and balances. The members of the Liberty and Security Committee of the Constitution project have all joined together in the statement on reforming the PATRIOT Act which is attached to my statement for the record. Broadly speaking, we are urging the Congress to initiate some important changes if you proceed with the reauthorization of three provisions that are sunsetted in the PATRIOT Act. Briefly, we believe the business records or library records provision provides largely unchecked powers. We believe they should be tightened,

and the inclusion of a gag order should be limited to 30 days. The lone wolf provision permits the government to use the Foreign Intelligence Surveillance Act for the surveillance of a non U.S. person with no ties to any group or entity. And that's important to remember. Suspects would still be subject to surveillance and search under traditional and well established standards of criminal conduct. The roving wiretap provision concerns us because innocent civilians may become inadvertent targets of surveillance. Two provisions, not scheduled to be sunsetted, are the ideological exclusion provision and the national security letter provision, section 505 of the PATRIOT Act. Let me focus for a minute on the NSLs. That provision does not even require a court order, and creates even greater potential for serious abuse.

Section 505 enabled agents to seek information without any demonstrated factual basis, and it vastly expanded the types of financial institutions that can receive demands through an NSL letter, to include such businesses as travel agencies, real estate firms, insurance companies, automobile dealers. Unfortunately, and sadly, these overly broad powers did not just create the potential for abuse. You pointed those out, Mr. Chairman. Audits by the Inspector General released in 2007 and 2008 have revealed numerous actual abuses in the issuance of NSLs. Let me be clear. The Liberty and Security Committee believes that the FBI should have the tools necessary to protect our citizens. And let me say from a personal standpoint, I strongly believe that. My son could have died. My oldest son could have died in the attack on 9/11. But we strongly believe we need to protect the liberties of Americans. The integrity of our Constitution is critically important. We believe we've struck the proper balance in our recommendations. And I sincerely hope you will consider them carefully as you move forward. Thank you again for asking me to be here.

Mr. NADLER. I thank the gentleman.

[The prepared statement of Mr. Evans follows:]

PREPARED STATEMENT OF THE HONORABLE THOMAS B. EVANS, JR.

Testimony of The Honorable Thomas B. Evans, Jr.
Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties
of the House Judiciary Committee

September 22, 2009

Thank you for the opportunity to testify today regarding the need to reform the Patriot Act. I am grateful to the leadership of this Subcommittee for holding this hearing on a subject of great importance to both our national security and our individual liberties. I am especially heartened to see this Subcommittee exercising its oversight responsibility, such a critically important element in our system of checks and balances.

I thought seriously about joining the FBI in the late 1950s. My experience serving as a Member of Congress (R – DE) only enhanced my appreciation that we must provide the FBI with the means it needs to protect the American people. This was further strengthened, of course, by the attacks of September 11, 2001. In the wake of that terrible tragedy, our nation clearly needed to mobilize to respond with a new and powerful counter-terrorism strategy. But we must not allow our fears to lead us to overreaction, and whenever we grant powers to the executive branch, we must incorporate proper safeguards to protect individual rights and ensure oversight.

Unfortunately, the Patriot Act was initially put together in haste in the wake of the September 11th attacks, and the Congress, pressed hard by the Administration, failed to consider all the negative implications. We missed our first chance to correct these deficiencies when various provisions of the Act came up for renewal four years ago. Now that several provisions of the Patriot Act are set to expire this year, I hope that Congress will take the opportunity to reform this Act and incorporate strong protections for constitutional rights and civil liberties. We should work to preserve the proper balance between the need to protect our national security and the need to safeguard the liberties of individual Americans. These two goals are not mutually exclusive.

I feel very strongly that we must work to preserve our system of checks and balances. This includes ensuring against abuse by an overreaching government. Proper oversight reduces substantially the potential for error. These convictions led me last year to become a member of the Liberty and Security Committee of the Constitution Project, and I have now joined with that broad bipartisan group in issuing a Statement on Reforming the Patriot Act. Many of the committee members are strong conservatives, and some are constitutional scholars. A copy of that statement is attached to my prepared remarks, and it outlines the minimum reforms that Congress should adopt in reconsidering the Patriot Act this year.

I am disappointed that the Obama administration has recommended that all three provisions of the Patriot Act set to expire this year be reauthorized without modification. Nevertheless, I am encouraged by the administration's expressed willingness to discuss reforms that provide additional safeguards for privacy rights while still protecting national security and the rule of law. These are exactly the types of reforms I will outline for you today; reforms that safeguard vital civil liberties while ensuring that law enforcement is able to effectively combat the threat of terrorism. I am cautiously optimistic that both Congress and the administration can reach a consensus and enact these much needed reforms.

Since the initial passage of the Patriot Act, we have learned how many of its provisions intrude upon Americans' privacy rights and civil liberties. Although much of the legislation was developed to

remedy gaps in the United States' intelligence gathering powers, the Patriot Act went well beyond those needs, and the Act authorizes overly broad executive powers to track, monitor, and search individuals without including the safeguards needed to prevent abuse. Such overbroad surveillance chills First Amendment freedoms and intrudes upon Fourth Amendment rights. History teaches us that the potential for abuse all too often results in actual abuse. We ignore history at our peril.

The Constitution Project's Liberty and Security Committee's specific recommendations include the following:

1. Business Records Provision: Section 215 of the Patriot Act

Section 215 of the Patriot Act, also known as the "business records" or "library records" provision, provides the FBI with broad and largely unchecked powers to obtain material from businesses in connection with counter-terrorism or counter-espionage investigations. This provision eliminated the prior requirement that the information sought must be connected to an agent of a foreign power, and it expanded the types of material that may be sought and the entities that can be required to provide information. Under Section 215, the FBI does not even need to show that the items it seeks are related to a person the FBI is investigating. It only needs to show that the information or object sought is relevant to a terrorism or espionage investigation. In addition, Section 215 includes a non-disclosure or "gag order" requirement, which allows the government to prevent recipients from disclosing that they have received such orders.

Although a judicial order is required before the government can seek records under Section 215, the minimal showing that must be made combined with the broad scope of records that can be obtained makes this power dangerously ripe for abuse. This provision is scheduled to sunset at the end of this year. Congress should only reauthorize Section 215 if it amends the provision to incorporate key safeguards. At a minimum, these should include:

- Tightening the standard for issuing an order under Section 215 to restore the requirement that the material sought must relate to a suspected agent of a foreign power or a person directly linked to such an agent, and requiring adoption of minimization procedures, to ensure that the scope of the order is no greater than necessary to accomplish the investigative purpose.

- Limiting to 30 days the period during which the recipient of a Section 215 order can be required not to disclose existence of the order, unless the government can demonstrate harm would result unless the "gag order" is extended.

2. National Security Letter Provision: Section 505 of the Patriot Act

The National Security Letter Provision of the Patriot Act, which is not scheduled to sunset, raises similar and even graver concerns. That provision does not even require a court order and creates even greater potential for serious abuse.

National Security Letters (NSLs) are demand letters signed by officials of the FBI and other agencies, which require disclosure of sensitive information held by banks, credit companies, telephone carriers and Internet Service Providers, among others. Companies that receive NSLs are usually prohibited from disclosing the fact or nature of a request.

As with the business records provision, Section 505 of the Patriot Act eliminated the requirement that the information sought through an NSL must "pertain to" a foreign power or the agent of a foreign power, and thus information about Americans is now at greater risk. The FBI is permitted merely to assert that the records are "relevant to" an investigation to protect against international terrorism or foreign espionage. Section 505 also enabled agents to seek information without any demonstrated factual basis, and it vastly expanded the types of "financial institutions" that can receive an NSL to include such businesses as travel agencies, real estate agents, insurance companies, and car dealers.

Sadly, these overly broad powers did not just create the *potential* for abuse. Audits by the Justice Department Inspector General (IG) released in 2007 and 2008 have revealed numerous *actual* abuses in the issuance of NSLs. The IG audits demonstrated that FBI agents had issued NSLs in many cases where they were not authorized, including using them against individuals who were not actually connected to any FBI investigation. The audits also demonstrated that the FBI had used unauthorized "exigent letters" to quickly obtain information without ever issuing the NSL that it promised to issue to cover the request.

As Congress considers renewal of the three Patriot Act provisions set to expire this year, it should, at a minimum, extend its examination to the NSL provision. Although the NSL provision is not scheduled to sunset, the lack of appropriate safeguards for this tool have been well-documented by the IG reports. Congress should enact reforms to limit the scope of NSLs and the potential for abuse, including:

- Re-establishing the prior requirement that there be specific facts showing that the records sought through an NSL relate to an agent of a foreign power; and requiring adoption of minimization to ensure that the scope of the order is no greater than necessary to accomplish the investigative purpose.

- Establishing reasonable limits on the "gag" that attaches to an NSL, requiring it to be narrowly tailored and limiting it to 30-days, extendable only by a court and based upon a showing of necessity.

- Establishing recipients' rights to seek judicial review of NSLs.

3. "Lone Wolf" Provision: Section 6001 of the Intelligence Reform and Terrorism Prevention Act

The "lone wolf" provision was originally created to permit surveillance of a hypothetical "lone wolf" terrorist – someone who operates without ties to any international terrorist organization. The provision eliminated the prior requirement in the Foreign Intelligence Surveillance Act (FISA) that only persons suspected of being agents of foreign powers or terrorist organizations can be subject to surveillance. So, the lone wolf provision allows the government to use FISA for surveillance of a non-US person who has no known ties to a group or entity.

FISA was adopted to provide special powers to conduct intelligence against foreign agents. FISA's authorization of secret wiretaps and secret home searches in the United States is an exception to traditional Fourth Amendment standards, which has been justified on the grounds that these extraordinary surveillance powers are limited to investigations of foreign powers and their agents. Under FISA, the government can obtain a warrant without a showing of probable cause that a crime is being committed or is about to be committed. But the "lone wolf" provision, by eliminating the

requirement to show a connection to any foreign group, undermines this justification for the lower FISA standards and raises serious constitutional concerns under the Fourth Amendment.

Amazingly, the administration acknowledged in the Justice Department's September 14, 2009 letter to Congress, that the government has never to date needed to rely on this lone wolf provision. Nonetheless, the administration has argued that these extraordinary powers, which raise serious Fourth Amendment concerns, are necessary because the "lone wolf" provision is an "essential tool" in the fight against terrorism. It is one thing to modify traditional legal standards in the face of a grave and known threat; it is another to authorize infringements on civil liberties when the facts show there is no need for such executive powers. There is no reason that Congress should reauthorize without modification a provision that drastically erodes civil liberties when the government cannot point to a single instance in which this provision was necessary to combat terrorism.

For these reasons, Congress should let the "lone wolf" provision sunset due to the serious constitutional issues it raises. Suspected terrorists would still be subject to surveillance and search under *traditional and established* criminal law standards.

If Congress does choose to reauthorize the "lone wolf" provision, it should include a new sunset period together with a rigorous public reporting requirement that would help Members of Congress and the public to assess whether there is any justification for this provision. Currently, the Attorney General is required to report to Congress semiannually on the use of the "lone wolf" provision; however such reports are not made public.

4. "Roving" Wiretap Provision: Section 206 of the Patriot Act

Section 206 of the Patriot Act allows the government to obtain "roving wiretap" orders that cover multiple phones or email addresses, without citing the particular location of the target. These wiretaps are conducted under FISA and based on orders received from the FISA Court.

This provision was designed to allow surveillance of a target who continually eludes government agents by constantly changing phones and email addresses. However, under Section 206, unlike those in traditional criminal investigations, the government is not required to identify *either* the particular communications device to be monitored or the individual who is the subject of the surveillance. The provision does require that the target be described "with particularity," but not that the target be named. Because there is no particularity of location requirement, as traditionally required by the Fourth Amendment, innocent civilians may become inadvertent targets of surveillance.

The roving wiretap provision is the last of the three Patriot Act provisions set to expire on December 31st. If Congress decides to reauthorize this provision, it should require that if the wiretap order does not specify the location of the surveillance, then it must identify the target. Conversely, if the order does not specify the target, then it should identify the location with particularity.

5. Ideological Exclusion Provision: Section 411 of the Patriot Act

Section 411 of the Patriot Act is not set to expire, but should also be reconsidered by Congress this year. This provision expanded the grounds for excluding and deporting foreign nationals based upon speech, raising serious First Amendment concerns. This provision permits the United States to deport foreign nationals for wholly innocent support of a "terrorist organization," even where there is no

connection between the foreign national's support and any act of violence, much less terrorism, by the recipient group. It also bars admission to the United States of foreign nationals who "endorse or espouse terrorist activity" or who "persuade others to support terrorist activity or a terrorist organization" in ways determined by the Secretary of State to undermine U.S. efforts to combat terrorism. It also excludes representatives of groups that "endorse acts of terrorist activity" in ways that undermine U.S. efforts to combat terrorism.

These provisions make individuals excludable and removable for speech and association that is constitutionally protected by the First Amendment, and are subject to the same sorts of ideologically biased application that the 1952 McCarran-Walter Act permitted before it was repealed over thirty years later. These provisions were initially cited by the State Department in denying admission to Tariq Ramadan, a Swiss scholar of Islam who had been hired to fill an endowed chair at Notre Dame University.

Congress should take this opportunity to amend Section 411 to eliminate deportation and exclusion based on speech and association that would be protected by the Constitution if engaged by a United States citizen. When it comes to core First Amendment freedoms, we should not tolerate a double standard.

Thank you again for the invitation to be a part of your review process. I hope you will seriously consider adopting reforms to the Patriot Act along the lines I have outlined.

Mr. NADLER. Mr. Wainstein, you are recognized for 5 minutes.

TESTIMONY OF KENNETH L. WAINSTEIN, FORMER ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION, DEPARTMENT OF JUSTICE

Mr. WAINSTEIN. Thank you Mr. Chairman. Chairman Nadler, Chairman Conyers, Members of the Subcommittee, thank you for

holding this important hearing and thank you for soliciting our views about the PATRIOT Act. My name is Ken Wainstein. I am a partner at the law firm of O'Melveny & Myers. But prior to my leaving government in January of this year, I served in a variety of positions and had the honor to work alongside the fine men and women who defend our country day in and day out. I also had the honor to participate along with my co-panelists in what has been I think a very constructive national discussion over the past 8 years over the limits of government investigative powers in this country's fight against international terrorism.

Today, I want to discuss the three provisions of the Foreign Intelligence Surveillance Act that are scheduled to expire at the end of this year and explain my position that all three of these authorities are important to our national security and should be reauthorized. The PATRIOT Act was originally passed within 45 days after 9/11 in response to the tragic attacks of that day.

In 2005, Congress, to its enduring credit, undertook a lengthy process of carefully scrutinizing each and every provision of that statute, a process that resulted in the reauthorization act that provided significant new safeguards for many of the original provisions. The authorities in the PATRIOT Act are now woven into the fabric of our counterterrorism operations and have now become a critical part of our defenses against what President Obama has aptly described as al-Qaeda's quote, far reaching network of violence and hatred. And this is particularly true of the three provisions that are subject to reauthorization this year.

The first authority I'd like to address is the roving wiretap authority in section 206 which allows agents to maintain continuous surveillance of a target as that target moves from one communication device to another, which is standard trade craft for many surveillance conscious terrorists and spies. This is an absolutely critical investigative tool, especially given the proliferation of inexpensive cell phones, calling cards and other innovations that make it easy to dodge surveillance by rotating communication devices. While law enforcement personnel investigating regular crimes have had this authority since 1986, national security agents trying to prevent terrorist attacks only received it in 2001.

While some have raised privacy concerns about this authority, a fair review of section 206 shows that Congress incorporated a number of safeguards to ensure its judicious and responsible use. This new provision did nothing to affect the touchstone government burden of demonstrating probable cause that a target is a foreign power or an agent of a foreign power.

Second, the statute ensures that the FISA court will closely monitor and receive reports from the government regarding any roving surveillance. And finally, the statute specifies that the government can use this authority only if the government can show specific facts demonstrating that a target is taking action such as switching cell phones that thwart the government's ability to conduct surveillance. Given these requirements, given these safeguards and given the clear operational need to surveil terrorists and spies as they rotate their phones and communications devices, there is a very strong case for reauthorizing this authority.

Section 215 authorizes the FISA court to issue orders for the production of records that law enforcement prosecutors have historically been able to acquire through grand jury subpoenas. Prior to the enactment of section 215, our national security personnel were hamstrung in their effort to obtain business records because the operative statute at the time required a higher showing of proof and limited those orders to only certainly types of businesses. Section 215 addressed these weaknesses by adopting a regular relevance standard for the issuance of the order and expanding the reach of the authority to any entity or any business. And like the roving wiretap authority, Congress built into this provision a number of safeguards that made section 215 orders significantly more protective of civil liberties than the grand jury subpoenas that are issued every day around this country by Federal and State prosecutors. Unlike grand jury subpoenas that a prosecutor can issue on his or own, a 215 order must be approved by a court. Unlike subpoenas, section 215 specifically bars issuance of an order if the investigation is focused only on someone's first amendment activities.

And unlike grand jury subpoenas, section 215 requires regular reporting to Congress and imposes a higher standard for particularly sensitive records like library records. With these safeguards in place, there is absolutely no reason to return to the days when it was easier for prosecutors to secure records in a simple assault prosecution than for national security investigators to obtain records to help defend our country against terrorist attacks.

Lastly, the lone wolf provision. That allows the government to conduct surveillance on a non U.S. person who engages in international terrorism without demonstrating his affiliation to a particular international terrorist organization. As Ranking Member Sensenbrenner indicated, back in 1978 when this statute was passed the contemplated terrorist target was a member of an organization like the Red Brigades. Today our terrorist adversary or our main adversary is al-Qaeda which is a network of like minded terrorists around the world whose membership shifts and fluctuates with changing alliances. Given this increasing fluidity in the organization and membership of our adversaries, there is greater likelihood today that we will encounter a foreign terrorist and not be able to identify that person's terrorist organization.

And to ensure the government can surveil that person, the lone wolf provision is absolutely critical to make sure that we can keep an eye on that person and prevent that person from undertaking a terrorist attack. Although, as was reported, the lone wolf provision has not been used, given the threat posed by foreign terrorists regardless of affiliation and the obvious need to keep them under surveillance, there is an ample case for maintaining this authority for the day when the government may need to use it. Thank you again, Mr. Chairman, for the opportunity to discuss the sunsetting PATRIOT Act provisions and the reasons for my belief that they should all be reauthorized.

[The prepared statement of Mr. Wainstein follows:]

PREPARED STATEMENT OF KENNETH L. WAINSTEIN

STATEMENT OF

KENNETH L. WAINSTEIN
PARTNER, O'MELVENY & MYERS LLP

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

CONCERNING

THE USA PATRIOT ACT SECTIONS 206 AND 215 AND THE "LONE WOLF" PROVISION OF THE INTELLIGENCE REFORM AND TERRORISM PREVENTION ACT OF 2004

PRESENTED ON

SEPTEMBER 22, 2009

I. Introduction

Chairman Nadler, Ranking Member Sensenbrenner and Members of the Subcommittee, thank you for the invitation to appear before you today. Thank you also for holding this important hearing and soliciting our thoughts about the Patriot Act and the three provisions that are scheduled to expire at the end of this year.

My name is Ken Wainstein, and I am a partner at the law firm of O'Melveny & Myers. Prior to my leaving the government in January of this year, I served in a variety of capacities, including Homeland Security Advisor to the President, Assistant Attorney General for National Security at the Department of Justice, United States Attorney, General Counsel and Chief of Staff of the FBI and career federal prosecutor. I was honored to work for many years alongside the men and women who devote themselves to the protection of our country, and to participate in the policy and legislative response to the terrorist threat that became manifest on September 11, 2001. I have also been honored to participate -- along with my co-panelists -- in what has been a very constructive national discussion over the past eight years about the appropriate parameters of the government's investigative capabilities in our country's fight against international terrorism.

Today, I will discuss some of the investigative authorities that our government relies upon to protect our national security and, in particular, the three amendments to the Foreign Intelligence Surveillance Act (FISA) that are scheduled to expire at the end of this year absent reauthorization. It is my position that all three authorities -- the roving wiretap authority, the business records order provision and the authority to surveil a "lone wolf" international terrorist -- are important to our national security and should be reauthorized.

II. Background to the Reauthorization Decision

Before addressing these three specific provisions, however, it is useful to consider where we find ourselves today in the evolution of our national security authorities since September 11, 2001. Immediately after the attacks of that day, Congress took stock of our national security authorities and found them inadequate. They were inadequate for several reasons: (1) they were designed more for the traditional adversaries of the Cold War and less for the asymmetrical terrorist threat we face today; (2) they did not afford sufficient coordination and information sharing between law enforcement and intelligence professionals; and (3) they did not provide to national security professionals many of the basic investigative tools that had long been available to law enforcement investigators. The upshot was that the agents on the front lines of our counterterrorism program lacked the tools they needed to identify, investigate and neutralize plots before they matured into terrorist attacks.

With the memory of 9/11 fresh in their minds, Congress drew up an omnibus package of needed authorities and passed the original Patriot Act 45 days after the attacks. While not perfect, the Patriot Act was a strong and a necessary piece of legislation. From my first days at the FBI in 2002, I could see the impact these authorities were having on our counterterrorism operations -- from the newly-permitted coordination between law enforcement and intelligence personnel to the enhanced access to business records that are vitally important to a fast-moving

threat investigation. The Patriot Act authorities were having the intended effect -- they were strengthening our capacity to prevent the next 9/11 attack.

With the approach of the 2005 sunsets that were built into the original Patriot Act, Congress undertook to re-examine these authorities and engage in a vigorous debate over their reauthorization. To its enduring credit, Congress went through a lengthy process of carefully scrutinizing each provision and identifying those where additional limitations or oversight could provide protection against misuse without reducing their operational effectiveness. This process resulted in the 2006 Reauthorization Act that provided significant new safeguards for many of the primary authorities in the original Patriot Act. It also made permanent all but two of the sixteen provisions that were scheduled to sunset that year.

With the benefit of that thorough re-examination and eight years of experience with the Patriot Act authorities, we are now at the point of institutionalizing them into the fabric of our counterterrorism operations. Our law enforcement and intelligence communities have adopted the procedures, training and policies to incorporate the new authorities into their operations; they have implemented the additional safeguards imposed by the Reauthorization Act; and they operate subject to substantial oversight by the Foreign Intelligence Surveillance Court (the FISA Court) and by Congress, which receives regular classified reports and briefings on the use of these authorities. And importantly, they are using the Patriot Act tools to significant effect. As FBI Director Mueller has testified, "the PATRIOT Act has changed the way the FBI operates, and . . . many of our operational counterterrorism successes since September 11 are the direct result of the changes incorporated in the PATRIOT Act." Hearing before the Select Committee on Intelligence, April 27, 2005.

III. The Counterterrorism Authorities Subject to Expiration this Year

With the continuing threat from what the President has aptly described as al Qaeda's "far-reaching network of violence and hatred," it is important that our counterterrorism professionals retain the ability to use all of our Patriot Act authorities. This is particularly true of the three provisions that are subject to reauthorization this year. These provisions were born of the harsh lesson of 9/11; they were carefully reviewed by Congress during the reauthorization process and two were augmented with substantial safeguards; and they have been effectively incorporated into our counterterrorism operations with due regard for privacy and civil liberties and with extensive oversight by the FISA Court and Congress. Given this track record, it is now time to institutionalize these authorities, with the clear understanding that Congress can -- and should -- keep a close eye on their use and propose future amendments if it perceives they are being misapplied.

A. Section 206 -- Roving Surveillance Authority

Section 206 of the Patriot Act authorized the government to conduct "roving" surveillance of a foreign power or agent thereof. Previously, national security investigators who were conducting electronic surveillance of a foreign terrorist or spy were required to go back to the FISA Court for a new order every time that target used a different telephone or other communication device. With this new authority, they could now secure authorization to

maintain continuous surveillance as a target moves from one communication device to another -- which is standard tradecraft for many surveillance-conscious terrorists and spies.

This is a critical investigative tool, especially given the proliferation of inexpensive cell phones, calling cards and other innovations that make it easy to dodge surveillance by rotating communication devices. While law enforcement personnel investigating regular crimes like drug trafficking have been using roving wiretaps since 1986, national security agents trying to prevent terrorist attacks only received this authority with the passage of the Patriot Act in 2001. Since then, the FBI has used it on approximately 140 occasions, and its use has been "tremendously important" and "essential, given the technology and growth of technology that we've had." Testimony of FBI Director Mueller, Hearing before the Senate Judiciary Committee, September 16, 2009.

While some have raised privacy concerns about this authority, a fair review of Section 206 shows that Congress incorporated a number of safeguards to ensure its judicious and responsible use. First, this new provision did nothing to affect the government's touchstone evidentiary burden; the government must still demonstrate probable cause that the target is a foreign power or an agent of a foreign power. Second, the statute ensures that the FISA Court will closely monitor any roving surveillance; within ten days of conducting roving surveillance on a new communication device, the government is required to give the FISA Court a full report explaining why it believes the target is now using that device and how it will adapt the standard minimization procedures to limit the acquisition, retention and dissemination of communications involving United States persons that might be collected from that surveillance. Finally, the government can use this authority only under limited circumstances; a Section 206 order can issue only if the government provides the FISA Court with "specific facts" demonstrating that actions of the target -- such as switching cell phones -- "may have the effect of thwarting" its ability to identify and conduct surveillance on the communication facility he is using.

These safeguards and the operational need to surveil terrorists and spies as they rotate their phones and other communication devices make a very strong case for reauthorizing the "roving wiretap" authority in Section 206.

B. Section 215 -- Business Records Orders under FISA

Section 215 authorized the FISA Court to issue orders for the production of the same kind of records and other tangible things that law enforcement officers and prosecutors have historically been authorized to acquire through grand jury subpoenas. As a long-time criminal prosecutor, I can tell you that the authority to compel production of business records is absolutely essential to our law enforcement investigations.

Prior to the enactment of Section 215, our national security personnel did not have that authority and they were hamstrung in their effort to obtain business records during international terrorism and espionage investigations. Whereas criminal prosecutors and investigators could issue a subpoena for any record that is relevant to their grand jury investigation, national security personnel could secure a court order only for records that pertain to a person who can be shown by "specific and articulable facts" to be a foreign power or an agent of a foreign power. In

addition, they were permitted to request FISA production orders only for those records held by a business that qualified as "a common carrier, public accommodation facility, physical storage facility or vehicle rental facility." The latter limitation meant, for example, that an agent investigating whether a terrorist had purchased bulk quantities of fertilizer to produce a bomb could not have used a FISA order to obtain the relevant records because a feed store is not "a common carrier, public accommodation facility, physical storage facility or vehicle rental facility."

Section 215 addressed these weaknesses by adopting the relevance standard for issuance of an order and by expanding the reach of this authority to any type of entity. With this new latitude, the Section 215 authority has been used by the FBI on approximately 250 occasions, *id.*, and has "been exceptionally useful" in its national security investigations. Testimony of FBI Director Mueller, Hearing before the House Judiciary Committee, May 20, 2009.

Like the roving surveillance authority, Congress built into Section 215 a panoply of safeguards to protect against misuse. In fact, it is clear that FISA Court orders under Section 215 are significantly more protective of civil liberties than the grand jury subpoenas that are regularly issued by criminal prosecutors around the country. While both authorities require that the records sought are relevant to an authorized investigation, only the Section 215 order requires court approval; a prosecutor, by contrast, can issue a subpoena without any court review at all. Moreover, unlike the grand jury subpoena authority, Section 215 explicitly disallows the issuance of court orders if the underlying investigation is only looking into conduct -- such as political speech or religious worship -- that is protected by the First Amendment. Finally, Section 215 provides for substantial congressional oversight by requiring the Department of Justice to submit detailed reports to Congress about its use of that authority.

In the Reauthorization Act of 2006, Congress added significant new safeguards to this authority. Addressing concerns raised about particularly sensitive records, it imposed the requirement of high-level approval within the FBI before a 215 order could be sought for "library circulation records, library patron lists, book sales records, book customer lists, firearms sales records, tax return records, educational records, or medical records containing information that would identify a person." It also provided procedures by which the recipient of a 215 order can appeal to the FISA Court to challenge and litigate the validity of the order and the basis for its nondisclosure requirement -- or "gag order."

With these safeguards in place, there is no reason to return to the days when it was easier for prosecutors to secure records in a simple assault prosecution than for national security investigators to obtain records that may help prevent the next 9/11. Section 215 should be reauthorized.

C. The Lone Wolf Provision

Section 6001 of the Intelligence Reform and Terrorism Protection Act (IRTPA) allows the government to conduct surveillance on a non-US person who "engages in international terrorism or activities in preparation therefor" without demonstrating his affiliation to a particular international terrorist organization. When FISA was originally passed in 1978, the contemplated

terrorist target of FISA surveillance was the agent of an organized terrorist group like the Red Brigades or one of the Palestinian terrorist organizations of that era. Today, we face a terrorist adversary in al Qaeda that is a global network of like-minded terrorists -- a network whose membership fluctuates with the shifting of alliances between regional groups. We also face the specter of self-radicalizing foreign terrorists who may not be part of a particular terrorist group, but who are nonetheless just as dangerous and just as committed to pursuing the violent objectives of international terrorism. Given the increasing fluidity in the organization and membership of our international terrorist adversaries, there is a greater likelihood today that we will encounter a foreign terrorist whose affiliation to an identifiable terrorist organization cannot be ascertained. To ensure that the government can surveil such a person, Congress passed the "lone wolf" provision permitting his surveillance based simply on the showing that he is involved in international terrorism. Importantly, this authority can only be used when the target of the surveillance is a non-US person.

The government recently reported that it has not yet used the "lone wolf" provision. Nonetheless, given the threat posed by foreign terrorists -- regardless of affiliation -- and the need to keep them under surveillance, it is important that we keep this authority available for the day when the government may need to use it.

IV. Conclusion

Thank you once again for the opportunity to discuss the sunsetting Patriot Act provisions, their importance to our counterterrorism program, and my reasons for believing they should all be reauthorized this year. I look forward to answering any questions you might have.

Mr. NADLER. I thank you. And I now recognize Mr. German for 5 minutes.

TESTIMONY OF MICHAEL GERMAN, POLICY COUNSEL, AMERICAN CIVIL LIBERTIES UNION

Mr. GERMAN. Chairman Nadler, Chairman Conyers, Ranking Member Sensenbrenner, thank you for the opportunity to testify on behalf of the American Civil Liberties Union as Congress revisits the USA PATRIOT Act. The PATRIOT Act vastly and unconstitutionally expanded the government's authority to pry into people's private lives with little or no evidence of wrongdoing, violating the fourth amendment protections against unreasonable searches and seizures and first amendment protections against free speech and association. Worse, it allows this expanded spying to take place in secret, with few protections to ensure these powers are not abused, and little opportunity for Congress determine whether these authorities are doing anything to make America safer. The three expiring provisions give Congress the opportunity, as the Department of Justice's September 14 letter suggested, to carefully examine how these expired authorities, expanded authorities impact American's privacy.

We urge Congress to broaden its review to include all post-9/11 domestic intelligence programs, including the Foreign Intelligence Surveillance Act amendments and the new Attorney General guidelines for FBI domestic operations, and rescind, repeal or modify any provisions that are unused, ineffective or prone to abuse. When several PATRIOT Act provisions came up for renewal in 2005 there was little in the public record for Congress to evaluate. Today Congress is not completely in the dark. Inspector general audits ordered in the PATRIOT Act reauthorization revealed significant abuse of National Security Letters, and courts have found several PATRIOT Act provisions unconstitutional, including NSL gag orders, certain material support provisions, ideological exclusion provisions, and the FISA significant purpose test.

There is also evidence that the government abused even the broadly expanded wire tapping authorities that Congress approved under the FISA Amendments Act. Congress needs to address all of these provisions and, indeed, this work is beginning. The ACLU fully supports both the National Security Letter Reform Act of 2009, sponsored by Chairman Nadler, and the Justice Act, a comprehensive reform bill introduced by Senators Russ Feingold and Richard Durbin last week. They should be acted upon promptly. Regarding the expiring provisions, the government's arguments for extending these authorities without amendment are simply unpersuasive. Unlike its criminal law counterpart, the John Doe roving wire tape provision of the PATRIOT Act authorizes the government to obtain secret FISA court orders to intercept communications without naming the target or making sure the wiretaps intercept only the targets communications. The government offers no explanation for why the roving wiretap authorities the FBI has used successfully in criminal cases since 1986, which better protect the rights of innocent persons, are insufficient for national security cases.

This provision should be narrowed to bring it in line with the criminal wiretap authorities or be allowed to expire. As for the lone wolf provision, which authorizes government agencies to obtain secret surveillance orders against individuals who are not connected

to international terrorist group or foreign nation, we now know it has never been used. The government justified this provision by imagining a hypothetical international terrorist who operates independently of any foreign power or terrorist organization, but there is little evidence to suggest this imaginary figure exists. This provision is overbroad and unnecessary, and should be allowed to expire. The third expiring provision, section 215 or the library records provision is also rarely used. Only 13 section 215 applications were made in 2008. But that doesn't mean there isn't abuse. The IG reported that in 2006 the FBI twice asked the FISA Court for a section 215 order seeking tangible things as part of a counterterrorism case. The Court denied the request both times because "the facts were too thin and the request implicated the target's first amendment rights."

Rather than re-evaluating the underlying investigation based on the court's first amendment concerns, the FBI circumvented the court's oversight and pursued the investigation using national security letters that were predicated on the same information contained in the section 215 application. This incident reveals the danger of looking at these separate authorities piecemeal. Narrowing one authority might simply lead to abuse of another. There have been many significant changes to our national security laws over the past 8 years, and addressing the excesses of the PATRIOT Act without examining the larger surveillance picture may not be enough to rein in an abusive intelligence gathering regime. Congress should conduct a comprehensive examination of all the laws, regulations and guidelines that prevent government surveillance of Americans without suspicion of wrongdoing.

The American Civil Liberties Union encourages Congress to exercise its oversight powers fully, to restore effective checks on these executive branch surveillance powers, and to prohibit unreasonable searches and seizures of private information without probable cause based on particularized suspicion. Thank you.

[The prepared statement of Mr. German follows:]

PREPARED STATEMENT OF MICHAEL GERMAN

Statement of the American Civil Liberties Union
Before the House Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
September 22, 2009

The USA Patriot Act

On October 26, 2001, amid the climate of fear and uncertainty that followed the terrorist attacks of September 11, 2001, President George W. Bush signed into law the USA Patriot Act and fundamentally altered the relationship Americans share with their government.[1] This act betrayed the confidence the framers of the Constitution had that a government bounded by the law would be strong enough to defend the liberties they so bravely struggled to achieve. By expanding the government's authority to secretly search private records and monitor communications, often without any evidence of wrongdoing, the Patriot Act eroded our most basic right – the freedom from unwarranted government intrusion into our private lives – and thwarted constitutional checks and balances. Put very simply, under the Patriot Act the government now has the right to know what you're doing, but you have no right to know what it's doing.

More than seven years after its implementation there is little evidence that the Patriot Act has been effective in making America more secure from terrorists. However, there are many unfortunate examples that the government abused these authorities in ways that both violate the rights of innocent people and squander precious security resources. Three Patriot Act-related surveillance provisions will expire in December 2009, which will give the 111th Congress an opportunity to review and thoroughly evaluate all Patriot Act authorities – as well as any other post-9/11 domestic intelligence programs – and rescind, repeal or modify provisions that are unused, ineffective or prone to abuse. The American Civil Liberties Union encourages Congress to exercise its oversight powers fully, to restore effective checks on executive branch surveillance powers and to prohibit unreasonable searches and seizures of private information without probable cause based on particularized suspicion.

In a September 14, 2009 letter to the Senate Judiciary Committee, the Department of Justice (DOJ) called for "a careful examination" of the expiring Patriot Act authorities and stated its willingness to consider modifications that would "provide additional protection for the privacy of law abiding Americans."[2] Congress should accept this invitation and conduct a thorough evaluation of all government surveillance authorities. The DOJ letter went on to argue for reauthorization of all three provisions without amendment but we believe that the "careful examination" it calls for will reveal that these and many other surveillance authorities are unnecessary and unconstitutionally broad.

OUR FOUNDING FATHERS FOUGHT FOR THE RIGHT TO BE FREE FROM GOVERNMENT INTRUSION

The Fourth Amendment to the U. S. Constitution protects individuals against 'unreasonable searches and seizures.' In1886, Supreme Court Justice Joseph P. Bradley suggested that the meaning of this phrase could not be understood without reference to the historic controversy over general warrants in England and her colonies.[3] General warrants were broad orders that allowed the search or seizure of unspecified places or persons, without probable cause or individualized suspicion. For centuries, English authorities had used these broad general warrants to enforce "seditious libel" laws designed to stifle the press and suppress political dissent. This history is particularly informative to an analysis of the Patriot Act because the purpose of the Fourth Amendment was not just to protect personal property, but "to curb the exercise of discretionary authority by [government] officers."[4]

To the American colonists, nothing demonstrated the British government's illegitimate use of authority more than "writs of assistance" – general warrants that granted revenue agents of the Crown blanket authority to search private property at their own discretion.[5] In 1761, in an event that John Adams later described as "the first act of opposition" to British rule, Boston lawyer James Otis condemned general warrants as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book."[6] Otis declared such discretionary warrants illegal, despite their official government sanction, because they "placed the liberty of every man in the hands of every petty officer."[7] The resistance to writs of assistance provided an ideological foundation for the American Revolution – the concept that the right of the people to be free from unwarranted government intrusion into their private affairs was the essence of liberty. American patriots carried a declaration of this foundational idea on their flag as they marched into battle: "Don't tread on me."

Proponents of the Patriot Act suggest that reducing individual liberties during a time of increased threat to our national security is both reasonable and necessary, and that allowing fear to drive the government's decisions in a time of emergency is "not a bad thing."[8] In effect, these modern-day patriots are willing to exchange our forbearers' "don't tread on me" banner for a less inspiring, one reading "if you aren't doing anything wrong you have nothing to worry about."

Colonial-era patriots were cut from different cloth. They saw liberty not as something to trade for temporary comfort or security, but rather as a cause worth fighting for even when the odds of success, not to mention survival, were slight. Our forbearers' commitment to personal liberty did not waver when Great Britain sent troops to quell their rebellion, nor did it waver during the tumultuous and uncertain period following the war as they struggled to establish a government that could secure the blessings of the liberty they fought so hard to win.

The framers of the Constitution recognized that giving the government unchecked authority to pry into our private lives risked more than just individual property rights, as the Supreme Court later recounted: "The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression."[9] These patriots understood from their own experience that political rights could not be secured without procedural protections. The Fourth Amendment requirements of prior judicial review and warrants issued only upon probable cause were determined to be the necessary remedies to the arbitrary and unreasonable assaults on free expression that were characterized by the government's use of general warrants. "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another."[10] The Supreme Court has long acknowledged the important interplay between First Amendment and Fourth Amendment freedoms. As it reflected in 1965, "what this history indispensably teaches is that the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain."[11]

The seizure of electronic communications and private records under the Patriot Act today is no less an assault on the ideas they contain than seizure of books during a less technologically advanced era. Indeed, even more fundamental liberty interests are at stake today because the Patriot Act expanded "material support" for terrorism statutes that effectively criminalize political association and punish wholly innocent assistance to arbitrarily blacklisted individuals and organizations. Patriot Act proponents suggest we should forfeit our rights in times of emergency, but the Supreme Court has made clear that the Constitution requires holding the government to more exacting standards when a seizure involve the expression of ideas even where compelling security interests are involved. As Justice Powell explained in *United States v. United States District Court*,

> National security cases, moreover, often reflect a convergence of First and Fourth Amendment values not present in cases of "ordinary" crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech.[12]

More exacting standards are necessary in national security cases because history has repeatedly shown that government leaders too easily mistake threats to their political security for threats to the national security. Enhanced executive powers justified on national security grounds were used against anti-war activists, political dissidents, labor organizers and immigrants during and after World War I. In the 1950s prominent intellectuals, artists and writers were blacklisted and denied employment for associating with suspected communists and socialists. Civil rights activists and anti-war protesters were targeted in the 1960s and 1970s in secret FBI and CIA operations.

Stifling dissent does not enhance security. The framers created our constitutional system of checks and balances to curb government abuse, and ultimately to make the government more responsive to the needs of the people – which is where all government

power ultimately lies. The Patriot Act gave the executive branch broad and unprecedented discretion to monitor electronic communications and seize private records, placing individual liberty, as John Otis warned, "in the hands of every petty officer." Limiting the government's power to intrude into private affairs, and checking that power with independent oversight, reduces the error and abuse that conspire to undermine public confidence. As the original patriots knew, adhering to the Constitution and the Bill of Rights makes our government stronger, not weaker.

EXCESSIVE SECRECY THWARTS CONGRESSIONAL OVERSIGHT

Just 45 days after the worst terrorist attack in history Congress passed the Patriot Act, a 342-page bill amending more than a dozen federal statutes, with virtually no debate. The Patriot Act was not crafted with careful deliberation, or narrowly tailored to address specific gaps in intelligence gathering authorities that were found to have harmed the government's ability to protect the nation from terrorism. In fact, the government hesitated for months before authorizing an official inquiry, and it took over a year before Congress published a report detailing the many significant pieces of intelligence the government lawfully collected before 9/11 but failed to properly analyze, disseminate or exploit to prevent the attacks.[13] Instead of first determining what led to the intelligence breakdowns and then legislating, Congress quickly cobbled together a bill in ignorance, and while under intense pressure, to give the president all the authorities he claimed he needed to protect the nation against future attacks.

The Patriot Act vastly – and unconstitutionally – expanded the government's authority to pry into people's private lives with little or no evidence of wrongdoing. This overbroad authority unnecessarily and improperly infringes on Fourth Amendment protections against unreasonable searches and seizures and First Amendment protections of free speech and association. Worse, it authorizes the government to engage in this expanded domestic spying in secret, with few, if any, protections built in to ensure these powers are not abused, and little opportunity for Congress to review whether the authorities it granted the government actually made Americans any safer.

The ACLU warned that these unchecked powers could be used improperly against wholly innocent American citizens, against immigrants living legally within our borders and against those whose First Amendment-protected activities were improperly deemed to be threats to national security by the attorney general.[14] Many members of Congress shared the ACLU's concerns and demanded the government include "sunsets," or expiration dates on certain provisions of the Patriot Act to give Congress an opportunity to review their effectiveness over time.

Unfortunately, when the expiring provisions came up for review in 2005 there was very little in the public record for Congress to evaluate. While the ACLU objected to the way the government exercised Patriot Act powers against individuals like Oregon attorney Brandon Mayfield, Idaho student Sami al-Hussayen and European scholar Tariq Ramadan, among others,[15] officials from the DOJ and the Federal Bureau of Investigation (FBI) repeatedly claimed there had been no "substantiated" allegations of abuse.[16] Of course, the lack of substantiation was not due to a lack of abuse, but rather to the cloak of secrecy that surrounded the government's use of these authorities, which was duly enforced through unconstitutional gag orders. Excessive secrecy prevented any meaningful evaluation of the Patriot Act. Nevertheless, in March 2006 Congress passed the USA Patriot Act Improvement and Reauthorization Act (Patriot Act reauthorization), making fourteen of the sixteen expiring provisions permanent.[17]

INCREASING LEVELS OF SURVEILLANCE

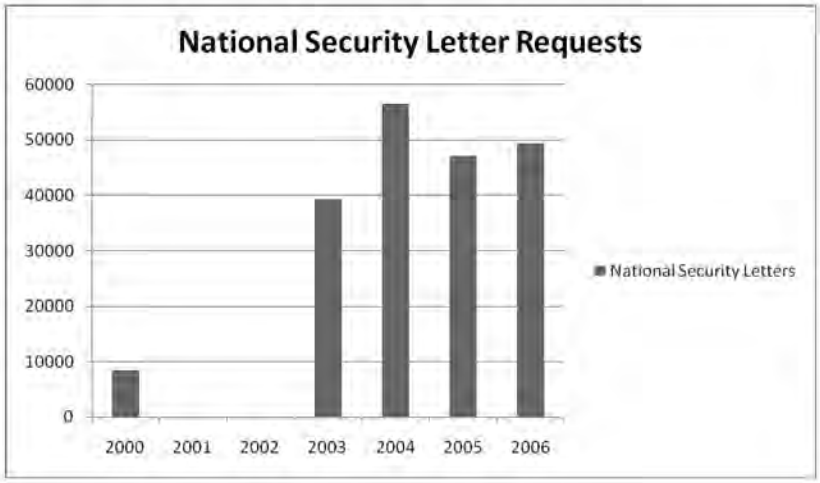
Little is known about how the government uses many of its authorities under the Patriot Act, but raw numbers available through government reports reflect a rapidly increasing level of surveillance.

Foreign Intelligence Surveillance Court Orders Approved
(Includes orders for electronic surveillance and physical searches)
Section 218 of the Patriot Act modified the legal standard necessary to obtain Foreign Intelligence Surveillance Court orders.

2000: 1012
2001: 934
2002: 1228
2003: 1724
2004: 1754
2005: 2072
2006: 2176
2007: 2370

See Electronic Privacy Information Center, Foreign Intelligence Surveillance Act Orders 1979-2007, http://epic.org/privacy/wiretap/stats/fisa_stats.html#footnote12 (last visited Dec. 1, 2008).

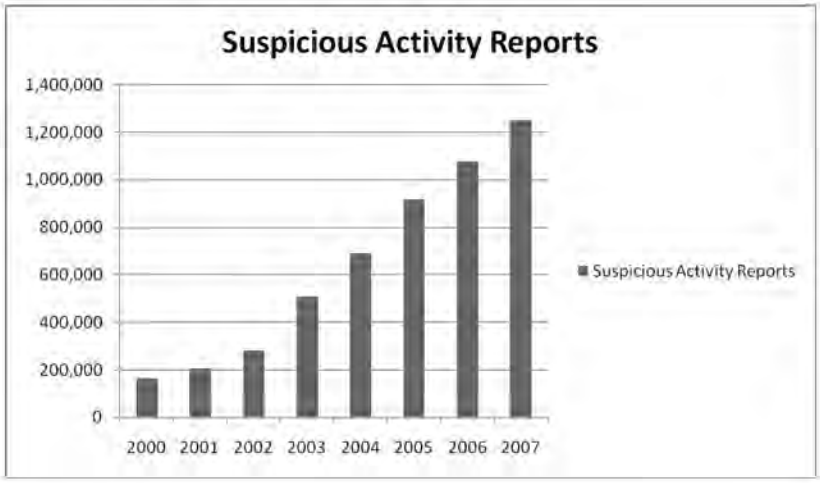
National Security Letter Requests*
Section 505 of the Patriot Act reduced the legal standard for issuing National Security Letters.



2000: 8,500
2001: No Data
2002: No Data
2003: 39, 346
2004: 56,507
2005: 47,221
2006: 49,425

See DEP'T OF JUSTICE, OFFICE OF INSPECTOR GENERAL, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS 69 (Mar. 2007), *available at* http://www.usdoj.gov/oig/special/s0703b/final.pdf; DEP'T OF JUSTICE, OFFICE OF INSPECTOR GENERAL, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF SECTION 215 ORDERS FOR BUSINESS RECORDS (Mar. 2007), *available at* http://www.usdoj.gov/oig/special/s0703a/final.pdf.
*These numbers understate the number of NSL requests the FBI actually made during these time periods. The inspector general determined that the FBI did not keep proper records regarding their use of NSLs and the audit revealed significant undercounting of NSL requests. No reliable data exists for the number of NSLs served in 2001 and 2002.

Suspicious Activity Reports filed by financial institutions
Sections 356 and 359 of the Patriot Act expanded the types of financial institutions required to file suspicious activity reports under the Bank Secrecy Act. These reports include detailed personal and account information and are turned over to the Treasury Department and the FBI.

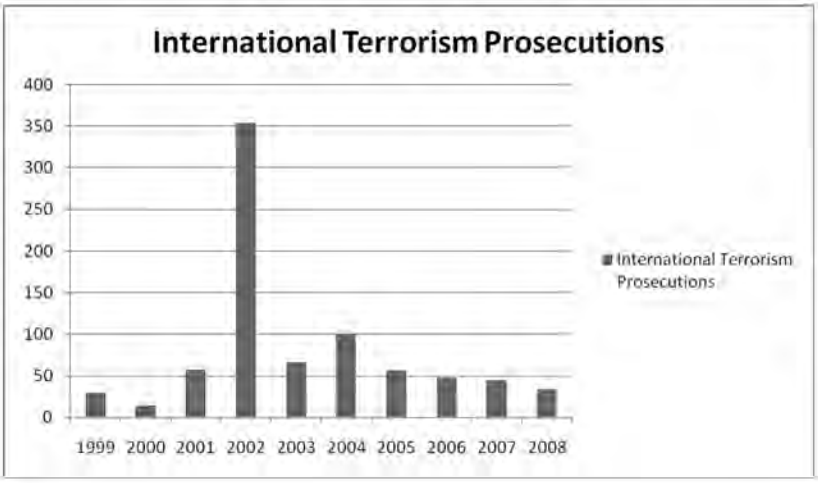


2000: 163,184
2001: 204,915
2002: 281,373
2003: 507,217
2004: 689,414
2005: 919,230
2006: 1,078,894
2007: 1,250,439

See DEP'T OF THE TREASURY, FINANCIAL CRIMES ENFORCEMENT NETWORK, THE SAR ACTIVITY REVIEW – BY THE NUMBERS, ISSUE 10 (May 2008), *available at* http://www.fincen.gov/news_room/rp/files/sar_by_numb_10.pdf.

MORE COLLECTION DOES NOT RESULT IN MORE PROSECUTIONS

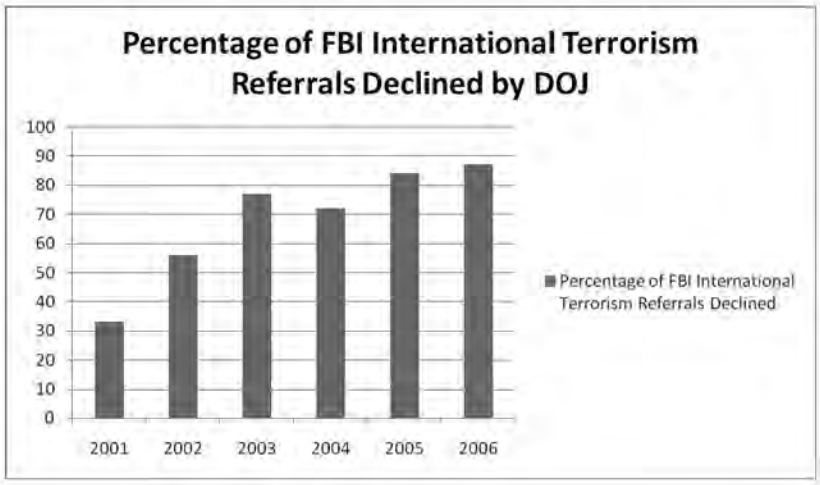
Data produced by the Executive Office for United States Attorneys and analyzed by the Transactional Records Access Clearinghouse (TRAC) shows that prosecutions in FBI international terrorism cases dropped steadily from 2002 to 2008.*



1999: 29
2000: 14
2001: 57
2002: 355
2003: 66
2004: 100
2005: 56
2006: 48
2007: 44
2008: 34

NEW SUNSET DATES CREATE OVERSIGHT AND AMENDMENT OPPORTUNITY

More critical to evaluating the effectiveness of post-Patriot Act surveillance, however, is DOJ's increasing tendency to refuse to prosecute FBI international terrorism investigations during that time period. In 2006, the DOJ declined to prosecute a shocking 87% of the international terrorism cases the FBI referred for prosecution. Only a tiny fraction of the many thousands of terrorism investigations the FBI opens each year are even referred for prosecution, thereby demonstrating that the vast majority of the FBI's terrorism-related investigative activity is completely for naught – yet the FBI keeps all of the information it collects through these dubious investigations, forever.



2001: 33%
2002: 56%
2003: 77%
2004: 72%
2005: 84%
2006: 87%

See TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, NATIONAL PROFILE AND ENFORCEMENT: TRENDS OVER TIME (2006), http://trac.syr.edu/tracfbi/newfindings/current/ (last visited Dec. 1, 2008); Todd Lochner, *Sound and Fury: Perpetual Prosecution and Department of Justice Antiterrorism Efforts*, 30 LAW & POLICY 168, 179 (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1109250 ("In fiscal year 2003 alone

the FBI opened over 25,000 terrorism investigations, a figure that dwarfs all declinations by federal prosecutors since that time").

NEW SUNSET DATES CREATE OVERSIGHT AND AMENDMENT OPPORTUNITY

When Congress reauthorized the Patriot Act in 2006, it established new expiration dates for two Patriot Act provisions and for a related provision of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA).[18] Under the reauthorization these three provisions, **section 206** and **section 215** of the Patriot Act and **section 6001** of the IRTPA, are all set to expire on December 31, 2009. The 111th Congress will revisit these provisions this year, which creates an opportunity for Congress to examine and evaluate the government's use and abuse of all Patriot Act authorities, as well as any other post-9/11 surveillance or security programs.

Section 206 of the Patriot Act authorizes the government to obtain "roving wiretap" orders from the Foreign Intelligence Surveillance Court (FISC) whenever a subject of a wiretap request uses multiple communications devices. The FISC is a secret court established under the Foreign Intelligence Surveillance Act (FISA) that issues classified orders for the FBI to conduct electronic surveillance or physical searches in intelligence investigations against foreign agents and international terrorists. Unlike roving wiretaps authorized for criminal investigations,[19] section 206 does not require the order to identify either the communications device to be tapped nor the individual against whom the surveillance is directed, which is what gives section 206 the Kafkaesque moniker, the "John Doe roving wiretap provision." The reauthorized provision requires the target to be described "with particularity," and the FBI to file an after-the-fact report to the FISC to explain why the government believed the target was using the phones it was tapping. However, it does not require the government to name the target, or to make sure its roving wiretaps are intercepting only the target's communications. The power to intercept a roving series of unidentified devices of an unidentified target provides government agents with an inappropriate level of discretion reminiscent of the general warrants that so angered the American colonists. There is very little public information available regarding how the government uses section 206, though FBI Director Robert Mueller recently revealed in March 25, 2009 testimony before the Senate Judiciary Committee that the FBI obtained roving wiretaps under this authority 147 times.[20] The DOJ's September 14, 2009 letter to the Senate Judiciary Committee offers no explanation for why the roving wiretap authorities the FBI has used in criminal cases since 1986, which better protect the rights of completely innocent persons, are insufficient. This provision should be narrowed to bring it in line with criminal wiretap authorities, or be allowed to expire.

The DOJ letter revealed that the FBI has never used the surveillance authorities granted under **section 6001** of the IRTPA, which is known as the "lone wolf" provision. Section 6001 authorizes government agencies to obtain secret FISA surveillance orders against individuals who are not connected to any international terrorist group or foreign nation. The government justified this provision by imagining a hypothetical "lone wolf," an international terrorist operating independently of any terrorist organization, but there is

little evidence to suggest this imaginary construct had any basis in reality. The failure to use this authority seems to substantiate this claim. Moreover, since terrorism is a crime, there is no reason to believe that the government could not obtain a Title III surveillance order from a criminal court if the government had probable cause to believe an individual was planning an act of terrorism.[21] Quite simply, this provision allows the government to avoid the more exacting standards for obtaining electronic surveillance orders from criminal courts. The constitutionality of a provision that allows the government to circumvent the warrant requirement of the Fourth Amendment where there is no connection to a foreign power or international terrorist group remains dubious. Congress should not provide the government an unconstitutionally broad power; especially where the problem it resolves only exists in hypothetical. This provision should be allowed to expire.

Section 215 of the Patriot Act provides a sweeping grant of authority for the government to obtain secret FISC orders demanding "any tangible thing" it claims is relevant to an authorized investigation regarding international terrorism or espionage. Known as the "library provision," section 215 significantly expands the types of items the government can demand under FISA and lowers the standard of proof necessary to obtain an order. Prior to the Patriot Act, FISA required probable cause to believe the target was an agent of a foreign power. Section 215 only requires the government to claim the items sought are relevant to an authorized investigation. Most significant in this change of standard, however, was the removal of the requirement for the FBI to show that the items sought pertain to a person the FBI is investigating. Under section 215, the government can obtain orders for private records or items belonging to people who are not even under suspicion of involvement with terrorism or espionage, including U.S. citizens and lawful resident aliens, not just foreigners.

Section 215 orders come with compulsory non-disclosure orders, which contributed to the secrecy surrounding how they were being used. To ensure that it would have at least some information upon which to evaluate Patriot Act powers before the next sunset period, Congress included a provision in the 2006 Patriot Act reauthorization that required the Department of Justice Inspector General (IG) to audit the FBI's use of National Security Letters (NSLs) and section 215 orders.[22] These reports provided the first thorough examination of the implementation of the post-9/11 anti-terrorism powers. They also confirmed what our nation's founders already knew: unchecked authority is too easily abused.

EVIDENCE OF ABUSE: THE INSPECTOR GENERAL AUDITS

NATIONAL SECURITY LETTERS

NSLs are secret demand letters issued without judicial review to obtain sensitive personal information such as financial records, credit reports, telephone and e-mail communications data and Internet searches. The FBI had authority to issue NSLs through four separate statutes, but these authorities were significantly expanded by **section 505** of the Patriot Act.[23] **Section 505** increased the number of officials who could authorize

NSLs and reduced the standard necessary to obtain information with them, requiring only an internal certification that the records sought are "relevant" to an authorized counterterrorism or counter-intelligence investigation. The Patriot Act reauthorization made the NSL provisions permanent.

The NSL statutes now allow the FBI and other executive branch agencies to obtain records about people who are not known – or even suspected – to have done anything wrong. The NSL statutes also allow the government to prohibit NSL recipients from disclosing that the government sought or obtained information from them. While Congress modified these "gag orders" in the Patriot Act reauthorization to allow NSL recipients to consult a lawyer, under the current state of the law NSLs are still not subject to any meaningful level of judicial review (ACLU challenges to the NSL gag orders are described below).[24]

The first two IG audits, covering NSLs and section 215 orders issued from 2003 through 2005, were released in March of 2007. They confirmed widespread FBI mismanagement, misuse and abuse of these Patriot Act authorities.[25] The NSL audit revealed that the FBI managed its use of NSLs so negligently that it literally did not know how many NSLs it had issued. As a result, the FBI seriously under-reported its use of NSLs in its previous reports to Congress. The IG also found that FBI agents repeatedly ignored or confused the requirements of the NSL authorizing statutes, and used NSLs to collect private information against individuals two or three times removed from the subjects of FBI investigations. Twenty-two percent of the audited files contained unreported legal violations.[26] Most troubling, FBI supervisors used hundreds of illegal "exigent letters" to obtain telephone records without NSLs by falsely claiming emergencies.[27]

On March 13, 2008, the IG released a second pair of audit reports covering 2006 and evaluating the reforms implemented by the DOJ and the FBI after the first audits were released in 2007.[28] Not surprisingly, the new reports identified many of the same problems discovered in the earlier audits. The 2008 NSL report shows that the FBI issued 49,425 NSLs in 2006 (a 4.7 percent increase over 2005), and confirms the FBI is increasingly using NSLs to gather information on U.S. persons (57 percent in 2006, up from 53 percent in 2005).[29]

The 2008 IG audit also revealed that high-ranking FBI officials, including an assistant director, a deputy assistant director, two acting deputy directors and a special agent in charge, improperly issued eleven "blanket NSLs" in 2006 seeking data on 3,860 telephone numbers.[30] None of these "blanket NSLs" complied with FBI policy and eight imposed unlawful non-disclosure requirements on recipients.[31] Moreover, the "blanket NSLs" were written to "cover information already acquired through exigent letters and other informal responses."[32] The IG expressed concern that such high-ranking officials would fail to comply with FBI policies requiring FBI lawyers to review all NSLs, but it seems clear enough that this step was intentionally avoided because the officials knew these NSL requests were illegal.[33] It would be difficult to call this conduct anything but intentional.

The ACLU successfully challenged the constitutionality of the original Patriot Act's gag provisions, which imposed a categorical and blanket non-disclosure order on every NSL recipient.[34] Upon reauthorization, the Patriot Act limited these gag orders to situations when a special agent in charge certifies that disclosure of the NSL request might result in danger to the national security, interference with an FBI investigation or danger to any person. Despite this attempted reform, the IG's 2008 audit showed that 97 percent of NSLs issued by the FBI in 2006 included gag orders, and that five percent of these NSLs contained "insufficient explanation to justify imposition of these obligations."[35] While a five percent violation rate may seem small compared to the widespread abuse of NSL authorities documented elsewhere, these audit findings demonstrate that the FBI continues to gag NSL recipients in an overly broad, and therefore unconstitutional manner. Moreover, the IG found that gags were improperly included in eight of the 11 "blanket NSLs" that senior FBI counterterrorism officials issued to cover hundreds of illegal FBI requests for telephone records through exigent letters.[36]

The FBI's gross mismanagement of its NSL authorities risks security as much as it risks the privacy of innocent persons. The IG reported that the FBI could not locate return information for at least 532 NSL requests issued from the field, and 70 NSL requests issued from FBI headquarters (28 percent of the NSLs sampled).[37] Since the law only allows the FBI to issue NSLs in terrorism and espionage investigations, it cannot be assumed that the loss of these records is inconsequential to our security. Intelligence information continuing to fall through the cracks at the FBI through sheer incompetence is truly a worrisome revelation.

SUGGESTED REFORM OF NSL STATUTES

- Repeal the expanded NSL authorities that allow the FBI to demand information about innocent people who are not the targets of any investigation. Reinstate prior standards limiting NSLs to information about terrorism suspects and other agents of foreign powers.

- Allow gag orders only upon the authority of a court, and only when necessary to protect national security. Limit scope and duration of such gag orders and ensure that their targets and recipients have a meaningful right to challenge them before a fair and neutral arbiter.

- Impose judicial oversight of all Patriot Act authorities. Allowing the FBI to self-certify that it has met the statutory requirements invites further abuse and overuse of NSLs. Contemporaneous and independent oversight of the issuance of NSLs is needed to ensure that they are no longer issued at the drop of a hat to collect information about innocent U.S. persons.

The ACLU fully supports the National Security Letter Reform Act of 2009 (H.R. 1800) sponsored by Representative Jerrold Nadler (D-NY), as well as the JUSTICE Act

introduced by Senators Russ Feingold and Richard Durbin last week, both of which would rein in the FBI's improper use of NSLs. They should be acted upon promptly. Further delay will simply mean that thousands more innocent people will have their private records collected by the FBI.

SECTION 215 ORDERS

The IG's **section 215** audits showed the number of FBI requests for section 215 orders were sparse by comparison to the number of NSLs issued. Only 13 section 215 applications were made in 2008.[38]

The disparity between the number of section 215 applications and the number of NSLs issued seems to suggest that FBI agents were bypassing judicial review in the section 215 process by using NSLs in a manner not authorized by law. An example of this abuse of the system was documented in the IG's 2008 section 215 report. The FBI applied to the FISC for a section 215 order, only to be denied on First Amendment grounds. The FBI instead used NSLs to obtain the information.

While this portion of the IG report is heavily redacted, it appears that sometime in 2006 the FBI twice asked the FISC for a section 215 order seeking "tangible things" as part of a counterterrorism case. The court denied the request, both times, because "the facts were too 'thin' and [the] request implicated the target's First Amendment rights."[39] Rather than re-evaluating the underlying investigation based on the court's First Amendment concerns, the FBI circumvented the court's oversight and pursued the investigation using three NSLs that were predicated on the same information contained in the section 215 application.[40] The IG questioned the legality of the FBI's use of NSLs based on the same factual predicate contained in the section 215 request the FISC rejected on First Amendment grounds, because the authorizing statutes for NSLs and section 215 orders contain the same First Amendment caveat.[41]

The IG also discovered the FISC was not the first to raise First Amendment concerns over this investigation to FBI officials. Lawyers with the DOJ Office of Intelligence Policy and Review (OIPR) raised the First Amendment issue when the FBI sent the section 215 application for its review.[42] The OIPR is supposed to oversee FBI intelligence investigations, but OIPR officials quoted in the IG report said the OIPR has "not been able to fully serve such an oversight role" and that they were often bullied by FBI agents:

> In addition, the former Acting Counsel for Intelligence Policy stated that there is a history of significant pushback from the FBI when OIPR questions agents about the assertions included in FISA applications. The OIPR attorney assigned to Section 215 requests also told us that she routinely accepts the FBI's assertions regarding the underlying investigations as fact and that the FBI would respond poorly if she questioned their assertions.[43]

When the FISC raised First Amendment concerns about the FBI investigation, the FBI general counsel decided the FBI would continue the investigation anyway, using methods that had less oversight. When asked whether the court's concern caused her to review the underlying investigation for compliance with legal guidelines that prohibit investigations based solely on protected First Amendment activity, the general counsel said she did not because "she disagreed with the court's ruling and nothing in the court's ruling altered her belief that the investigation was appropriate."[44] Astonishingly, she put her own legal judgment above the decision of the court. She added that the FISC "does not have the authority to close an FBI investigation."[45]

A former OIPR counsel for intelligence policy argued that while investigations based solely on association with subjects of other national security investigations were "weak," they were "not necessarily illegitimate."[46] It is also important to note that this investigation, based on simple association with the subject of another FBI investigation, was apparently not an aberration. The FBI general counsel told the IG the FBI would have to close "numerous investigations" if they could not open cases against individuals who merely have contact with other subjects of FBI investigations.[47] Conducting "numerous investigations" based upon mere contact, and absent facts establishing a reasonable suspicion of wrongdoing, will only result in wasted effort, misspent security resources and unnecessary violations of the rights of innocent Americans.

The FBI's stubborn defiance of OIPR attorneys and the FISC demonstrates a dangerous interpretation of the legal limits of the FBI's authority at its highest levels, and lays bare the inherent weakness of any set of internal controls. The FBI's use of NSLs to circumvent more arduous section 215 procedures confirms the ACLU's previously articulated concerns that the lack of oversight of the FBI's use of its NSL authorities would lead to such inappropriate use.

The DOJ's September 14, 2009 letter indicates that no recipient of a section 215 order has ever challenged its validity, and cites this as evidence the authority is not being abused.[48] This argument ignores the fact that section 215 orders are designed to obtain records held in the possession of third parties, as opposed to the subject of the information demand, so the interest in expending the time and expense of fighting such an order is remote. We know the FBI engaged in massive abuse of NSLs, yet out of over two hundred thousand NSL recipients only a handful ever challenged these demands. Moreover, recipients of section 215 orders are gagged from disclosing they received them, so any public debate about the reasonableness of these demands short of a court challenge is effectively thwarted.

Moreover, despite the FBI's infrequent use of section 215, the IG discovered serious deficiencies in the way it managed this authority. The IG found substantial bureaucratic delays at both FBI headquarters and OIPR in bringing section 215 applications to the FISC for approval. While neither the FBI's FISA Management System nor DOJ's OIPR tracking system kept reliable records regarding the length of time section 215 requests remained pending, the IG was able to determine that processing times for section 215 requests ranged from ten days to an incredible 608 days, with an

average delay of 169 days for approved orders and 312 days for withdrawn requests.[49] The IG found these delays were the result of unfamiliarity with the proper process, simple misrouting of the section 215 requests and an unnecessarily bureaucratic, self-imposed, multi-layered review process.[50] Most tellingly, the IG's 2008 report found that the process had not improved since the IG identified these problems had been identified in the 2007 audit.[51] DOJ has used long processing times for FISA applications as justification for expanding its surveillance powers and reducing FISC review, but this evidence shows clearly that ongoing mismanagement at the FBI and OIPR drives these delays, not a lack of authority.[52] Congress should instead compel efficiency at these agencies by increasing its oversight and reining in these expanded authorities.

SUGGESTED REFORMS

- Repeal the expanded section 215 authorities that allow the FBI to demand information about innocent people who are not the targets of any investigation. Return to previous standards limiting the use of 215 authorities to gather information only about terrorism suspects and other agents of foreign powers.

UNCONSTITUTIONAL: COURT CHALLENGES TO THE PATRIOT ACT

Court challenges offered another source of information about the government's misuse of Patriot Act powers.

NATIONAL SECURITY LETTER GAG ORDERS

The ACLU challenged the non-disclosure and confidentiality requirements in NSLs in three cases. The first, *Doe v. Mukasey*, involved an NSL served on an Internet Service Provider (ISP) in 2004 demanding customer records pursuant to the Electronic Communications Privacy Act (ECPA).[53] The letter prohibited the anonymous ISP and its employees and agents "from disclosing to any person that the FBI sought or obtained access to information or records under these provisions." In the midst of a lawsuit over the constitutionality of the NSL provisions in ECPA, the Patriot Act reauthorization was enacted amending the NSL provision but maintaining the government's authority to request sensitive customer information and issue gag orders – albeit in a slightly narrower set of circumstances.[54] In September 2007, the District Court for the Southern District of New York found that even with the reauthorization amendments the gag provision violated the Constitution. The court struck down the amended ECPA NSL statute in its entirety,[55] with Judge Victor Marrero writing that the statute's gag provisions violated the First Amendment and the principle of separation of powers.

In December 2008, the Second U.S. Circuit Court of Appeals upheld the decision in part. The appeals court invalidated parts of the statute that placed the burden on NSL recipients to initiate judicial review of gag orders, holding that the government has the burden to justify silencing NSL recipients. The appeals court also invalidated parts of the statute that narrowly limited judicial review of the gag orders – provisions that required

the courts to treat the government's claims about the need for secrecy as conclusive and required the courts to defer entirely to the executive branch.[56] The appeals court then remanded the case back to the lower court and required the government to finally justify the more than four-year long gag on the "John Doe" NSL recipient in the case. In June 2009, the government attempted to satisfy this requirement by filing its justification for the gag entirely in secret documents which not even Doe's lawyers had any access to. The ACLU asked the court to order the government to disclose its secret filings or at least provide them with an unclassified summary and redacted version of the documents. In August 2009, Judge Marrero ordered the government to partially disclose its secret filing and to release a public summary of its evidence. The parties are now briefing the issue of whether the now five-year-old gag on Doe is constitutional.

The second case, *Library Connection v. Gonzales*, involved an NSL served on a consortium of libraries in Connecticut.[57] In September 2006, a federal district court ruled that the gag on the librarians violated the First Amendment. The government ultimately withdrew both the gag and its demand for records.

The third case, *Internet Archive v. Mukasey*, involved an NSL served on a digital library.[58] In April 2008, the FBI withdrew the NSL and the gag as a part of the settlement of the legal challenge brought by the ACLU and the Electronic Frontier Foundation.[59] In every case in which an NSL recipient has challenged an NSL in court, the government has withdrawn its demand for records, creating doubt regarding the government's need for the records in the first place.

In addition, a 2007 ACLU Freedom of Information Act suit revealed that the FBI was not the only agency abusing its NSL authority. The Department of Defense (DOD) does not have the authority to investigate Americans, except in extremely limited circumstances. Recognizing this, Congress gave the DOD a narrow NSL authority, strictly limited to non-compulsory requests for information regarding DOD employees in counterterrorism and counter-intelligence investigations,[60] and to obtaining financial records[61] and consumer reports[62] when necessary to conduct such investigations. Only the FBI has the authority to issue compulsory NSLs for electronic communication records and for certain consumer information from consumer reporting agencies. This authority can only be used in furtherance of authorized FBI investigations. Records obtained by the ACLU show the DOD issued hundreds of NSLs to collect financial and credit information since September 2001, and at times asked the FBI to issue NSLs compelling the production of records the DOD wanted but did not have the authority to obtain. The documents suggest the DOD used the FBI to circumvent limits on the DOD's investigative authority and to obtain information it was not entitled to under the law. The FBI compliance with these DOD requests – even when it was not conducting its own authorized investigation – is an apparent violation of its own statutory authority.

MATERIAL SUPPORT FOR TERRORISM PROVISIONS

Laws prohibiting material support for terrorism, which were expanded by the Patriot Act, are in desperate need of re-evaluation and reform. Intended as a mechanism

to starve terrorist organizations of resources, these statutes instead undermine legitimate humanitarian efforts and perpetuate the perception that U.S. counterterrorism policies are unjust.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), passed in the wake of the Oklahoma City bombing, criminalized providing material support to terrorists or terrorist organizations.[63] Title 18 U.S.C. § 2339A makes it a federal crime to knowingly provide material support or resources in preparation for or in carrying out specified crimes of terrorism, and 18 U.S.C. § 2339B outlaws the knowing provision of material support or resources to any group of individuals the secretary of state has designated a foreign terrorist organization (FTO).[64] AEDPA defined "material support or resources" as "currency or other financial securities, financial services, lodging, training, safe-houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." AEDPA also amended the Immigration & Nationality Act (INA) to give the secretary of state almost unfettered discretion to designate FTOs.[65]

The secretary of state may designate an organization as an FTO if she finds that the organization is foreign, that it engages in or retains the capacity and intent to engage in terrorist activities, and that its activities threaten the national defense, foreign relations or economic interests of the United States. An FTO may challenge its designation in federal court but the INA gives the government the ability to use classified information *in camera* and *ex parte*, so the designated organization never gets to see, much less dispute the allegations against it. Moreover, a judge must determine that the government acted in an arbitrary and capricious manner – a very difficult legal standard for an FTO to prove - in order to overturn a designation.

Section 805 of the Patriot Act expanded the already overbroad definition of "material support and resources" to include "expert advice or assistance," and **section 810** increased penalties for violations of the statute.[66] Through IRTPA, Congress narrowed these provisions in 2004 to require that a person have knowledge that the organization is an FTO, or has engaged or engages in terrorism. However, the statute still does not require the government to prove that the person specifically intended for his or her support to advance the terrorist activities of the designated organization.[67] In fact, the government has argued that those who provide support to designated organizations can run afoul of the law even if they oppose the unlawful activities of the designated group, intend their support to be used only for humanitarian purposes and take precautions to ensure that their support is indeed used for these purposes.[68] This broad interpretation of the material support prohibition effectively prevents humanitarian organizations from providing needed relief in many parts of the world where designated groups control schools, orphanages, medical clinics, hospitals and refugee camps.[69]

In testimony before Congress in 2005, ACLU of Southern California staff attorney Ahilan T. Arulanantham gave a first hand account of the difficulties he experienced while providing humanitarian aid to victims of the 2004 tsunami in Sri

Lanka.[70] At the time of the tsunami approximately one-fifth of Sri Lanka was controlled by the Liberation Tigers of Tamil Eelam (LTTE), an armed group fighting against the Sri Lankan government. The U.S. government designated the LTTE as an FTO, but for the 500,000 people living within its territory, the LTTE operates as an authoritarian military government. As a result, providing humanitarian aid to needy people in this part of Sri Lanka almost inevitably requires dealing directly with institutions the LTTE controls. And because there is no humanitarian exemption from material support laws (only the provision of medicine and religious materials are exempted), aid workers in conflict zones like Sri Lanka are at risk of prosecution by the U.S. government. Arulanantham explained the chilling effect of these laws:

> I have spoken personally with doctors, teachers, and others who want to work with people desperately needing their help in Sri Lanka, but fear liability under the "expert advice," "training," and "personnel" provisions of the law. I also know people who feared to send funds for urgent humanitarian needs, including clothing, tents, and even books, because they thought that doing so might violate the material support laws. I have also consulted with organizations, in my capacity as an ACLU attorney, that seek to send money for humanitarian assistance to areas controlled by designated groups. I have heard those organizations express grave concerns about continuing their work for precisely these reasons. Unfortunately, the fears of these organizations are well-justified. Our Department of Justice has argued that doctors seeking to work in areas under LTTE control are not entitled to an injunction against prosecution under the material support laws, and it has even succeeded in winning deportation orders under the immigration law's definition of material support, for merely giving food and shelter to people who belong to a "terrorist organization" even if that group is not designated.[71]

Tragically, our counterterrorism laws make it more difficult for U.S. charities to operate in parts of the world where their good works could be most effective in winning the battle of hearts and minds. In 2006 Congress passed the Patriot Act reauthorization, making the material support provisions permanent.[72]

Such unjust and counter-productive consequences are a direct result of the overbroad and unconstitutionally vague definition of material support in the statute. The First Amendment protects an individual's right to join or support political organizations and to associate with others in order to pursue common goals. The framers understood that protecting speech and assembly were essential to the creation and functioning of a vibrant democracy. As a result, the government cannot punish mere membership in or political association with disfavored groups – even those that engage in both lawful and unlawful activity – without the strictest safeguards.

The material support provisions impermissibly criminalize a broad range of First Amendment-protected activity, both as a result of their sweeping, vague terms and because they do not require the government to show that a defendant *intends* to support

the criminal activity of a designated FTO. Courts have held that vague statutes should be invalidated for three reasons: "(1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of laws...; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms."[73] Material support prohibitions against "training," "services" and "expert advice and assistance" fail each of these three standards.

Any suggestion that the government would not use the material support statutes to prosecute purely First Amendment-protected speech is belied by the fact that it already has. In a most notorious example, the government brought charges against University of Idaho Ph.D. candidate Sami Omar Al-Hussayen, whose volunteer work managing websites for a Muslim charity led to a six-week criminal trial for materially supporting terrorism. The prosecution argued that by running a website that had links to other websites that carried speeches advocating violence, Al Hussayen provided "expert assistance" to terrorists. A jury ultimately acquitted Al-Hussayen of all terrorism-related charges.[74]

The material support provisions also impose guilt by association in violation of the Fifth Amendment. Due process requires the government to prove personal guilt – that an individual *specifically intended* to further the group's unlawful ends – before criminal sanctions may be imposed.[75] Even with the IRTPA amendments, the material support provisions do not require specific intent. Rather, the statutes impose criminal liability based on the mere knowledge that the group receiving support is an FTO or engages in terrorism. Indeed, a Florida district court judge in *United States v. Al-Arian* warned that under the government's reading of the material support statute, "a cab driver could be guilty for giving a ride to an FTO member to the UN."[76] And these constitutional deficiencies are only exacerbated by the unfettered discretion these laws give the secretary of state to designate groups, and the lack of due process afforded to groups that wish to appeal their designation.

A recent study of material support prosecutions from September 2001 to July 2007 reveals an unusually high acquittal rate for these cases.[77] The DOJ's trial conviction rate for all felonies is fairly steady over the years: 80% in 2001, 82% in 2002, 82% in 2003 and 80% in 2004.[78] But almost half (eight of 17) of the defendants charged with material support of terrorism under §2339B who chose to go to trial were acquitted, and three others successfully moved to have their charges dismissed before trial.[79] This disparity suggests that the government is overreaching in charging material support violations for behavior not reasonably linked to illegal or violent activity. The data is especially troubling given that the median sentence for a conviction at trial for material support under §2339B is 84 months longer than for a guilty plea to the same offense.[80] That those defendants who risk the additional 84 months in prison are acquitted in almost half of the cases raises a disturbing question of whether the government is using the draconian sentences provided in this Patriot Act-enhanced statute to compel plea bargains where the evidence might not support conviction at trial. Of the 61 defendants whose cases were resolved during the study period, 30 pled guilty to material support and another 11 pled guilty to other charges. Only nine of the remaining 20 were convicted.

In *Humanitarian Law Project v. Mukasey*, a group of organizations and individuals seeking to support the nonviolent and lawful activities of Kurdish and Tamil humanitarian organizations challenged the constitutionality of the material support provisions on First and Fifth Amendment grounds.[81] They contended that the law violated the Constitution by imposing a criminal penalty for association without requiring specific intent to further an FTO's unlawful goals, and that the terms included in the definition of "material support or resources" were impermissibly vague. In 2007, the U.S. Court of Appeals for the Ninth Circuit found the terms "training" and "service," and part of the definition of "expert advice and assistance" unconstitutionally vague under the Fifth Amendment.[82] The government is appealing this decision.

SUGGESTED REFORM OF MATERIAL SUPPORT STATUTES

- Amend the material support statutes to require specific intent to further an organization's unlawful activities before imposing criminal liability.
- Remove overbroad and impermissibly vague language, such as "training," "service" and "expert advice and assistance," from the definition of material support.
- Establish an explicit duress exemption to remove obstacles for genuine refugees and asylum-seekers to enter and/or remain in the United States.
- Provide notice, due process and meaningful review requirements in the designation process, and permit defendants charged with material support to challenge the underlying designation in their criminal cases.

IDEOLOGICAL EXCLUSION

The Patriot Act revived the discredited practice of ideological exclusion: denying foreign citizens' entry into the U.S. based solely on their political views and associations, rather than their conduct.

Section 411 of the Patriot Act amended the INA to expand the grounds for denying foreign nationals admission into the United States, and for deporting those already here.[83] This section authorizes the exclusion of not only foreign nationals who support domestic or foreign groups the U.S. has designated as "terrorist organizations," but also those who support "a political, social or other similar group whose public endorsement of acts of terrorist activity the secretary of state has determined undermines United States efforts to reduce or eliminate terrorist activities." Moreover, Congress added a provision that authorizes the exclusion of those who have used a "position of prominence within any country to endorse or espouse terrorist activity, or to persuade others to support terrorist activity or a terrorist organization, in a way that the secretary of state has determined undermines United States efforts to reduce or eliminate terrorist activities."[84] Though ostensibly directed at terrorism, the provision focuses on words, not conduct, and its terms are broad and easily manipulated. The State Department's Foreign Affairs Manual takes the sweeping view that the provision applies to foreign nationals who have voiced "irresponsible expressions of opinion." Over the last six years, dozens of foreign scholars, artists and human rights activists have been denied entry to the United States not because of their actions – but because of their political views, their writings and their associations.

During the Cold War, the U.S. was notorious for excluding suspected communists. Among the many dangerous individuals excluded in the name of national security were Nobel Laureates Gabriel Garcia Márquez, Pablo Neruda and Doris Lessing, British novelist Graham Greene, Italian playwright Dario Fo and Pierre Trudeau, who later became prime minister of Canada. When Congress repealed the Cold War era

communist exclusion laws, it determined that "it is not in the interests of the United States to establish one standard of ideology for citizens and another for foreigners who wish to visit the United States." It found that ideological exclusion caused "the reputation of the United States as an open society, tolerant of divergent ideas" to suffer. When Congress enacted the "endorse or espouse" provision, it ignored this historical lesson.

The ACLU challenged the constitutionality of "ideological exclusion" in *American Academy of Religion v. Napolitano* (previously *American Academy of Religion v. Chertoff*). In July 2004, the Department of Homeland Security (DHS) used the provision to revoke the visa of Tariq Ramadan, a Swiss citizen, one of Europe's leading scholars of Islam and a vocal critic of U.S. policy. Ramadan had accepted a position to teach at the University of Notre Dame. After DHS and the State Department failed to act on a second visa application which would have permitted Ramadan to teach at Notre Dame, he applied for a B Visa to attend and participate in conferences in the U.S. After the government failed to act on *that* application for many months, in January 2006, the American Academy of Religion (AAR), the American Association of University Professors and PEN American Center – organizations that had invited Professor Ramadan to speak in the United States – filed suit. They argued that the government's exclusion of Professor Ramadan, as well as the ideological exclusion provision, violated their First Amendment right to receive information and hear ideas, and compromised their ability to engage in an intellectual exchange with foreign scholars. When challenged in court, the government abandoned its allegation that Professor Ramadan had endorsed terrorism. [85]

The district court held that the government could not exclude Ramadan without providing a legitimate reason and that it could not exclude Ramadan based solely on his speech. It ordered the government to adjudicate Ramadan's pending visa application within 90 days.[86] Thereafter, however, the government found an entirely new basis for barring Ramadan. Invoking the expanded material support provisions of the Real ID Act, the government determined that Professor Ramadan was inadmissible because of small donations he made from 1998 to 2002 to a lawful European charity that provides aid to Palestinians.[87] The plaintiffs continued to challenge the legality of Professor Ramadan's exclusion as well as the constitutionality of the ideological exclusion provision. In July 2007, the district court upheld Professor Ramadan's exclusion but did not rule on the constitutionality of the ideological exclusion provision, finding instead that the plaintiffs lacked standing. The ACLU appealed that decision, and in July of 2009, the U.S. Court of Appeals for the Second Circuit found that the U.S. government had not adequately justified its denial of a visa to Professor Ramadan. The court found that the First Amendment rights of U.S. organizations are at stake when foreign scholars, artists, politicians and others are excluded, and that the organizations have a First Amendment right to "'hear, speak, and debate with' a visa applicant." The appeals court also found that the government cannot exclude an individual from the U.S. on the basis of "material support" for terrorism without affording him the "opportunity to demonstrate by clear and convincing evidence that he did not know, and reasonably should not have known, that the recipient of his contributions was a terrorist organization." The Second Circuit did not

address the constitutionality of the ideological exclusion provision because it agreed with the district court that plaintiffs lacked standing.

The imposition of an ideological litmus test at the border is raw censorship and violates the First Amendment. It allows the government to decide which ideas Americans may or may not hear. Ideological exclusion skews political and academic debate in the U.S. and deprives Americans of information they have a constitutional right to hear. Particularly now, Americans should be engaged with the world, not isolated from it.

SUGGESTED REFORM OF IDEOLOGICAL EXCLUSION STATUTES

- Ban ideological exclusion based on speech that would be protected in the United States under the First Amendment.
- Repeal the "endorse or espouse" provision.

RELAXED FISA STANDARDS

Section 218 of the Patriot Act amended FISA to eliminate the requirement that the *primary purpose* of a FISA search or surveillance must be to gather foreign intelligence.[88] Under the Patriot Act's amendment, the government needs to show only that a *significant purpose* of the search or surveillance is to gather foreign information in order to obtain authorization from the FISC.[89] This seemingly minor change allows the government to use FISA to circumvent the basic protections of the Fourth Amendment, even where criminal prosecution is the government's primary purpose for conducting the search or surveillance. This amendment allows the government to conduct intrusive investigations to gather evidence for use in criminal trials without establishing probable cause of illegal activity before a neutral and disinterested magistrate, and without providing notice required with ordinary warrants. Instead, the government can obtain authorization for secret searches from a secret and unaccountable court based on an assertion of probable cause that the target is an "agent of a foreign power," a representation the court must accept unless "clearly erroneous." An improperly targeted person has no way of knowing his or her rights have been violated, so the government can never be held accountable.

Lowering evidentiary standards does not make it easier for the government to spy on the guilty. Rather, it makes it more likely that the innocent will be unfairly ensnared in overzealous investigations. A most disturbing example of the way this provision enables the government to spy on innocent Americans is the case of Brandon Mayfield, an American citizen and former U.S. Army officer who lives with his wife and three children in Oregon where he practices law.

In March 2004, the FBI began to suspect Mayfield of involvement in a series of terrorist bombings in Madrid, Spain, based on an inaccurate fingerprint identification. Although Mayfield had no criminal record and had not left the U.S. in over 10 years, he and his family became subject to months of secret physical searches and electronic surveillance approved by the FISC. In May 2004, Mayfield was arrested and imprisoned

for weeks until news reports revealed that the fingerprints had been matched to an Algerian national, Ouhane Daoud. Mayfield was released the following day. In a subsequent lawsuit, *Mayfield v. United States*, a federal district court held that the Patriot Act amendment violated the Fourth Amendment by allowing the government to avoid traditional judicial oversight to obtain a surveillance order, retain and use information collected in criminal prosecutions without allowing the targeted individuals a meaningful opportunity to challenge the legality of the surveillance, intercept communications and search a person's home without ever informing the targeted individual and circumvent the Fourth Amendment's particularity requirement.[90]

SUGGESTED REFORM OF FISA STATUTES

- Restore the primary purpose requirement to FISA.

ONLY ONE PIECE OF THE PUZZLE

The Patriot Act may have been the first overt expansion of domestic spying powers after September 11, 2001 – but it certainly wasn't the last, and arguably wasn't even the most egregious. There have been many significant changes to our national security laws over the past eight years, and addressing the excesses of the Patriot Act without examining the larger surveillance picture may not be enough to rein in an out of control intelligence-gathering regime. Congress must not only conduct vigorous oversight of the government's use of Patriot Act powers, it must also review the other laws, regulations and guidelines that now permit surveillance of Americans without suspicion of wrongdoing. Congress should scrutinize the expanded surveillance authorities found in the Attorney General Guidelines for Domestic FBI Operations, Executive Order 12333, IRTPA, the amended FISA, and the ECPA. Ultimately, Congress must examine the full panoply of intelligence activities, especially domestic intelligence gathering programs, and encourage a public debate about the proper nature and reach of government surveillance programs on American soil and abroad.

Fundamentally, Congress must recognize that overbroad, ineffective or abusive surveillance programs are counterproductive to long-term government interests because they undermine public confidence and support of U.S. anti-terrorism programs. An effort by Congress to account fully for abuses of government surveillance authorities in the recent past is absolutely necessary for several reasons. First, only by holding accountable those who engaged in intentional violations of law can we re-establish the primacy of the law and deter future abuses. Second, only by creating an accurate historical record of the failure of these abusive programs can government officials learn from these mistakes and properly reform our national security laws and policies. Finally, only by vigorously exercising its oversight responsibility in matters of national security can Congress reassert its critical role as an effective check against abuse of executive authority.

The Constitution gives Congress the responsibility to conduct oversight, and Congress must fulfill this obligation to ensure the effective operation of our government. Congress should begin vigorous and comprehensive oversight hearings to examine all

post-9/11 national security programs to evaluate their effectiveness and their impact on Americans' privacy and civil liberties, and it should hold these hearings in public to the greatest extent possible.

CONCLUSION – IT IS TIME TO AMEND OUR SURVEILLANCE LAWS

In 2009, Congress must once again revisit the Patriot Act, as three temporary provisions from the 2006 reauthorization are set to expire by the end of the year. This time, however, Congress is not completely in the dark. The IG audits ordered in the Patriot Act reauthorization proved the government lied when it claimed that no Patriot Act powers had been abused. Critics once derided as hysterical librarians were proven prescient in their warnings that these arbitrary and unchecked authorities would be misused. Just like the colonists who fought against writs of assistance, these individuals recognized that true patriotism meant standing up for their rights, even in the face of an oppressive government and an unknowable future. Certainly there are threats to our security, as there always have been, but our nation can and must address those threats without sacrificing our essential values or we will have lost the very freedoms we strive to protect.

Courts all around the country have spoken, striking down several Patriot Act provisions that infringed on the constitutional rights of ordinary Americans. Yet the government has successfully hidden the true impacts of the Patriot Act under a cloak of secrecy that even the courts couldn't – or wouldn't – penetrate.

It is time for Congress to act. Lawmakers should take this opportunity to examine thoroughly all Patriot Act powers, and indeed all national security and intelligence programs, and bring an end to any government activities that are illegal, ineffective or prone to abuse. This oversight is essential to the proper functioning of our constitutional system of government and becomes more necessary during times of crisis, not less. Serving as an effective check against the abuse of executive power is more than just Congress' responsibility; it is its patriotic duty.

APPENDIX – THE PATRIOT ACT AT A GLANCE

Many provisions in the amended Patriot Act have been abused – or have the potential to be – because of their broad and sweeping nature. The sections detailed on these pages need congressional oversight. Despite numerous hearings during the 2005 reauthorization process, there is a dearth of meaningful information about their use. Congress and the public need real answers, and the forthcoming expiration date is the perfect opportunity to revisit the provisions that have worried civil libertarians since 2001:

- Section 203: Information Sharing. The Patriot Act and subsequent statutes encourage or require information sharing. While it is important for critical details to reach the right people, little is known about the breadth of use and the scope of distribution of our personal information.

- Section 206: Roving "John Doe" Wiretaps. Typical judicial orders authorizing wiretaps, including Foreign Intelligence Surveillance Act (FISA) wiretap orders, identify the person or place to be monitored. This requirement has its roots firmly planted in the original Bill of Rights – the giants of our history having insisted on such a concept, now memorialized in the Fourth Amendment, where it calls for warrants "particularly describing the place to be searched, and the persons or things to be seized." However, these roving warrants are required to specify neither person nor place, amounting to the "general warrants" that had been loath to our nation's founders. This section will expire on December 31, 2009.

- Section 209: Access to Stored Communications. The Patriot Act amended criminal statutes so that the government can obtain opened emails and emails older than 180 days with only a subpoena instead of a warrant.

- Section 212: Voluntary Disclosures and Exigent Letters. Current law permits telecommunications companies to release consumer records and content to the government when they have a good faith belief it relates to a threat. However, the Patriot Act and subsequent legislation lowered that trigger from a "reasonable" to "good faith" belief that the information reflects an emergency. The act also took away the requirement that the threat be "imminent." The Department of Justice Inspector General has confirmed that the government is using this loophole to request information in the absence of true emergencies.

- Section 213: Sneak and Peek Searches. These are delayed notice search warrants. Before the Patriot Act, criminal search warrants required prior notification except in exigent circumstances or for stored communications when notice would "seriously jeopardize an investigation." The Patriot

Act expanded this once narrow loophole – used solely for stored communications – to all searches. Agents might now use this vague catch-all to circumvent longstanding Fourth Amendment protections. These sneak and peek warrants are not limited to terrorism cases – thereby undermining one of the core justifications for the original Patriot Act. In fact, for the 2007 fiscal year, the government reports that out of 690 sneak and peak applications, only seven, or about one percent, were used for terrorism cases.

- Section 214: Pen Register/Trap and Trace Orders Under FISA. Pen register/trap and trace devices pick up communication records in real time and provide the government with a streaming list of phone calls or emails made by a person or account. Before the Patriot Act, this section was limited to tracking the communications of suspected terrorists. Now, it can be used against people who are generally relevant to an investigation, even if they have done nothing wrong.

- Section 215: FISA Orders for Any Tangible Thing. These are FISA Court orders for any tangible thing – library records, a computer hard drive, a car – the government claims is relevant to an investigation to protect against terrorism. Since passage of the Patriot Act, the person whose things are being seized need not be a suspected terrorist or even be in contact with one. These changes are scheduled to expire on Dec. 31, 2009.

- Section 216: Criminal Pen Register/ Trap and Trace Orders. The Patriot Act amended the criminal code to clarify that the pen register/trap and trace authority permits the government to collect Internet records in real time. However, the statute does not define 'Internet record' clearly. Congress needs to make sure that the government is not abusing this provision to collect lists of everything an innocent person reads on the Internet.

- Section 218: "Significant Purpose" to Begin an Intelligence Wiretap or Conduct Physical Searches. Before the Patriot Act, the extensive and secretive powers under FISA could only be used when the collection of foreign intelligence – as opposed to prosecution – was the primary purpose of the surveillance. Now, collecting foreign intelligence need only be a "significant" purpose, permitting the government to use this lower FISA warrant standard in place of a tradition criminal warrant. Congress must to find out whether the government has conducted surveillance under the relaxed FISA standards for criminal prosecutions.

- Section 219: Single Jurisdiction Search Warrants. The Patriot Act allows judges sitting in districts where terror related activities may have occurred to issue warrants outside of their district, possibly causing hardship on a recipient who may want to challenge the warrant.

- Section 220: Nationwide Search Warrants for Electronic Evidence. This provision permits a judge to issue an order for electronic evidence outside of the district in which he or she sits. This provision may cause a hardship for a remote Internet or phone service provider who wants to challenge the legality of the order.

- Section 411: Ideological Exclusion. The Patriot Act amended the Immigration and Nationality Act to expand the terrorism-related grounds for denying foreign nationals admission into the United States, and for deporting aliens already here. This revived the discredited practice of ideological exclusion: excluding foreign citizens based solely on their political views and associations, rather than their conduct.

- Section 505: National Security Letters. NSLs are demands for customer records from financial institutions, credit bureaus and communications service providers. They have existed for decades, but prior to passage of the Patriot Act and its subsequent amendments, they were limited to collecting information on suspected terrorists or foreign actors. Recipients are gagged from telling anyone besides their lawyers and those necessary to respond to the request that they either received or complied with a NSL. The gag has been struck down as unconstitutional but remains on the books. In 2007 and 2008, the Justice Department's inspector general reported that upwards of 50,000 NSLs are now issued each year, many of which obtain information on people two and three times removed from a suspected terrorist.

- Section 802: Definition of Domestic Terrorism. The Patriot Act broadened the definition of domestic terrorist acts to include any crime on a state or federal level as predicate offenses, including peaceful civil disobedience.

- Section 805: Material Support. This provision bars individuals from providing material support to terrorists, defined as providing any tangible or intangible good, service or advice to a terrorist or designated group. As amended by the Patriot Act and other laws since September 11, this section criminalizes a wide array of activities, regardless of whether they actually or intentionally further terrorist goals or organizations. Federal courts have struck portions of the statute as unconstitutional and a number of cases have been dismissed or ended in mistrial.

- Section 6001 of intelligence reform bill: "Lone Wolf" Surveillance and Search Orders. Since its inception, FISA has regulated searches and surveillance on US soil for intelligence purposes. Under FISA, a person would have to belong to a group suspected of terrorism before he or she could be surveilled. The Patriot Act added a new category, allowing

someone wholly unaffiliated with a terrorist organization to be targeted for surveillance. This section is scheduled to expire on December 31, 2009.

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[1] The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272.
[2] Letter from Ronald Weich, Assistant Attorney General, U.S. Department of Justice, to Senator Patrick Leahy, Chairman, Committee on the Judiciary, (Sept. 14, 2009), *available at* http://judiciary.senate.gov/resources/documents/111thCongress/upload/091409WeichToLeahy.pdf.
[3] *Boyd v. United States*, 116 U.S. 616, 624 (1886).
[4] Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 556 (1999).
[5] *See Boyd*, 116 U.S. 616.
[6] *Id.* at 625.
[7] *Id.*
[8] John Yoo and Eric Posner, *Patriot Act Under Fire*, AMERICAN ENTERPRISE INSTITUTE ONLINE, Dec. 1, 2003, *available at* http://www.aei.org/publications/pubID.19661,filter./pub_detail.asp.
[9] *Marcus v. Search Warrant*, 367 U.S. 717, 729 (1961).
[10] *Marron v. United States*, 275 U.S. 192, 196 (1927).
[11] *Stanford v. Texas*, 379 U.S. 476, 485 (1965).
[12] *United States v. United States District Court (Keith)*, 407 U.S. 297, 313 (1972).
[13] S. REP. NO. 107-351 (Dec. 2002); H.R. REP. NO. 107-792 (Dec. 2002).
[14] Letter from the American Civil Liberties Union to the U.S. House of Representatives (Oct. 23, 2001) (on file with author), *available at* http://www.aclu.org/natsec/emergpowers/14402leg20011023.html; Letter from the American Civil Liberties Union to the U.S. Senate (Oct. 23, 2001) (on file with author), *available at* http://www.aclu.org/natsec/emergpowers/14401leg20011023.html.
[15] Letter from the American Civil Liberties Union to Senator Dianne Feinstein (April 4, 2005) (on file with author), *available at* http://www.aclu.org/safefree/general/17563leg20050404.html.
[16] *USA PATRIOT Act of 2001: Hearing Before the S. Select Comm. on Intelligence*, 109th Cong. 97, 100 (2005) (statement of Alberto R. Gonzales, Att'y Gen. of the United States and Robert S. Mueller, III, Director, Federal Bureau of Investigation). A later report by the Department of Justice Inspector General would reveal that between 2003 and 2005 the FBI had self-reported 19 possible legal violations regarding its use of National Security Letters to the President's Intelligence Oversight Board. Attorney General Gonzales received at least six reports detailing FBI intelligence violations, including misuse of NSLs, three months prior to his Senate testimony. To a certain degree AG Gonzales and FBI Director Mueller were truthful in their testimony because as they well knew, President Bush's Intelligence Oversight Board did not meet to "substantiate" any of the violations reported until the Spring of 2007. *See* DEP'T. OF JUSTICE, OFFICE OF INSPECTOR GENERAL, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS 69 (Mar. 2007), *available at* http://www.usdoj.gov/oig/special/s0703b/final.pdf; John Solomon, *Gonzales was told of FBI violations*, WASH. POST, Jul. 10, 2007, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/07/09/AR2007070902065.html; John Solomon, *In Intelligence World, a Mute Watchdog*, WASH. POST, Jul. 15, 2007, at A3, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/07/14/AR2007071400862.html.
[17] USA PATRIOT Improvement and Reauthorization Act of 2005 (PIRA), Pub. L. No. 109-177, § 119(a), 120 Stat. 192 (2006).
[18] Pub. L. No. 108-458, 118 Stat. 3638 (2004).
[19] 18 U.S.C. § 2518(11), (12).
[20] *Oversight of the Federal Bureau of Investigation: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (Testimony of Robert S. Mueller, III, Director, Federal Bureau of Investigation).
[21] Electronic surveillance orders in criminal investigations are governed by the Omnibus Crime Control and Safe Streets Act of 1968. *See* 18 U.S.C. §§ 2510-2520 (2006).
[22] PIRA § 119(a).

[23] The four NSL authorizing statutes include the Electronic Communications Privacy Act, 18 U.S.C. § 2709 (2000), the Right to Financial Privacy Act, 12 U.S.C. § 3401 (2000), the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. (2000), and the National Security Act of 1947, 50 U.S.C. § 436(a)(1)(2000).
[24] As amended, the NSL statute authorizes the Director of the FBI or his designee (including a Special Agent in Charge of a Bureau field office) to impose a gag order on any person or entity served with an NSL. *See* 18 U.S.C. § 2709(c). To impose such an order, the Director or his designee must "certify" that, absent the non-disclosure obligation, "there may result a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person." *Id.* at § 2709(c)(1). If the Director of the FBI or his designee so certifies, the recipient of the NSL is prohibited from "disclos[ing] to any person (other than those to whom such disclosure is necessary to comply with the request or an attorney to obtain legal advice or legal assistance with respect to the request) that the [FBI] has sought or obtained access to information or records under [the NSL statute]." *Id.* Gag orders imposed under the NSL statute are imposed by the FBI unilaterally, without prior judicial review. While the statute requires a "certification" that the gag is necessary, the certification is not examined by anyone outside the executive branch. The gag provisions permit the recipient of an NSL to petition a court "for an order modifying or setting aside a nondisclosure requirement." *Id.* at § 3511(b)(1). However, in the case of a petition filed "within one year of the request for records," the reviewing court may modify or set aside the nondisclosure requirement only if it finds that there is "no reason to believe that disclosure may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person." *Id.* at § 3511(b)(2). Moreover, if a designated senior government official "certifies that disclosure may endanger the national security of the United States or interfere with diplomatic relations," the certification must be "treated as conclusive unless the court finds that the certification was made in bad faith." *Id.*
[25] DEP'T OF JUSTICE, OFFICE OF INSPECTOR GENERAL, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS (Mar. 2007), *available at* http://www.usdoj.gov/oig/special/s0703b/final.pdf [hereinafter 2007 NSL Report]; DEP'T OF JUSTICE, OFFICE OF INSPECTOR GENERAL, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF SECTION 215 ORDERS FOR BUSINESS RECORDS (Mar. 2007), *available at* http://www.usdoj.gov/oig/special/s0703a/final.pdf [hereinafter 2007 Section 215 Report].
[26] 2007 NSL Report, *supra* note 25, at 84.
[27] *Id.*at 86-99.
[28] DEP'T OF JUSTICE, OFFICE OF INSPECTOR GENERAL, A REVIEW OF THE FBI'S USE OF NATIONAL SECURITY LETTERS: ASSESSMENT OF CORRECTIVE ACTIONS AND EXAMINATION OF NSL USAGE IN 2006 (Mar. 2008), *available at* http://www.usdoj.gov/oig/special/s0803b/final.pdf [hereinafter 2008 NSL Report]; DEP'T OF JUSTICE, OFFICE OF INSPECTOR GENERAL, A REVIEW OF THE FBI'S USE OF SECTION 215 ORDERS FOR BUSINESS RECORDS IN 2006 (Mar. 2008), *available at* http://www.usdoj.gov/oig/special/s0803a/final.pdf [hereinafter 2008 Section 215 Report].
[29] 2008 NSL Report, *supra* note 28, at 9.
[30] *Id.* at 127, 129 n.116.
[31] *Id.*at 127.
[32] *Id.*
[33] *Id.*at 130.
[34] *See Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y 2004); *Doe v. Gonzales*, 500 F.Supp. 2d 379 (S.D.N.Y. 2007); *Doe v. Gonzales*, 386 F. Supp. 2d 66 (D.Conn. 2005); PIRA, Pub. L. No. 109-177, 120 Stat. 195 (2006); USA Patriot Act Additional Reauthorizing Amendments Act of 2006 (ARAA) Pub. L. No.109-178, 120 Stat. 278 (2006). The ACLU is still litigating the constitutionality of the gag order provisions in the USA PATRIOT Improvement and Reauthorization Act of 2005. *See* Press Release, American Civil Liberties Union, ACLU Asks Appeals Court to Affirm Striking Down Patriot Act 'National Security Letter' Provision (Mar. 14, 2008) (on file with author), *available at* http://www.aclu.org/safefree/nationalsecurityletters/34480prs20080314.html.
[35] 2008 NSL Report, *supra* note 28, at 11, 124.
[36] *Id.*at 127.
[37] *Id.*at 81, 88.

[38] Letter from Ronald Weich, Assistant Attorney General, United States Department of Justice, to Harry Reid, Majority Leader, United States Senate (May 14, 2009) (on file with author), *available at* http://www.fas.org/irp/agency/doj/fisa/2008rept.pdf.
[39] 2008 Section 215 Report, *supra* note 28, at 68.
[40] *Id.* at 72.
[41] *Id.* at 73.
[42] *Id.* at 67.
[43] *Id.* at 72.
[44] *Id.*
[45] *Id.* at 71 n.63.
[46] *Id.* at 73.
[47] *Id.* at 72-73.
[48] Letter from Ronald Weich, Assistant Attorney General, U.S. Department of Justice, to Senator Patrick Leahy, Chairman, Committee on the Judiciary, *supra* note 2.
[49] 2008 Section 215 Report, *supra* note 28, at 43.
[50] *Id.* at 45-47.
[51] *Id.* at 47.
[52] *See, Foreign Intelligence Surveillance Act: Closed Hearing Before the H. Permanent Select Comm. on Intelligence,* 110th Cong. (Sept. 6, 2007) (Statement of Kenneth Wainstein, Assistant Att'y Gen., National Security Division, U.S. Dep't of Justice), *available at* http://www.fas.org/irp/congress/2007_hr/090607wainstein.pdf.
[53] *See Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y 2004); *Doe v. Gonzales*, 500 F. Supp. 2d 379 (S.D.N.Y. 2007); *Doe v. Gonzales*, 386 F. Supp. 2d 66 (D.Conn. 2005). The ACLU is still litigating the constitutionality of the gag order provisions in the USA PATRIOT Improvement and Reauthorization Act of 2005. *See*, Press Release, American Civil Liberties Union, ACLU Asks Appeals Court to Affirm Striking Down Patriot Act 'National Security Letter' Provision (Mar. 14, 2008) (on file with author), *available at* http://www.aclu.org/safefree/nationalsecurityletters/34480prs20080314.html.
[54] PIRA.
[55] *Doe v. Gonzales*, 500 F. Supp. 2d 379, 25 A.L.R. Fed. 2d 775 (S.D.N.Y. 2007).
[56] *Doe v. Mukasey,* No. 07-4943-cv (2nd Cir. Dec. 15, 2008), *available at* http://www.aclu.org/pdfs/safefree/doevmukasey_decision.pdf.
[57] *Library Connection v. Gonzales,* 386 F. Supp. 2d 66, 75 (D. Conn. 2005).
[58] *See* Joint Administrative Motion to Unseal Case, Internet Archive v. Mukasey, No. 07-6346-CW (N.D. Cal. May 1, 2008), *available at* https://www.aclu.org/pdfs/safefree/internetarchive_motiontounseal_20080501.pdf.
[59] *Id.* at 3.
[60] National Security Act of 1947, 50 U.S.C. § 436.
[61] Right to Financial Privacy Act, 12 U.S.C. § 4314.
[62] Fair Credit Reporting Act, 15 U.S.C. § 1681v.
[63] Pub. L. No. 104-132, 110 Stat. 1214 (1996).
[64] § 2339A. Providing material support to terrorists

> (a) Offense. – Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of section 32, 37, 81, 175, 229, 351, 831, 842(m) or (n), 844(f) or (i), 930(c), 956, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 1993, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332f, or 2340A of this title, section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284), or section 46502 or 60123(b) of title 49, or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.
>
> (b) Definition. – In this section, the term "material support or resources" means currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment,

facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.

§ 2339B. Providing material support or resources to designated foreign terrorist organizations

(a) Prohibited activities. –

(1) Unlawful conduct. – Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. . . .

(g) Definitions. – As used in this section . . .

(4) the term "material support or resources" has the same meaning as in section 2339A; . . .

(6) the term "terrorist organization" means an organization designated as a terrorist organization under section 219 of the Immigration and Nationality Act.

[65] 66 Stat. 163, § 219, as amended, 8 U.S.C. §§ 1101 et seq. As noted, 18 U.S.C. §§ 2339A and 2339B are not the only statutes pertaining to material support. In addition, the criminal liability provisions of the International Emergency Economic Powers Act (IEEPA), permit the designation of "specially designated terrorists" and "specially designated global terrorists" and give the President authority to regulate, prohibit or prevent any form of economic transaction that provides services to benefit terrorists. 50 U.S.C. § 1705 (2007).

[66] PATRIOT Act, Pub. L. No. 107-56, § 805(a)(2), 115 Stat. 272 (2001). ; 18 U.S.C. §§ 2339A(b) and 2339B(g)(4).

[67] IRTPA, Pub. L. No. 108-458, 118 Stat. 3638 (2004).

[68] *See Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d. 1134, 1142-48, (C.D. Cal. 2005).

[69] *See* Brief for American Civil Liberties Union as Amicus Curiae Supporting Plaintiffs-Appellees, Humanitarian Law Project v. Gonzales, No. 05-56753, 05-56846 (9th Cir. filed May 19, 2006), *available at* http://www.aclu.org/images/general/asset_upload_file394_25628.pdf.

[70] *Implementation of the USA Patriot Act: Prohibition of Material Support Under Sections 805 of the USA Patriot Act and 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004: Hearing Before the H. Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary,* 109th Cong. 23-28 (2005) (Written statement of Ahilan T. Arulanantham, Staff Attorney, ACLU of Southern California), *available at* http://www.aclu.org/safefree/general/17536leg20050510.html; *See also*, Ahilan T. Arulanantham, A Hungry Child Knows No Politics: A Proposal for Reform of the Laws Governing Humanitarian Relief and 'Material Support' of Terrorism, American Constitution Society (June 2008), *available at* http://www.acslaw.org/files/Arulanantham%20Issue%20Brief.pdf.

[71] *Implementation of the USA Patriot Act: Prohibition of Material Support Under Sections 805 of the USA Patriot Act and 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004: Hearing Before the H. Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary,* 109th Cong. 26 (2005) (Written statement of Ahilan T. Arulanantham, Staff Attorney, ACLU of Southern California).,

[72] PIRA § 104.

[73] *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998).

[74] Maureen O'Hagan, *A Terrorism Case that went Awry*, SEATTLE TIMES, Nov. 22, 2004, *available at* http://seattletimes.nwsource.com/html/localnews/2002097570_sami22m.html.

[75] *See Scales v. United States,* 367 U.S. 203, 224-25 (1961).

[76] *United States v. Al-Arian*, 308 F. Supp. 2d 1322, 1337 (M.D. Fla. 2004).

[77] Robert M. Chesney, *Federal Prosecution of Terrorism-Related Offenses: Conviction and Sentencing Data of the "Soft-Sentence" and "Data-Reliability" Critiques*, 11 LEWIS & CLARK L. REV. 837 (2007).

[78] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2001 (2003), BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2002 (2004), BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2003 (2005), BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004 (2006), *available* http://www.ojp.usdoj.gov/bjs/pubalp2.htm#cfjs (follow the hyperlink of the same title to access each year's compendium).

[79] Chesney, *supra* note 77, at 885.

[80] *Id.* at 886.
[81] The ACLU filed an *amicus curiae* brief on behalf of Plaintiffs. *See* Brief for American Civil Liberties Union as Amicus Curiae Supporting Plaintiffs-Appellees, Humanitarian Law Project v. Gonzales, No. 05-56753, 05-56846 (9th Cir. filed May 19, 2006), *available at* http://www.aclu.org/images/general/asset_upload_file394_25628.pdf.
[82] *Humanitarian Law Project v. Mukasey*, 509 F.3d 1122 (9th Cir. 2007).
[83] 8 U.S.C. § 1182(a)(3)(B)(i)(VI).
[84] *Id.*
[85] *American Academy of Religion v. Chertoff*, No. 06 CV 588 (PAC), 2007 WL 4527504 (S.D.N.Y.).
[86] *See American Academy of Religion v. Chertoff*, 463 F.Supp.2d 400 (S.D.N.Y. 2006); *American Academy of Religion v. Chertoff*, No. 06 CV 588 (PAC), 2007 WL 4527504 (S.D.N.Y.).
[87] *See* Rearing and Empowering America for Longevity against acts of International Destruction Act of 2005 (REAL ID), Pub. L. No. 109-13, Div. B, 119 Stat. 231.
[88] PATRIOT Act, Pub. L. No. 107-56, § 218, 115 Stat. 272 (2001)..
[89] *Id.*.
[90] *Mayfield v. United States*, 504 F. Supp. 2d 1023 (D. Or. 2007). The ACLU filed an *amicus curiae* brief on behalf of Plaintiffs. *See* brief for American Civil Liberties Union as Amicus Curiae Supporting Plaintiffs, Mayfield v. United States, No. 07-35865 (9th Cir. filed March 14, 2008), *available at* http://www.aclu.org/images/asset_upload_file16_34495.pdf.

Mr. NADLER. I thank the witnesses. I will recognize myself to begin the questioning for 5 minutes. Mr. German, will you restate briefly, you said that section 206, roving wiretaps, had broader authority and less safeguards than the criminal roving wiretaps. And what was the specific one you cited?

Mr. GERMAN. That it doesn't compel the identification of the person or require the government to determine that the person is actually using the communication device.

Mr. NADLER. And therefore it can be used pretty widely. Mr. Wainstein, why should not the section 206 contain that protection or that requirement that's in the criminal version of the roving wiretaps?

Mr. WAINSTEIN. Well, as to the authorization to issue an order based on a description as opposed to the identity of the person, that particular issue, that's just, that's a recognition of the reality of what we're dealing with when we're dealing with people, foreign spies and terrorists. These are people who we often don't know the name of.

Mr. NADLER. And you don't have the same situation in the criminal context?

Mr. WAINSTEIN. Less frequently. It's less frequently a problem because sometimes we do have people who come in—let's take it outside the context of foreign terrorism, foreign espionage, which are crimes, and look at drug trafficking. Yeah. Sometimes there are people whose names we don't know. But in the foreign intelligence context, the people who come in here who are spies and operatives of foreign intelligence services go to great lengths to hide their identities. So we often will not know. But we'll know darn sure that they are a——

Mr. NADLER. In other words, you'll know his appearance but you won't know his name?

Mr. WAINSTEIN. Well, we'll have watched him. We'll have seen him with physical surveillance. We might have gotten a pen register and seen that he's got contacts with other people who are known operatives. And keep in mind, we can only get the FISA court order if we show sufficient specificity in our description of the person to satisfy the court.

Mr. NADLER. Okay. Mr. German, why would you disagree with that?

Mr. GERMAN. Well, I don't think there's been a sufficient showing. I mean, I would love for government to publish how this authority has actually been used and then we can have a debate based on the facts.

Mr. NADLER. Ms. Spaulding, you alluded to the same thing in your testimony. Could you comment on this little dialogue here?

Ms. SPAULDING. Yeah. I am sympathetic with the challenges that the government might face in knowing the name of the target of the surveillance. I think then that it is very important that the statute explicitly require that this target be identified with sufficient specificity to eliminate or significantly reduce the risk that the wrong person is going to be targeted. And the risk is enhanced when you come to a roving wiretap where you're changing facilities and instruments that you're tapping. So to require great specificity in the description of the target, and also a showing by the govern-

ment that there are reasonable grounds to believe that that particular individual is going to be proximate to and using that instruments, becomes very important.

Mr. NADLER. And the great specificity would be the same as or similar to what we have in the criminal code?

Ms. SPAULDING. It would be similar to. But, again, I'm comfortable with having the government not knowing the name of the target if they are able to describe that individual with sufficient specificity.

Mr. NADLER. Thank you. Now, Ms. Spaulding, you noted in your written statement that Congress should consider requiring the government to set forth in the initial application the grounds upon which it believes the disclosure of a section 215 order would be harmful. Why do you believe that this consideration is important? And when you answer the question, talk also about the NSL, with a similar question.

Mr. EVANS. Can you ask that question again? I don't have a hearing aid with me.

Mr. NADLER. I'm sorry. I said I asked—Ms. Spaulding had said in her testimony that it is important that we should consider requiring the government to set forth in the initial application the grounds upon which it believes the disclosure of a section 215 order would be harmful; in other words, why do we need the gag order? I am asking Ms. Spaulding, why do you believe that this consideration is important. And when you answer the question, comment on the NSL context as well as the section 215 context, please.

Ms. SPAULDING. Thank you, Mr. Chairman. I think it's important for a number of reasons. And it is particularly relevant in the section 215 and NSL letters when they are delivered to third party record holders, when it's delivered to a business asking for the records of a third party, of another individual, because they really have very little incentive to challenge the gag order, to challenge the underlying order itself or to challenge the gag order. It is not in their best interest to have it publicized that they are handing over to the government customer information. And so putting the burden on the recipient of the order to challenge that requirement not to disclose really dramatically reduces the likelihood that it's going to be challenged and, in fact, with regard to challenging underlying orders, the Department of Justice letter acknowledges that no recipient, no business recipient of a 215 request has ever challenged the order, which I think is pretty compelling evidence——

Mr. NADLER. So the whole debate that we had last time during the reauthorization of the grounds for challenge might be a little irrelevant?

Ms. SPAULDING. And the Second Circuit recently ruled in the context of national security letters that, in fact, putting the burden on the recipient as opposed to on the government raises some real serious constitutional issues.

Mr. NADLER. Thank you. I just have one more question. Mr. German, the 2008 IG report on the FBI's use of section 215 orders noted that the FBI issued national security letters, and the Chairman alluded to this, after the FISA court denied requests for section 215 orders to get the same information. The FISA court said this implicates first amendment concerns. You can't get the order

so they just went and issued NSLs to themselves. The Court based its denial on first amendment concerns.

In your opinion, as a former FBI agent, do you believe the FBI is using NSLs to evade the requirements of section 215 orders, especially given the relative low number of section 215 orders that are issued in contrast to the very large number of NSLs; and if so, what should we do about this problem?

Mr. GERMAN. I don't know if I can say in the context of my experience as a FBI agent because I didn't work with that——

Mr. NADLER. In the context of all your experience.

Mr. GERMAN. But certainly, the facts that were related in that Inspector General report reflected that there was a great concern about the first amendment violations that were occurring in this request for documents. So the fact that the FBI continued and ignored the Court's advice, I think, does show abuse and, you know, clearly the report details considerable abuse of national security letters.

Mr. NADLER. But that also would show, would it not, that if the FISA court refused to grant a 215 order because it said the facts implicated first amendment concerns that should prohibit it, the NSLs should also not have been issued because of the same first amendment concerns, but that there was no check on the power of the FBI to make sure of that.

Mr. GERMAN. Exactly right, that there was no outside check allowed the abuse to happen.

Mr. NADLER. My last question. Mr. Wainstein, how should we fix that? In other words, how do we ensure that FBI or the Justice Department, which doesn't have to go to court to get an NSL order, that the proper safeguards are there so that you can't implicate the first amendment the way the Court said you couldn't do it in the 215?

Mr. WAINSTEIN. Well, I think you'd have to take a sort of broader view of it first. This is not the only administrative subpoena authority out there. There are 300 some administrative subpoena authorities on the criminal side used every day every minute of every day around this country by Federal authorities, and they have different requirements but essentially the same idea, that they're issued directly by the Agency to people who possess third party records.

So this is not an anomaly here. The NSLs are not an anomaly. They're actually a tried and true part of the tool kit that law enforcement and intel have used for years. Secondly, keep in mind this is one incident that was highlighted by this IG report that otherwise—there was one other, but this is the one that sort of got the most attention, that looked at, you know, a lot of activity and they found this one concern. I don't believe that this is symptomatic of a broader problem that the FBI is going out to try to subvert the first amendment.

Keep in mind, these are different investigative authorities. 215 has a different standard it has to meet. The FISA court found that the information was thin and didn't want to issue the order and said that they thought it might—I can't remember the language but the investigation might be based on first amendment activities. I'm quite confident that the general counsel's office did not just

lightly blow off the FISA court opinion; that they did go back and look at this and decide that under the different standards for NSLs that it was appropriate.

Mr. NADLER. Thank you. My time is well expired. I will now recognize the gentleman from Wisconsin.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman. I'm very curious at the fact that most of the discussion of the questions and answers has been on national security letters. And I want to make it clear, again, that national security letter authority was not one of the expanded authorities given to law enforcement by the PATRIOT Act. The national security letter law was passed in 1986, 15 years before the PATRIOT Act, under legislation sponsored by Senator Leahy of Vermont. And much of the adverse legal decisions on this entire issue have been relative to the Leahy national security letter law, rather than the Sensenbrenner PATRIOT Act.

And I do take a little bit of a pride of authorship in the fact that with the Sensenbrenner PATRIOT Act, 15 of the 17 expanded law enforcement provisions either went unchallenged as to their constitutionality in almost 8 years, or in one case, there was a constitutional challenge that was withdrawn. The two sections of the PATRIOT Act that were held unconstitutional in the Mayfield case by the District Court of Oregon, which is currently on appeal, involved whether FISA orders violated fourth amendment. And there is a string of cases from other courts that have reached the opposite conclusion that FISA orders do not violate the fourth amendment.

And I think the Supreme Court is going to end up deciding that issue definitively when the case gets up there. So all of this hyperbole that the PATRIOT Act has been a blatantly unconstitutional enactment of Congress that tramples on civil rights is simply not born out by the litigation that has occurred in the almost 8 years that the PATRIOT Act has been law. And I really would admonish people, both in this room and out of this room, to look at the fact that 15 of those 17 expanded authorities of law enforcement, nobody has bothered to challenge.

Now, if it isn't unconstitutional, and it's working, then really, I don't think that we should break something that doesn't need fixing. And I'm afraid that that's where we're at. So I would like to, at this time, ask unanimous consent to include in the record a lengthy letter from Robert F. Turner, Associate Director of the Center for National Security Law at the University of Virginia law school that talks about the three expiring provisions of the PATRIOT Act, which is what we ought to be talking about here, none of which have been even challenged.

Mr. NADLER. Without objection.

Mr. SENSENBRENNER. I yield back the balance of my time.

Mr. NADLER. I thank the gentleman. I now recognize the distinguished Chairman of the full Committee, the gentleman from Michigan.

Mr. CONYERS. Thank you, Mr. Chairman. I want to commend all of our witnesses here today, including Mr. Wainstein, who's been very forthcoming. And I want to commend former Chairman Sensenbrenner too. He mentioned the Sensenbrenner PATRIOT Act.

Of course, I mentioned the Sensenbrenner/Conyers PATRIOT Act that got doused in the Rules Committee.

That was a very mysterious activity in which nobody ever found out—there were no fingerprints on the new bill, that the Sensenbrenner PATRIOT Act, which I suppose Mr. Sensenbrenner wrote that night and got it up there, because nobody ever saw it in the Judiciary Committee. But it's one of those mysteries in the legislative process that have not been fully examined. And maybe some day we'll get a Judiciary Committee Chairman or maybe even a constitutional Subcommittee Chairman that will step up to the plate and find out how a several hundred page bill could be substituted for another in the middle of the night.

The Rules Committee was meeting after midnight when this was acted upon. And I only digress to show you that there's been bipartisanship on the Judiciary Committee. There are very few important bills in which every Republican and every Democrat votes in its favor, and that's what happened to the Sensenbrenner/Conyers. But then whatever else happened to it is one of those problems that need further investigation. Now, the witnesses have raised, I think I stopped counting at about 11, there are a number of small problems that need to be cleared up about reissuing the three provisions that have an expiration date.

Now, I set that aside from the reconsideration of the rest of the PATRIOT Act that doesn't have any expiration date. And I'm sure our Chairman is going to be—has got a fix or a feel for that. I will yield to him if he wants to tell me what it is. But I go along with him.

Mr. NADLER. Well, we're going to be looking at all the sections of the PATRIOT Act as we look at this. We're going to use the opportunity provided by the expiration of these three sections to look at all the other sections as well as section 505 which is the national security letter, which although as Mr. Sensenbrenner said, did predate the PATRIOT Act, was considerably amended by the PATRIOT Act.

Mr. CONYERS. Could I ask the witnesses what further, after having heard each others' testimony here, what else would you add to any of each others' comments or what would you want this Committee to know about everything—here is our former colleague heading a bipartisan committee. Here is probably the most experienced lawyer on the intelligence law before the Committee. We have the American Civil Liberties Union, which has participated in more privacy cases, civil liberties cases, civil rights cases than anybody else. And also a distinguished member of the Bar who has some very profound experience himself. What do each of you think about—I don't want to put it this way—each others' testimony?

Mr. EVANS. I think it's a great thing to have this oversight responsibility that you've accepted on this Committee. And I would like to make one point, and that is the challenges, the limited number of challenges to the various provisions. It would take, if you're an innocent person, it would take a very courageous man or woman to make that challenge because of the image that's created. And so I think that's the reason there have not been more challenges.

Mr. CONYERS. Also, the bill they'd get from their lawyers too would be another preventive, would dissuade a lot of people. You

know, taking on the United States government is not something that you can walk into any law office and say, well, I think they're totally wrong here. I'm innocent. Or at least—and I want to handle that, and I can tell you what the average law firm would say. And I want to have Mr. Wainstein comment on that. They would say, do you have about $150,000 to continue this conversation? What about it Wainstein? You're a partner, full fledged.

Mr. WAINSTEIN. We're just looking for a righteous case, sir. That's all. Give us a righteous case. That's all we want.

Mr. CONYERS. Well, I know your law firm is good on pro bono work. But when you get one of these walking into the office and you decide to take it, without consideration of the legal cost that may be incurred, it's a pretty heavy duty. Mr. German?

Mr. GERMAN. You know, as I mentioned in my testimony, one of the problems with these authorities is that they are exercised in secret. And I think having more facts in the debate would be very helpful to everybody, especially members of the public in trying to understand the arguments on both sides. And I commend the Department of Justice for their letter where they actually revealed the number of times these authorities were use. But I think how they are used and when they are used is also very important. And you know, obviously there is a need to protect some national security interests. But I think the excessive secrecy is really harming the public debate on this issue.

Mr. NADLER. I thank the gentleman. The gentleman from Iowa is recognized.

Mr. KING. Mr. Chairman, I thank the witnesses. This has been interesting testimony, interesting dialogue. And I was unaware of the Sensenbrenner/Conyers bill until I heard the testimony here. And I would trust that that came out of a very serious effort to try to provide safety and security for the American people in the immediate aftermath of September 11. And I listened to the Chairman's lament that that bill didn't arrive to the floor in the same condition that it left his oversight. I understand the sentiment, Mr. Chairman.

Mr. CONYERS. Would the gentleman, distinguished gentleman from Iowa yield?

Mr. KING. Of course I'd yield to the Chairman.

Mr. CONYERS. This was before your time, sir. You weren't even here.

Mr. KING. And that would be why I don't remember it.

Mr. CONYERS. Well, apparently.

Mr. KING. Thank you, Mr. Chairman. Now I don't feel so badly for not being completely tuned in to the history. It, however, did trigger my memory of how the bankruptcy cram down bill came out of the Committee with the King amendment and didn't arrive at the floor with the King amendment on it. So I thought it would be useful to bring the subject up so we could both be refreshed on the history of this Judiciary Committee, Mr. Chairman.

Mr. NADLER. Will the gentleman yield?

Mr. KING. I'd yield.

Mr. NADLER. I'd point out that whatever the merits of that situation, that was one amendment. We held in this Committee, I think, 5 days of markup on the PATRIOT Act and achieved unanimity,

with many amendments from both sides of the aisle being approved, not on party line votes. We achieved a unanimous vote. And then the bill just disappeared, completely disappeared, and we had a new, several 100-page bill. The PATRIOT Act we have today was a new, several 100-page bill that appeared fresh from the head of Zeus or the Rules Committee, and voted on literally the next day, hot from the printer that nobody had a chance to read. That was unfortunate.

Mr. KING. Reclaiming my time, and perhaps even resetting the clock, I would wonder if maybe the Chairman of the Subcommittee and the full Committee might wish to join me in my endeavor to move the Rules Committee to the floor of the full House, because the business of this Congress takes place up there in the hole in the wall rather than in front of the light of the public eye. Anybody care to respond to that while we are having this dialogue?

Mr. NADLER. I will simply respond by saying I am not sure what you mean by move the Rules Committee to the floor of the House, and it is not before this Committee anyway, but we should certainly discuss it, whatever it is.

Mr. KING. I appreciate that response. And maybe we could just move the light of day up to the hole in the wall. And now I will turn my attention to the panel who is here to testify and enlighten all of us, and by the way, everybody that is watching these proceedings. And I am curious, as we look back on the history, and I would direct my first question to Mr. German, I am curious about the position of the ACLU during that period of history in the immediate aftermath of September 11, as the bill that was crafted in this Committee and the long markup that was had and the one that came to the floor, did you have a position on the overall base bill, on the amendments, and a position on the bill as it came to the floor for a vote in support or opposition, Mr. German?

Mr. GERMAN. And I also wasn't at the ACLU then, I was in the FBI then. So my recollection maybe isn't perfect. But I understand that they did offer statements that are in the record urging that there be caution and moderation in responding, and trying to discover the facts before legislating.

Mr. KING. But perhaps not in opposition to the PATRIOT Act as it came to the floor for final passage?

Mr. NADLER. Would the gentleman yield?

Mr. KING. I would yield.

Mr. NADLER. I don't remember what the ACLU said about the bill that came out of this Committee, but they were most certainly in opposition to the bill on the floor.

Mr. KING. On the floor.

Mr. NADLER. Yes.

Mr. KING. Thank you. I appreciate that clarification. Those little tumblers of analyzing history are helpful to me. And the discussion that we have on the reauthorization of these three particular sections of the PATRIOT Act that I would ask Mr. German, have you or your organization been involved in drafting alternative legislation that you have put together that is useful for this Committee to be aware of?

Mr. GERMAN. Have we been involved in—we have been offering suggestions, yes.

Mr. KING. Conceptually or specific language?

Mr. GERMAN. I am sure over time specific language often.

Mr. KING. Well, thanks for that clarification, too. That is not a zone that I work in very much. I didn't have a feel for that. Do you have examples of individuals whose constitutional rights have been, you believe, violated under any of the three sections that we are considering reauthorizing?

Mr. GERMAN. No, because we don't know who they have been used against.

Mr. KING. And even though some of them are bound to confidentiality, doesn't it happen, from time to time, that people will breach that confidentiality if they believe that their constitutional rights have been breached?

Mr. GERMAN. I am not sure they would know that these—the FISA authorities usually don't alert the target of their surveillance.

Mr. KING. Let me submit that we have had as a subject of the various Subcommittees of this Judiciary Committee subjects who were before us anonymously because of certain allegations that were made about their history. And I am going to keep them anonymous, so I won't define them any further. And it would strike me that if there were some significant constitutional violations that it would take individuals to bring those kind of cases, we could go beyond the hypothetical and then just simply deal with a defined personality, whether it be an individual or not. Why don't I hear about that? Why don't I hear about even a hypothetical individual beyond the generalities that we have discussed here? Why isn't it more specific if there are constitutional rights that are at play here?

Mr. GERMAN. Well, any use of an unconstitutional authority is an abuse. It is unconstitutional.

Mr. KING. But a person has to have standing.

Mr. GERMAN. Because the person doesn't know. And nobody in the public knows. Only the government knows who these authorities are being used against.

Mr. KING. Then how, if no one knows, aren't we back to if a tree falls in the forest?

Mr. GERMAN. Well, when it revolves around the constitutional rights of Americans. I think we have to make sure that we are protecting those rights. And that is the obligation, is to protect the Constitution and the rights of Americans.

Mr. KING. One of those obligations——

Mr. NADLER. Would the gentleman yield for a second?

Mr. KING. I would yield.

Mr. NADLER. Just to clarify, I think what is being said is that if you are being wiretapped unconstitutionally, without any proper evidence, et cetera, you won't know about that, and therefore you can't bring the case. And it may be that nobody knows about it, but still your rights are being violated.

Mr. KING. And I understand that explanation. I just don't quite accept how, if constitutional rights have been violated and no one knows it, if there has actually been an effect of a violation if it can't be identified. And I will take you off this hypothetical path, and I would turn then to Mr. Wainstein. Are you aware of any individuals whose rights have been violated? And are you aware of cases that have been resolved and American people that have been

protected because of the utilization of the PATRIOT Act? And I will just leave that there and open the question to your response.

Mr. WAINSTEIN. Well, sure, the PATRIOT Act has been tremendously helpful, and Director Mueller has testified on countless occasions how it has really——

Mr. KING. And within these three sections, if you could.

Mr. WAINSTEIN. Within these three sections I know that it has been used, I watched it—two of the three sections, one has not been used but two of the provisions, I watched them get used, watched how the information was then integrated into the investigation, how important it was. And without getting into specifics, I mean, you can see just the roving wiretap, you can see how critical that is. Because nowadays, you know, you can get cell phones for pennies almost, throw them away, and start a new one an hour later. And if the government has to go back to the FISA court with a 70-page document every time someone throws away a cell phone, they are going to be stymied in their ability to surveil somebody. So that just on its face it is clear how critical that is both in criminal investigations as well as——

Mr. KING. But isn't there a constitutional distinction between a roving wiretap and the previous FISA law that was designed for land lines? A constitutional distinction?

Mr. WAINSTEIN. Well, there is constitutional debate over whether that is constitutional, but the courts that have looked at the roving wiretap authority in the criminal context have found it constitutional.

Mr. KING. That is my point next. I thank the gentleman and the witnesses and appreciate the dialogue, Mr. Chairman. I yield back.

Mr. NADLER. Thank you. The gentleman from Georgia is recognized for 5 minutes.

Mr. JOHNSON. Thank you, Mr. Chairman. If the appropriate Committee were to look at the proceedings of the Rules Committee and decide to require that those Committee meetings be held on the floor of the House, as has been suggested, I believe the number one, smoking gun piece of evidence would be the Sensenbrenner PATRIOT Act bill, the 700-page one. That is an intriguing issue as to how that occurred. That is one of the big mysteries of our time. Kind of like the beginning of the earth and how big is the solar system, or are there any other solar systems, you know, those kinds of things. But let me ask this question. With respect to section 215, wherein the FISA order can also require or contain a gag order, how long does the gag order last? Is there any limits on how long it lasts or the scope of the gag order?

Mr. WAINSTEIN. Sir, I am not sure if that question is to me, but——

Mr. JOHNSON. Sure.

Mr. WAINSTEIN.—I will take a crack at it. There is a nondisclosure order that comes along with a 215 order, similar to the NSL context. And it does say that the person who receives that order is not to disclose it to anybody else. But then there are exceptions. You are allowed to disclose the fact of the order to your attorney if you are seeking counsel from a lawyer. You are allowed to disclose to somebody, you know, if you are a bank and you need to go to a clerk to try get assistance to get records the government

wants, you can disclose the fact of the order to that person. But then you are allowed to challenge it. There is also a process that was put in place and was carefully crafted in the context of the FISA reauthorization—I am sorry, PATRIOT Act reauthorization back in 2005, 2006, Congress put in place an elaborate mechanism for challenging not only the validity of the order itself as to whether the 215 order is oppressive or otherwise unlawful——

Mr. JOHNSON. Let me stop you here. And I appreciate those answers. Does the Act itself put any limitations on the length of time that the gag order would be in effect? Assuming there would be no challenge by the third party to it?

Mr. WAINSTEIN. A recipient can challenge it after a year. So after it is in place for a year a person who has received the order——

Mr. JOHNSON. If he or she or it does not challenge it, then it just goes on for year after year after year?

Mr. WAINSTEIN. You know, I believe that is the case. I am not aware of it expiring at any time.

Mr. JOHNSON. And what happens if a FISA order is not responded to by the third party, a third party from whom tangible evidence, if you will, tangible things has been requested from? Suppose they just turn their nose up—suppose it was, let's say, the ACLU and, you know, the ACLU receives a FISA order. So first of all, they would be on the hook if they did not challenge it for an indefinite time. And secondly, what would happen if they decided to not respond or refused to turn over some information based on, say, a privilege? What would happen there?

Mr. EVANS. That is why our Liberty and Security Committee, that is a bipartisan group—by the way all of us act on a pro bono basis, and I do everything on a pro bono basis, but we believe that there should be some reasonable limitation, like 30 days, so that you could then go out publicly and talk about it. But I go back to what the Chairman had initially said and what I had added, you know, you got to have awful deep pockets these days to bring challenges.

Mr. JOHNSON. Suppose there is a non-deep pocketed third party from whom tangible documentation has been ordered under a FISA order, and that third party decides to violate the gag order? What happens in that kind of scenario?

Mr. EVANS. I would refer to the former Assistant Attorney General.

Mr. WAINSTEIN. These orders can be enforced. They are orders of the Court. So if you defy the order——

Mr. JOHNSON. Would they be enforced in the secret FISA court?

Mr. WAINSTEIN. For the 215 orders, yes. In the NSL context or grand jury subpoena context, it would be a regular district court. That is my understanding.

Mr. JOHNSON. So it is possible a person can be locked up secretly for violating the FISA order. It can be an indefinite detention, if you will.

Mr. WAINSTEIN. You know, I am not sure about that, sir. The FISA statute, as amended by the PATRIOT Act reauthorization, lays out a process by which you can challenge, you as a recipient can challenge that FISA court order. You go to court and you challenge it and say I don't think I should have to turn these being doc-

uments over, and here are the reasons. And if it is, as you said, a privilege, and it is a legitimate privilege, then the court would I think say okay, fine, you have got a privilege and craft a resolution. But if you do not have a basis for challenging the subpoena or the 215 order other than the fact that you just don't want to turn the documents over, it is a legitimate court order and the court has the authority to enforce it, just as with——

Mr. JOHNSON. Can you appeal that FISA order ruling by the FISA court?

Mr. WAINSTEIN. Yes. You can appeal FISA court rulings to the FISA Court of Review.

Mr. JOHNSON. Who would it be appealed to?

Mr. WAINSTEIN. It is a court, an appellate court that issues opinions. It is I think three judges sit, I believe, on each hearing. And I think it has only issued two opinions, right? But it would be appealed to them. So you do have the full process.

Mr. JOHNSON. Thank you, sir. And thank you, Mr. Chairman.

Mr. NADLER. Thank you. And finally, the gentleman from Texas.

Mr. GOHMERT. Thank you, Mr. Chairman. And I appreciate the panelists and your input. It is a tough issue. And it was back apparently when it first passed as a bill. And then 5 years ago when we took it up, I was one of the, I guess, couple of people on the day that we passed out of Committee on the Republican side that was adamant about the need for sunsets so we would have people come in and talk to us about how these powers had been used. The one provision regarding cell phones, and you make great points, how do you use conventional methods when we have throwaway cell phones?

Those were never anticipated in the original methods of pursuing the bad guys. And in looking at the September 21 story about, the headline here is Terror Probe Prompts Mass Transit Warning, but I see the word cell phones mentioned a number of times in the story. Do we know if any of the powers granted under the PATRIOT Act were utilized in bringing to light this alleged terror plot? Anybody know?

Mr. WAINSTEIN. I don't believe there has been a reference in the press to any specific tools.

Mr. GOHMERT. That were used.

Mr. WAINSTEIN. Not that I have seen.

Mr. GOHMERT. Okay.

Ms. SPAULDING. And in fact, the earlier witness, Mr. Hinnen from the Justice Department, was careful with his words not to suggest whether they were or were not.

Mr. GOHMERT. Okay. I will wait to read how we did that in *The New York Times*. I am wondering, in the last year there was information that came out about a wiretap conversation with one of our Members, Jane Harman. Was that wiretapped under this provision of the PATRIOT Act? Does anybody know? I am just curious. Apparently I take it by your silence nobody knows. I see the need there, and it being critical to proper law enforcement. And it was apparently such an important tool to us not being attacked again during the Bush administration. But coming forward to the NSLs, you know, in the PATRIOT Act, the power was expanded to allow field offices to make NSL requests as opposed to the FBI head-

quarters. I think at the time the PATRIOT Act passed, most of us here on this Committee were not aware of just how profound the effect of Director Mueller's 5-year up or out policy would be and had been that we have lost thousands of years of experience because of that. Policy basically being if you are in charge, in a supervisory position for 5 years in the field, then you have to either move to headquarters here in Washington or take a demotion or get out.

So 5-year up or out. So I am wondering, in view of Director Mueller's policy, having lost thousands and thousands of years of experience, and recalling Director Mueller saying after the vast abuses of the NSLs came to light saying that he took responsibility for not having the experience and training in the field to properly monitor those NSLs, if maybe we should pull back the NSL authority to the FBI headquarters, where the Director has pulled so much of the remaining experience.

I just know that when this passed, that was not really an issue on the radar screen. But it does seem to make sense that that could be a reason there were so many abuses reported by the inspector general. You just didn't have the experience. You know, some office is going from 25 years experience in charge to six, good people all, but experience does make a difference. So I would be interested in comments from our panelists on that issue, as to whether that might be something we need to look at as far as pulling the power back to FBI headquarters. I would really like to hear from everybody, if you have got a comment.

Ms. SPAULDING. Congressman, I think that is a very interesting suggestion. And clearly, since the inspector general came out with its report, the FBI has tightened its procedures and has taken steps to try to ensure that they reduce the number of mistaken uses and abuses of national security letters. But I think——

Mr. GOHMERT. I think I recall the Director saying we wouldn't find any evidence in the rest of the offices of that kind of abuse.

Ms. SPAULDING. Another possibility that you might consider is enhancing the role of the National Security Division at the Department of Justice in terms of oversight and managing the national security letter process.

Mr. EVANS. I think it is a very important issue that should quite appropriately be addressed.

Mr. WAINSTEIN. If I can, Congressman Gohmert, I don't know the quote you referenced just now about how Director Mueller said you would not find those abuses in any field offices.

Mr. GOHMERT. After it came to light, he said they had done a full audit of all the other offices that the IG had not had a chance to inspect, and we wouldn't find abuses like that again.

Mr. WAINSTEIN. They did do a full audit. And actually, I was in the National Security Division at the time, and it was a huge deployment of people. They went out and audited all the field offices. And they found the incidence of mistakes which was basically consistent with the incidence level that Glenn Fine had found, the IG report had found.

Mr. GOHMERT. Right.

Mr. WAINSTEIN. But I think what he might have been referring to, I am guessing here, but the exigent letters, which were sort of

the more abusive aspect of it. He might have been saying that was probably not something that migrated out to the field offices, because that was, I believe, primarily in headquarters. That might have been what he was talking about. The mistakes, though, were found in the field offices as well. My concern about your suggestion that maybe we pull the NSL authorizing authority back to FBI headquarters is that it would reduce—really it would add cumbersome bureaucratic requirements to getting an NSL out. And in the course of a fast moving threat investigation, you need to be able to get records quickly. And just the extra time and complication of having to go to FBI headquarters to get their approval would slow things down and could, you know, in the wrong situation be the difference between catching a terrorist and not catching a terrorist.

I believe that the sort of better way of doing it is, as Suzanne said, make sure that you have the necessary systems in place and the oversight. I think you heard from Mr. Hinnen earlier, and as Ms. Spaulding said, you know, since the Glenn Fine report, a lot of procedures have been put in place both in the FBI as well as in the National Security Division to make sure those kind of problems don't arise again. And it is sort of interesting, as a side line, you look at let's say the SEC right now in the aftermath of what happened last fall and the questions about how they should change their operations. What is one of the first things that has come to the fore is suggestions to delegate the authority to take certain investigative steps lower down, to make the investigators more nimble, to be able to build cases more quickly. Same kind of thing that we saw in the FBI. And that is the natural reaction when you have an overly complicated system in place.

Mr. GOHMERT. All right. An example of the SEC, is that how Goldman Sachs was able to have their biggest profit in the second quarter, and someone supposedly overseeing that is also on their board, but our Treasury Secretary gave him a waiver, I believe, of that conflict?

Mr. NADLER. The gentleman, I think that is a little afield. The gentleman's time has expired.

Mr. GOHMERT. Could I have the last panelist comment on that?

Mr. NADLER. Mr. German, you can respond briefly.

Mr. GERMAN. Thank you. I agree that stronger internal oversight mechanisms are very important. But I would also argue that outside oversight is critical. And the strongest internal oversight mechanisms aren't going to be as effective as outside oversight.

Mr. GOHMERT. By outside what do you mean?

Mr. GERMAN. By this body, where it is applicable by the courts, whether that is the FISA court or the criminal courts. But also, I think the problem with the national security letters is that the scope was so broad, that that allowed the records of innocent people to be collected, and that was perfectly legal. And that is really where I believe the abuse——

Mr. GOHMERT. With the Chairman's indulgence, do you have a recommendation for how that broad scope could be tightened up?

Mr. GERMAN. Sure. To bring it back into the pre-PATRIOT Act authority where you are using it against a suspected agent of a foreign power or a member of a terrorist group rather than just

against, as the IG found, people two and three times removed from the subject of the investigation.

Mr. NADLER. And that would be by restoring the language of particularity?

Mr. GERMAN. Right.

Mr. GOHMERT. Okay. Thank you.

Mr. NADLER. I thank you. I thank all the witnesses. Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond as promptly as they can so that their answers may be made part of the record. Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record. Again, I thank the witnesses. And with that, this hearing is adjourned.

[Whereupon, at 1:35 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 14, 2009

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your letter requesting our recommendations on the three provisions of the Foreign Intelligence Surveillance Act ("FISA") currently scheduled to expire on December 31, 2009. We believe that the best legislation will emerge from a careful examination of these matters. In this letter, we provide our recommendations for each provision, along with a summary of the supporting facts and rationale. We have discussed these issues with the Office of the Director of National Intelligence, which concurs with the views expressed in this letter.

We also are aware that Members of Congress may propose modifications to provide additional protection for the privacy of law abiding Americans. As President Obama said in his speech at the National Archives on May 21, 2009, "We are indeed at war with al Qaeda and its affiliates. We do need to update our institutions to deal with this threat. But we must do so with an abiding confidence in the rule of law and due process; in checks and balances and accountability." Therefore, the Administration is willing to consider such ideas, provided that they do not undermine the effectiveness of these important authorities.

1. Roving Wiretaps, USA PATRIOT Act Section 206 (codified at 50 U.S.C. § 1805(c)(2))

We recommend reauthorizing section 206 of the USA PATRIOT Act, which provides for roving surveillance of targets who take measures to thwart FISA surveillance. It has proven an important intelligence-gathering tool in a small but significant subset of FISA electronic surveillance orders.

This provision states that where the Government sets forth in its application for a surveillance order "specific facts" indicating that the actions of the target of the order "may have the effect of thwarting" the identification, at the time of the application, of third parties necessary to accomplish the ordered surveillance, the order shall direct such third parties, when identified to furnish the Government with all assistance necessary to accomplish surveillance of the target identified in the order. In other words, the "roving" authority is only available when the Government is able to provide specific information that the target may engage in counter-surveillance activity (such as rapidly switching cell phone numbers. The language of the statute does not allow the Government to make a general, "boilerplate" allegation that the target may

engage in such activities; rather, the Government must provide specific facts to support its allegation.

There are at least two scenarios in which the Government's ability to obtain a roving wiretap may be critical to effective surveillance of a target. The first is where the surveillance targets a traditional foreign intelligence officer. In these cases, the Government often has years of experience maintaining surveillance of officers of a particular foreign intelligence service who are posted to locations within the United States. The FBI will have extensive information documenting the tactics and tradecraft practiced by officers of the particular intelligence service, and may even have information about the training provided to those officers in their home country. Under these circumstances, the Government can represent that an individual who has been identified as an officer of that intelligence service is likely to engage in counter-surveillance activity.

The second scenario in which the ability to obtain a roving wiretap may be critical to effective surveillance is the case of an individual who actually has engaged in counter-surveillance activities or in preparations for such activities. In some cases, individuals already subject to FISA surveillance are found to be making preparations for counter-surveillance activities or instructing associates on how to communicate with them through more secure means. In other cases, non-FISA investigative techniques have revealed counter-surveillance preparations (such as buying "throwaway" cell phones or multiple calling cards). The Government then offers these specific facts to the FISA court as justification for a grant of roving authority.

Since the roving authority was added to FISA in 2001, the Government has sought to use it in a relatively small number of cases (on average, twenty-two applications a year). We would be pleased to brief Members or staff regarding actual numbers, along with specific case examples, in a classified setting. The FBI uses the granted authority only when the target actually begins to engage in counter-surveillance activity that thwarts the already authorized surveillance, and does so in a way that renders the use of roving authority feasible.

Roving authority is subject to the same court-approved minimization rules that govern other electronic surveillance under FISA and that protect against the unjustified acquisition or retention of non-pertinent information. The statute generally requires the Government to notify the FISA court within 10 days of the date upon which surveillance begins to be directed at any new facility. Over the past seven years, this process has functioned well and has provided effective oversight for this investigative technique.

We believe that the basic justification offered to Congress in 2001 for the roving authority remains valid today. Specifically, the ease with which individuals can rapidly shift between communications providers, and the proliferation of both those providers and the services they offer, almost certainly will increase as technology continues to develop. International terrorists, foreign intelligence officers, and espionage suspects — like ordinary

criminals — have learned to use these numerous and diverse communications options to their advantage. Any effective surveillance mechanism must incorporate the ability to rapidly address an unanticipated change in the target's communications behavior. The roving electronic surveillance provision has functioned as intended and has addressed an investigative requirement that will continue to be critical to national security operations. Accordingly, we recommend reauthorizing this feature of FISA.

2. **"Business Records," USA PATRIOT Act Section 215 (codified at 50 U.S.C. § 1861-62)**

We also recommend reauthorizing section 215 of the USA PATRIOT Act, which allows the FISA court to compel the production of "business records." The business records provision addresses a gap in intelligence collection authorities and has proven valuable in a number of contexts.

The USA PATRIOT Act made the FISA authority relating to business records roughly analogous to that available to FBI agents investigating criminal matters through the use of grand jury subpoenas. The original FISA language, added in 1998, limited the business records authority to four specific types of records, and required the Government to demonstrate "specific and articulable facts" supporting a reason to believe that the target was an agent of a foreign power. In the USA PATRIOT Act, the authority was changed to encompass the production of "any tangible things" and the legal standard was changed to one of simple relevance to an authorized investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities.

The Government first used the USA PATRIOT Act business records authority in 2004 after extensive internal discussions over its proper implementation. The Department's inspector general evaluated the Department's implementation of this new authority at length, in reports that are now publicly available. Other parts of the USA PATRIOT Act, specifically those eliminating the "wall" separating intelligence operations and criminal investigations, also had an effect on the operational environment. The greater access that intelligence investigators now have to criminal tools (such as grand jury subpoenas) reduces but does not eliminate the need for intelligence tools such as the business records authority. The operational security requirements of most intelligence investigations still require the secrecy afforded by the FISA authority.

For the period 2004-2007, the FISA court has issued about 220 orders to produce business records. Of these, 173 orders were issued in 2004-06 in combination with FISA pen register orders to address an anomaly in the statutory language that prevented the acquisition of subscriber identification information ordinarily associated with pen register information. Congress corrected this deficiency in the pen register provision in 2006 with language in the USA PATRIOT Improvement and Reauthorization Act. Thus, this use of the business records authority became unnecessary.

The remaining business records orders issued between 2004 and 2007 were used to obtain transactional information that did not fall within the scope of any other national security investigative authority (such as a national security letter). Some of these orders were used to support important and highly sensitive intelligence collection operations, of which both Members of the Intelligence Committee and their staffs are aware. The Department can provide additional information to Members or their staff in a classified setting.

It is noteworthy that no recipient of a FISA business records order has ever challenged the validity of the order, despite the availability, since 2006, of a clear statutory mechanism to do so. At the time of the USA PATRIOT Act, there was concern that the FBI would exploit the broad scope of the business records authority to collect sensitive personal information on constitutionally protected activities, such as the use of public libraries. This simply has not occurred, even in the environment of heightened terrorist threat activity. The oversight provided by Congress since 2001 and the specific oversight provisions added to the statute in 2006 have helped to ensure that the authority is being used as intended.

Based upon this operational experience, we believe that the FISA business records authority should be reauthorized. There will continue to be instances in which FBI investigators need to obtain transactional information that does not fall within the scope of authorities relating to national security letters and are operating in an environment that precludes the use of less secure criminal authorities. Many of these instances will be mundane (as they have been in the past), such as the need to obtain driver's license information that is protected by State law. Others will be more complex, such as the need to track the activities of intelligence officers through their use of certain business services. In all these cases, the availability of a generic, court-supervised FISA business records authority is the best option for advancing national security investigations in a manner consistent with civil liberties. The absence of such an authority could force the FBI to sacrifice key intelligence opportunities.

3. "Lone Wolf," Intelligence Reform and Terrorism Prevention Act of 2004 Section 6001 (codified at 50 U.S.C. § 1801(b)(1)(C))

Section 6001 of the Intelligence Reform and Terrorism Prevention Act of 2004 defines a "lone wolf" agent of a foreign power and allows a non-United States person who "engages in international terrorism activities" to be considered an agent of a foreign power under FISA even though the specific foreign power (*i.e.*, the international terrorist group) remains unidentified. We also recommend reauthorizing this provision.

Enacted in 2004, this provision arose from discussions inspired by the Zacarias Moussaoui case. The basic idea behind the authority was to cover situations in which information linking the target of an investigation to an international group was absent or insufficient, although the target's engagement in "international terrorism" was sufficiently established. The definition is quite narrow: it applies only to non-United States persons; the activities of the person must meet the FISA definition of "international terrorism;" and the

information likely to be obtained must be foreign intelligence information. What this means, in practice, is that the Government must know a great deal about the target, including the target's purpose and plans for terrorist activity (in order to satisfy the definition of "international terrorism"), but still be unable to connect the individual to any group that meets the FISA definition of a foreign power.

To date, the Government has not encountered a case in which this definition was both necessary and available, *i.e.*, the target was a non-United States person. Thus, the definition has never been used in a FISA application. However, we do not believe that this means the authority is now unnecessary. Subsection 101(b) of FISA provides ten separate definitions for the term "agent of a foreign power" (five applicable only to non-United States persons, and five applicable to all persons). Some of these definitions cover the most common fact patterns; others describe narrow categories that may be encountered rarely. However, this latter group includes legitimate targets that could not be accommodated under the more generic definitions and would escape surveillance but for the more specific definitions.

We believe that the "lone wolf" provision falls squarely within this class. While we cannot predict the frequency with which it may be used, we can foresee situations in which it would be the only avenue to effective surveillance. For example, we could have a case in which a known international terrorist affirmatively severed his connection with his group, perhaps following some internal dispute. The target still would be an international terrorist, and an appropriate target for intelligence surveillance. However, the Government could no longer represent to the FISA court that he was currently a member of an international terrorist group or acting on its behalf. Lacking the "lone wolf" definition, the Government could have to postpone FISA surveillance until the target could be linked to another group. Another scenario is the prospect of a terrorist who "self-radicalizes" by means of information and training provided by a variety of international terrorist groups via the Internet. Although this target would have adopted the aims and means of international terrorism, the target would not actually have contacted a terrorist group. Without the lone wolf definition, the Government might be unable to establish FISA surveillance.

These scenarios are not remote hypotheticals; they are based on trends we observe in current intelligence reporting. We cannot determine how common these fact patterns will be in the future or whether any of the targets will so completely lack connections to groups that they cannot be accommodated under other definitions. However, the continued availability of the lone wolf definition eliminates any gap. The statutory language of the existing provision ensures its narrow application, so the availability of this potentially useful tool carries little risk of overuse. We believe that it is essential to have the tool available for the rare situation in which it is necessary rather than to delay surveillance of a terrorist in the hopes that the necessary links are established.

Thank you for the opportunity to present our views. We would be happy to meet with your staff to discuss them. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Ronald Weich
Assistant Attorney General

cc: The Honorable Jeff Sessions
Ranking Minority Member

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September 21, 2009

The Honorable Jerrold Nadler
Chairman
Subcommittee on the Constitution, Civil Rights and Civil Liberties
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable F. James Sensenbrenner, Jr.
Ranking Minority Member
Subcommittee on the Constitution, Civil Rights and Civil Liberties
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

RE: Opposition to Eliminating the "Lone Wolf" Provision of FISA/PATRIOT Acts

Dear Chairman Nadler and Representative Sensenbrenner:

I was recently contacted by a member of the Committee's minority staff seeking my thoughts on a proposal to eliminate the "lone wolf" provision of the USA PATRIOT Act. I gave her a brief summary of my concerns, and offered to provide a more detailed statement for the record if that would be helpful. This letter is in fulfillment of that offer. I apologize for the length, but the issues are of tremendous importance.

I want to emphasize at the start that **the views which follow are entirely my own**, and should not be attributable to any group, organization, or entity with which I am now or have in the past been associated. That disclaimer includes the University of Virginia and the Center for National Security Law (which does not take positions on legislation). I am not writing as a representative of any group, and to the best of my knowledge I have not received anything of value in the past decade from any organization or entity that has a financial interest in anything I will discuss in this statement.

These are not new issues to me. When FISA was enacted in 1978 I was serving as national security adviser to Senator Robert P. Griffin of Michigan, at the time a member of the Senate Foreign Relations Committee. Between 1981 and 1984 I served in the White House as Counsel to the President's Intelligence Oversight Board (PIOB), where my duties involved overseeing the implementation of FISA and other laws and executive orders affecting the activities of the Intelligence Community.[1] In 1984-85 I served as Acting Assistant Secretary of State for Legislative and Intergovernmental Affairs.

As a scholar, I co-founded the nation's first think tank dealing with national security law more than twenty-eight years ago, and I wrote my 1700-page doctoral (SJD) dissertation on "National Security and the Constitution"—with a heavy focus on the separation of constitutional powers related to intelligence. I am co-editor of the 1400-page law school casebook, *National Security Law*, in which I wrote the chapter on separation of powers. I chaired the American Bar Association's Standing Committee on Law and National Security (1988-91), and edited the ABA *National Security Law Report* for most of the 1990s.[2] I have also testified on issues related to intelligence before the House and Senate judiciary and intelligence committees.

I am not a member of any political party, have never made a financial contribution to any political party or candidate for federal office, and I take pride in the fact that my views of the Constitution have not shifted on the basis of which political party occupies the White House or holds a majority in Congress. In my scholarship, I have been an equal opportunity critic of both Democrats and Republicans.

With respect to your hearing scheduled for Tuesday, September 22, I would like to address seven points:

I. America still faces a serious risk of terrorist attack;

II. The lack of "lone wolf" authority in FISA seriously undermined FBI efforts to prevent the 9/11 attacks;

III. The Coleen Rowley myth;

IV. There was no evidence Moussaoui was an "agent" of any "foreign power";

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[1] While at the PIOB I wrote a 200-page memo examining the constitutional powers of Congress and the President, which is available online at: http://www.virginia.edu/cnsl/pdf/Turner-Cong,Constitution&ForeignAffairs.pdf.

[2] Let me emphasize again that my remarks are *personal* and are not those of the American Bar Association or any other organization.

V. Congress deserves a great deal of responsibility for the success of the 9/11 attacks, and legislative efforts to prevent the President from protecting the nation against attacks by "lone wolf" foreign terrorists will both violate the Constitution and endanger the security and lives of the American people;

VI. The problem of legislative "lawbreaking"; and

VII. The harm caused by legislative "lawbreaking."

This letter was of necessity prepared rather hastily over this past weekend, and I apologize in advance for any typographical errors that may still exist.

I. America Still Faces a Serious Risk of Terrorist Attack

Watching "politics as usual" in Washington, it sometimes appears that some Members of Congress have forgotten we are still involved in two wars authorized by Congress, and the terrorist threat against America continues to be a very serious one. According to press accounts,[3] this past weekend the FBI arrested Najibullah Zazi, Mohammed Wali Zazi, and Ahmad Wais Afzali for making "false statements" during an FBI investigation. Najibullah Zazi has reportedly admitted that he received instructions on weapons and explosives in an al Qaeda training camp in Pakistan last year, and his laptop computer contained data that strongly suggests they were planning on blowing up New York's Grand Central Station, subway stations, or other possible targets. The human costs of such an attack could have easily dwarfed the horrors of 9/11. Not everything done by our Intelligence Community to prevent attacks can be made public without compromising valuable sources and methods, but this one incident alone should serve as a reminder that we still live in a very dangerous world.

II. The Lack of "Lone Wolf" Authority in FISA Seriously Undermined FBI Efforts to Prevent the 9/11 Attacks

This is the "Subcommittee on the Constitution . . . ," and quite appropriately much of my letter will address constitutional issues. But before doing so, I want to urge you to contemplate a prudential consideration that could have very personal political ramifications for any of you who elect to terminate the "lone wolf" provision first enacted as an amendment to the PATRIOT Act and FISA by Section 6001 of the Intelligence

[3] *See, e.g.,* CNN.com/crime, *3 men in terror probe charged with making false statements,* available online at: http://www.cnn.com/2009/CRIME/09/20/terror.probe/index.html.

Reform and Terrorism Prevention Act of 2004. Put simply, you will not only be betraying your constitutional oath of office to "support" the Constitution[4]; you will once again be undermining the security of this nation and the safety of the American people.

Sadly, this is not hyperbole. I am serious, and yet I suspect this is a conclusion that will shock you. You deserve an explanation. But first let me get to the more specific issue of how the absence of authority to conduct surveillance of a "lone wolf" terrorist undermined the FBI's effort to gain access to the content of Zacarias Moussaoui's laptop computer and materially impeded a critically important investigation that—in the absence of FISA—might well have prevented the attacks of September 11, 2001.[5]

I have read a fair amount of silliness to the effect that the problem was not FISA, but rather that a certain (non-lawyer) Supervisory Special Agent at FBI Headquarters did not know that "probable cause" was the applicable legal standard for a FISA warrant, or that it might be possible to obtain a warrant even if a foreign terrorist organization had not previously been identified as such by our government. This was relied upon in a 2003 report by Senators Patrick Leahy, Charles Grassley, and Arlen Specter.

Consider this excerpt from their report:

> **3. FBI's Misunderstanding of Legal Standards Applicable to the FISA**
>
> *a. The FISA Statutory Standard: "Agent of a Foreign Power"* □
>
> In order to obtain either a search warrant or an authorization to conduct electronic surveillance pursuant to FISA, the FBI and Justice Department must establish before the FISA Court ("FISC") probable cause that the targeted person is an "agent of a foreign power." . . . Accordingly, in the Moussaoui case, to obtain a FISA warrant the FBI had to collect only enough evidence to establish that there was "probable cause" to believe that Moussaoui was the "agent" of an "international terrorist group" as defined by FISA.

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[4] U.S. CONST., Art. VI, Cl. 3.

[5] While it is reported that the search of Moussaoui's laptop following 9/11 pursuant to a criminal warrant did not reveal any "smoking gun" that would have clearly led to the prevention of those attacks, there was enough useful information to ultimately indict and convict Moussaoui of conspiracy to kill American citizens during those attacks. Without access to all of the classified material in the case one can only speculate about whether information on the laptop might have produced other leads that could have broken the case; the one thing that is clear is that by preventing that access prior to 9/11 the Congress made the job of the FBI far more difficult.

> However, even the FBI agents who dealt most with FISA did not correctly understand this requirement. During a briefing with Judiciary Committee staff in February 2002, the Headquarters counterterrorism Unit Chief of the unit responsible for handling the Moussaoui FISA application stated that with respect to international terrorism cases, FISA warrants could only be obtained for "recognized" terrorist groups (presumably those identified by the Department of State or by the FBI itself or some other government agency). . . .
>
> Nowhere, however, does the statutory definition require that the terrorist group be an identified organization that is already recognized (such as by the United States Department of State) as engaging in terrorist activities. . . .
>
> In the context of this case, the foreign power would be an international terrorist group, that is, "a group engaged in international terrorism or activities in preparation therefore." A "group" is not defined in the FISA, but in common parlance, and using other legal principles, including criminal conspiracy, a group consists of two or more persons whether identified or not. It is our opinion that such a "group" may exist, even if not a group "recognized" by the Department of State. . . .
>
> In making this evaluation, the fact, as recited in the public indictment, that *Moussaoui "paid $6,800 in cash" to the Minneapolis flight school, without adequate explanation for the source of this funding, would have been a highly probative fact bearing on his connections to foreign groups.*[6]

With all due respect, this is absolutely *absurd*. In fairness, two of the three Senators who signed this report were elected to the Senate more than a decade after FISA was enacted in 1978, as were most members of this subcommittee. But as someone who was there at the time, I can assure you that the idea that government "spying" on someone legally in this country might be justified under FISA because the individual in question—with no criminal record and no hard evidence of involvement in planning any specific criminal act—failed to explain the source of $6,800 in cash in his possession to the satisfaction of an FBI agent (and keep in mind that Moussaoui *did* offer an explanation[7]—the controlling issue here is that an FBI official did not consider his explanation "adequate"), would have outraged the sponsors of the FISA legislation.

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[6] *FBI Oversight in the 107th Congress by the Senate Judiciary Committee: FISA Implementation Failures, An Interim Report* (Feb. 2003), available online at: http://www.fas.org/irp/congress/2003_rpt/fisa.html.

[7] DOJ INSPECTOR GENERAL MOUSSAOUI REPORT, *infra* note 10, at 115.

Nor is having "connections to foreign groups" (or even "foreign terrorist groups") the legal standard required by FISA. Congress was anxious to gain control over the collection of foreign intelligence, and in drafting FISA no one considered that America might someday face a threat from a "lone wolf" foreign national–be it a radical Islamic terrorist like Zacarias Moussaoui or a freelance entrepreneur trying to smuggle WMD across our borders to sell to the highest bidder. Congress' primary goal in 1978 was to make *certain* that American intelligence agencies could not monitor the international communications of dissenters and "peace activists" like Jane Fonda and Tom Hayden—who were working hand-in-hand with our Communist enemies trying to undermine a different armed conflict that had been authorized by Congress by a 99.6% majority in 1964.[8] Jane and her former husband Tom could easily be connected together, and both clearly (and quite openly) had "connections" to a "foreign power" against whom Congress had authorized the use of military force. Indeed, both very publicly traveled to Hanoi in violation of travel restrictions established by our government. But when the National Security Agency intercepted their international communications, congressional Liberals were outraged.

If any member of this subcommittee seriously believes that Congress intended to permit FISA warrants because a U.S. Person failed to satisfy the subjective satisfaction of a government official about the source of money he had spent on a perfectly lawful purpose, and that individual had "connections" to a foreign group, I would urge you to read the 1978 report of the House Permanent Select Committee on Intelligence on FISA. On page 34, that report emphasizes that the term "agent of a foreign power" intentionally *excluded* "mere sympathizers, fellow-travelers, or persons who may have merely attended meetings of the group . . . ."[9]

I am sincerely *shocked* at the suggestion that these Senators, in the absence of the 9/11 attacks, would have accepted the argument—in the total absence of any particular evidence of their involvement in a past or specific planned criminal act—that since Moussaoui had a friend who was also a "foreigner" (both lawfully admitted to this country), the two of them constituted a "group" and thus could be deemed a "foreign power" under FISA. By the clear language of the HPSCI report, they could "sympathize" with al Qaeda, attend meetings of al Qaeda, and presumably travel around the world in the company of al Qaeda leaders ("fellow travelers"), and Congress expressly declared that their privacy rights were not to be violated—imposing felony penalties on any

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[8] *See*, e.g., Robert F. Turner, *Vietnam War: Reassessing the Causes: Gulf of Tonkin Incident Not the Real Start*, WASH. TIMES, Aug. 2, 2009, available on line at: http://www.washingtontimes.com/news/2009/aug/02/reassessing-the-causes/

[9] 1 H. REP'T NO. 95-1283 at 34.

government intelligence agent who didn't get the message and engaged in electronic surveillance outside the parameters of FISA. To qualify for a FISA warrant, the government has to show "probable cause" that they were "agents" of a "foreign power." According to the FISA legislative history, to meet that standard there must be "a nexus between the individual and the foreign power that suggests that the person is likely to do the bidding"[10] of the foreign power.

While it may be unfortunate that a non-lawyer at the FBI did not fully understand the technicalities of FISA (I suspect he or she *did* know that violation of that statute was a felony), that is neither particularly surprising nor relevant to the reason a FISA warrant was not sought for Moussaoui. Relying upon that fact to explain why no one examined the contents of Moussaoui's laptop is but a pitiful effort at misdirecting the American people from the true culprit here: the *United States Congress*. In Section VI below I will explain why the enactment of FISA was a flagrantly unconstitutional act. But first it is important to document its role in undermining the very admirable efforts by FBI professionals to prevent the 9/11 attacks. Those efforts failed primarily because of an unlawful statute enacted by Congress in 1978.

By far the most independent and detailed investigation of this matter was that conducted by the Office of the Inspector General of the Department of Justice, released in November 2004 and made public in June 2006. The discussion of the FBI investigation of Zacarias Moussaoui totaled 120 single-spaced pages.[11]

III. The Coleen Rowley Myth

As you may recall, on May 21, 2002, Coleen Rowley, Chief Division Counsel of the FBI's Minneapolis Office, sent a scathing letter to FBI Director Robert Mueller blaming lawyers at FBI Headquarters for refusing to process her requests for a FISA warrant so she could search the contents of his laptop and other possessions. By her account, this incompetence prevented the FBI from preventing the horrors of 9/11. For her heroic act of "whistleblowing," later that year she was named one of the three "Persons of the Year" and had her photograph on the cover of *Time* magazine.

This is not the time to dispel the mythology of Coleen Rowley in any detail, but it probably should be noted for the record that she was a good part of the problem rather

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[10] *Quoted in* OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, A REVIEW OF THE FBI'S HANDLING OF INTELLIGENCE INFORMATION RELATED TO THE SEPTEMBER 11 ATTACKS 165 n.137 (November 2004), *Chapter Four: The FBI's Investigation of Zacarias Moussaoui* (hereafter cited as DOJ INSPECTOR GENERAL MOUSSAOUI REPORT).

[11] DOJ INSPECTOR GENERAL MOUSSAOUI REPORT, *supra* note 10.

than the solution. Her real beef was not with the lawyers who repeatedly, consistently, and correctly (and I might add rather patiently) explained to her that she had to get more information and show that Moussaoui was an "agent" of a "foreign power" before a FISA warrant could lawfully be issued, but with the Congress that had enacted (with the connivance[12] of President Jimmy Carter) the unconstitutional FISA statute.

Sadly, Ms. Rowley was *incompetent* in a setting where professional competence was essential if the nation was to avoid a catastrophe. Although she had been trained about FISA and was expected to be able to advise her office about its requirements and provisions, long after that tragedy she readily admitted to investigators from the Justice Department's Office of the Inspector General that she "lacked extensive knowledge about FISA and that she was not in a position to advise the Minneapolis FBI on the issues surrounding the FISA request."[13] The Inspector General report noted:

> When we questioned Rowley about the basis for her belief that probable cause for a FISA warrant was "clear" when the information from the French was received, her responses indicated that she did not fully understand the statutory requirements of FISA. She believed that sufficient information existed to obtain a FISA warrant because she believed the French information indicated that there was probable cause to believe that Moussaoui was engaged in terrorist activities. Rowley failed to consider whether there was probable cause to believe that Moussaoui was an agent acting for or on behalf of a foreign power. She further stated her belief that the foreign power connection could be made to Bin Laden because Moussaoui shared similar philosophy and goals with Bin Laden and was linked to Khattab, who also held radical Islamic beliefs. These statements revealed a lack of a full understanding of agency principles under the existing FISA requirements.[14]

Yet, despite this incompetence and admitted ignorance, Rowley did not hesitate to go public with grossly defamatory allegations against FBI lawyers who did know and do their jobs—as painful as that might have been—and subsequently take her charges to Congress and the American people, where they were gullibly accepted as truth. Rowley resigned from the FBI and promptly sought to exploit her newly found publicity by running (unsuccessfully) for Congress. The FBI agents she defamed continue, for the

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[12] I discuss the fact that the Carter Administration Justice Department recognized (and told Congress) that the FISA statute unconstitutionally usurped presidential power, but that Carter was willing to sign and "follow it," *infra* at note 88 and accompanying text.
[13] DOJ INSPECTOR GENERAL MOUSSAOUI REPORT, *supra* note 10 at 206.
[14] *Id.* at 190 n.146.

most part, to do their jobs quietly in the background—trying very hard to keep this nation safe.

IV. There Was No Evidence Moussaoui Was an "Agent" of Any "Foreign Power"

As I mentioned earlier, in 1981 I co-founded the nation's first law school "think tank" on national security law. For seventeen of the last nineteen summers, it has been my pleasure to run a two-week, highly intensive National Security Law Institute each June to train law professors to teach in this growing new field and government lawyers to practice it. We have had government attorneys from every department and agency of the Executive Branch with significant national security responsibilities, and foreign government attorneys from countries on six continents. Over the years, a significant percentage of the lawyers assigned to the FBI General Counsel's National Security Law Unit (NSLU) have attended the Institute (as many as six or seven at one time), and it has been my privilege to chat with them during meals and breaks. I have often discussed the Moussaoui FISA request with them, and to date I have not found a *single* NSLU attorney who did not agree that the statutory predicate for a FISA warrant was not even arguably satisfied by the request from the Minneapolis FBI office in the Moussaoui case.

There is now a very detailed summary of this issue prepared by the Department of Justice Office of Inspector General, and it is instructive to examine the statements they recorded about Moussaoui. He was described as "a dirty bird" who probably was "up to something"[15]; and one FBI officer declared he was "convinced . . . a hundred percent that Moussaoui was a bad actor."[16] There was a report from one source that "Moussaoui followed the teachings of a sheikh," but the source never learned the sheikh's name.[17] Moussaoui's former roommate volunteered that Moussaoui accepted "radical Islamic fundamentalist beliefs," and French intelligence sources reported that someone (who was angry at Moussaoui) asserted Moussaoui "was devoted to Wahabbism, the Saudi Arabian sect of the Islamic religion adhered to by Bin Laden."[18] Keep in mind that FISA expressly provided: "[N]o United States person may be considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the first amendment to the Constitution of the United States . . . ."[19] One can only imagine, in the absence of the 9/11 attacks, how Congress (or the courts, for that matter) would have

[15] DOJ INSPECTOR GENERAL MOUSSAOUI REPORT, *supra* note 10 at 134.
[16] *Id.* at 114.
[17] *Id.* at 118.
[18] *Id.* at 170.
[19] Foreign Intelligence Surveillance Act, 50 U.S. § 1805.

reacted upon learning the FBI was "spying" upon someone lawfully in this country because he happened to share religious beliefs with a known terrorist.

The Alleged Khattab Connection

Prior to 9/11, there was no known connection between Zacarias Moussaoui and Usama bin Laden. The best anyone could come up with was a communication from a French intelligence source that someone had alleged that, while living in France, Moussaoui had persuaded a French Muslim to go to Chechnya and fight with an Islamic rebel group engaged in a civil war against Russian troops occupying part of the country—during which the man died.[20] Perhaps, it was thought, Moussaoui could be tagged as an "agent" of Ibn Khattab, the head of the Chechen rebel group, and then Khattab could be linked to bin Laden. It was worth a shot.

One person the FBI interviewed in connection with a different case provided further "evidence" of a Khattab-bin Laden connection. While the individual was being interviewed in his apartment, an FBI agent noted that he had a photograph on his wall of Usama bin Laden, and another photograph of Khattab![21] It was on the basis of such flimsy "evidence" that FBI authorities struggled to meet the FISA standard in their effort to prevent a major terrorist attack.

Trying to be helpful, a CIA source asserted to the FBI that Khattab was "known to be an associate of Usama Bin Laden from past shared involvement in combat."[22] Unfortunately, the "combat" in question ended more than a dozen years prior to the Moussaoui investigation—when both served in the Afghan *Mujahideen* fighting against Soviet occupation. Presumably few on this subcommittee would seriously argue that this was proof that Khattab was "doing Usama bin Laden's bidding" in 2001.

FBI intelligence officers worked tirelessly to try to establish a connection between Khattab or his rebel group and al Qaeda, and each time they drew a blank. As the Inspector General report affirmed, "In 2001, the FBI viewed Ibn Khattab and the Chechen rebel group he led as "not an identified terrorist organization," because they were fighting a civil war and were no threat to the United States."[23] Similarly, the

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[20] *Id.* at 141.
[21] *Id.* at 145.
[22] *Id.* at 150, 152.
[23] *Id.* at 141, 145.

Central Intelligence Agency had no information linking Khattab with bin Laden in recent years.[24]

An FBI officer identified in the IG report as "Robin" researched "Ibn Khattab" in FBI intelligence computer databases and found "insufficient intelligence to link his group to anything more than a civil war."[25] She also ran the names of Moussaoui and all of his known associates in Oklahoma (where he had earlier taken flying lessons) and Minnesota, and "did not find any evidence linking any of these individuals to a foreign power."[26]

More importantly, the source of the allegation reported by the French "had no direct knowledge of a connection between Moussaoui and [Ibn] Khattab," the leader of the Chechen rebel group for which Moussaoui's acquaintance had fought (and died). All that was really being alleged was that Moussaoui had urged a friend to travel to Chechnya to fight against the Russians. Assuming for the moment that the allegation was even true, perhaps Moussaoui simply hated Russians. Surely, if a U.S. Person urged a friend or neighbor to join the Marines and volunteer to serve in Afghanistan we would not assume she was a Marine Corps recruiter or an agent controlled by the Afghan government.

As the IG report makes clear, the FBI tried very hard to establish a link between Khattab and bin Laden, but "the most recent intelligence indicated that Kahttab and Bin laden were not connected"[27]; and "based on intelligence information, it was known that Khattab and Bin laden were 'contemporaries' but were not connected to each other. . . . Khattab was not working for Bin Laden."[28] There was a lot of wishing and hoping to the contrary, but no one familiar with the available intelligence quarreled with this conclusion prior to the 9/11 attacks.

One might add that, even if there had been conclusive evidence that Khattab was a key al Qaeda aid in the pay and service of Usama bin Laden, that *still* would not have come close to satisfying the statutory predicate Congress imposed for a FISA warrant. The further link showing that Zacarias Moussaoui was an "agent" of Ibn Khattab or his rebel group was still absent. As M.E. "Spike" Bowman—the long-time head of the FBI's NSLU and one of the most respected experts in the nation in this field—explained: "[E]ven if everyone were to agree that the Chechen rebels could be pled as a foreign

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[24] *Id.* at 150. (The report says "currently," which presumably was intended to distinguish between recent information and knowledge that he served in the Afghan *Mujahideen* in the 1980s.)
[25] *Id.* at 145.
[26] *Id.*
[27] *Id.* at 153.
[28] *Id.*

power, the Minneapolis FBI lacked sufficient evidence to establish that Moussaoui was an agent of that foreign power."[29]

Again, it is important to note that this was *not* a close decision. The FBI didn't ignore the evidence that suggested that Moussaoui might be involved in a major terrorist plot—they were extremely concerned and worked very hard to get more intelligence so they could stop what many of them felt was almost certain to occur if they failed. They failed not because of a lack of diligence or professional competence (for the most part), but rather because Congress in 1978 had made it a felony for them to carry out the type of foreign intelligence investigation that presidents throughout our history had authorized and courts had upheld as lawful.[30]

The Phoenix Memorandum (EC)

This is not to say that everything the FBI did was perfect. On July 10, 2001, an FBI Special Agent named Kenneth Williams wrote an electronic communication (EC) to the Usama Bin Laden Unit (UBLU) and the Radical Fundamentalist Unit (RFU) at FBI Headquarters in Washington, DC. He warned of a pattern of radical al Qaeda supporters training in U.S. flight schools, and speculated this may be in preparation for hijacking commercial aircraft and using them as weapons. Although several of the people involved in the Moussaoui investigation were aware of this memo, it was not brought to the attention of the NSLU lawyers who were considering the application of the Minneapolis Field Office for a FISA warrant for Moussaoui. As the IG report recognized, this was a mistake.[31]

While sharing this document with NSLU lawyers would almost certainly have "gotten their attention" and made them very anxious to help field agents get as much information about Moussaoui and other radical Muslims who were known to have received flight training in America, it would not have solved the "foreign power" problem that barred obtaining a FISA warrant for Moussaoui. The Phoenix EC made no reference to Moussaoui, and did not connect him with any "foreign power."[32] Most people of Middle Eastern descent or followers of Islam who were learning to fly in America were not international terrorists.

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[29] *Id.* at 164.
[30] *See infra*, note 85 and accompanying text.
[31] DOJ INSPECTOR GENERAL MOUSSAOUI REPORT, *supra* note 10 at 208-09.
[32] *Id.* at 129, 147-48, 160.

The Possibility of Declaring Ibn Khattab's Chechen Rebel Group a "Foreign Power"

Another theoretical option that was discussed in the desperate effort to find some way to crack the nut caused by Congress' failure in drafting FISA to consider the possibility of a "lone wolf" terrorist threat was getting Khattab's rebel group declared an international terrorist organization and thus a "foreign power." Despite the time that was spent examining it, it was a non-starter from the beginning. First of all, there was no serious evidence Moussaoui was an "agent" of Khattab's group—the only known connection was that someone in France had alleged that Moussaoui had once urged a fellow Muslim to go to Chechnya to fight against the Russians. As already discussed, that does not come close to establishing that he is an "agent" of the Chechen rebels.

More importantly, there was simply not enough time to take this approach. Moussaoui was already in the process of being deported to France, and—even if theoretically possible, given the little evidence available at the time—everyone consulted on the idea noted it would take months to accomplish, with "several levels of approval required."[33] At best, the FBI had days, not months. Indeed, the 9/11 attacks themselves occurred only a few weeks after these discussions took place.

One might add that, even had there been authority in the 1978 FISA statute to obtain a warrant for a "lone wolf" terrorist like Moussaoui, it might not have helped. The Inspector General's report notes that the INS could only hold Moussaoui for "seven to ten days"[34] before deporting him to France (where he could only be held a few more days before being released), and includes several references to the belief that "FISA requests normally took a long time,"[35] and "the FISA request could take a few months to complete . . . ."[36]

In Section V, below, I will discuss the arguments made by John Locke and later reflected in the *Federalist Papers* that "speed and dispatch" were essential qualities in the preservation of the security of the nation. That—along with the need for "unity of plan"

[33] *Id.* at 142-43, 159, 182, 196.
[34] *Id.* at 133.
[35] *Id.*
[36] *Id.* at 148.

and "secrecy"—was why the conduct of diplomacy and war and "the business of intelligence" were given exclusively to the Executive—subject, of course, to a negative in the Senate over a completed treaty, a negative in each House of Congress over a decision to launch an all-out, aggressive War,"[37] and other expressed exceptions to the general grant of "executive Power" to the President. Perhaps the most positive consequence of our experience under the FISA statute has been the lesson it should by now have taught us about the remarkable wisdom of our Founding Fathers.

V. Congress Deserves a Great Deal of Responsibility for the Success of the 9/11 Attacks, and Legislative Efforts to Prevent the President from Protecting the Nation Against Attacks by "Lone Wolf" Foreign Terrorists Will Both Violate the Constitution and Endanger the Security and Lives of the American People

In Section VI below I will demonstrate that the Founding Fathers did not intend for Congress to have *any* role in what John Jay described in *Federalist* No. 64 as "the business of intelligence . . . ." They understood from painful experience with the Continental Congress that large legislative bodies could not be relied upon to keep secrets. Because of that, as Jay explained in 1788, important foreign sources of intelligence information would not confide important secrets in the United States if they believed their information would be shared with Congress. Thus, as I will discuss below, when the First Congress (setting a precedent to be followed for years) first appropriated funds for foreign intercourse, it told the President to account only for the "amount" of any expenditures from this account that he felt should not be made public. And from that time until the early 1970s, it was the understanding of all three branches of our government that foreign intelligence was the exclusive responsibility of the President.

I will also demonstrate in Section VI that the FISA statute is unconstitutional, and was recognized as such by President Carter's Attorney General at the time. This conclusion has been affirmed by the Foreign Intelligence Surveillance Court of Review, which we created in the 1978 FISA statute.

One of the reasons that influential theorists like John Locke and the Founding Fathers alike argued that Congress should play no role in the day-to-day conduct of foreign intercourse is because it is not able to anticipate all of the developments that might occur in diplomatic negotiations, on the battlefield, and the like. As John Locke explained in his *Second Treatise on Civil Government*:

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[37] *See, e.g.*, Robert F. Turner, *The Relevance of Congressional Power to "Declare War,"* 25 HARV. J. L. & PUB. POL. 519 (2002).

> §147. These two powers, executive and federative, though they be really distinct in themselves, yet one comprehending the execution of the municipal laws of the society within its self, upon all that are parts of it; the other the management of the security and interest of the puhlic without, with all those that it may receive benefit or damage from, yet they are always almost united. And though this federative power in the well or ill management of it be of great moment to the commonwealth, yet it is much less capable to be directed by antecedent, standing, positive laws, than [by] the executive; and so must necessarily be left to the prudence and wisdom of those, whose hands it is in, to be managed for the public good: for the laws that concern subjects one amongst another, being to direct their actions, may well enough precede them. But what is to be done in reference to foreigners, depending much upon their actions, and the variation of designs and interests, must be left in great part to the prudence of those, who have this power committed to them, to be managed by the best of their skill, for the advantage of the commonwealth.[38]

That the Founding Fathers embraced this wisdom is clear from *Federalist* No. 64, in which John Jay—later to serve as the first Chief Justice of the United States—wrote:

> [T]there frequently are occasions when days, nay even when hours are precious. The loss of a battle, the death of a Prince, the removal of a minister, or other circumstances intervening to change the present posture and aspect of affairs, may turn the most favorable tide into a course opposite to our wishes. As in the field, so in the cabinet, there are moments to be seized as they pass, and they who preside in either, should be left in capacity to improve them. So often and so essentially have we heretofore suffered from the want of *secrecy* and *dispatch*, that the Constitution would have been inexcusably defective if no attention had been paid to those objects.[39]

The idea that Congress would have the audacity to impede the President's effort to collect foreign intelligence information from foreigners—requiring reams of paperwork and delays of weeks if not months[40]—would have shocked the Founding Fathers.

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[38] JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT § 147 (1689).
[39] THE FEDERALIST, No. 64 at 435 (Jacob E. Cooke, ed. 1961)(emphasis added).
[40] *See supra*, note 33 and accompanying text.

While some today think that concerns about protecting intelligence "sources and methods" is of relatively modern origin, Jay nailed the problem brilliantly in this same essay:

> It seldom happens in the negotiation of treaties, of whatever nature, but that perfect SECRECY and immediate DESPATCH are sometimes requisite. There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions, who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular Assembly. The [constitutional] convention have done well, therefore, in so disposing of the power of making treaties, that although the President must, in forming them, act by the advice and consent of the Senate, yet *he will be able to manage the business of intelligence in such a manner as prudence may suggest.*[41]

Put more simply, the Framers of our Constitution understood that Congress could not be trusted to keep secrets,[42] and it could not make quick decisions to respond to rapidly changing circumstances in negotiations or on the battlefield.[43] So these matters of necessity had to be entrusted to the discretion of the President. That was done by vesting the "executive" and "commander in chief" powers in the President by Article II of the Constitution.

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[41] *Id.* at 434-35 (emphasis added).

[42] As early as 1776, Benjamin Franklin and his four colleagues on the Committee on Secret Correspondence of the Second Continental Congress unanimously concluded that they could not share wonderful news of a major French covert operation to support the American Revolution, because: ""We find by fatal experience that Congress consists of too many members to keep secrets." "Verbal statement of Thomas Story to the Committee," 2 PAUL FORCE, AMERICAN ARCHIVES: A DOCUMENTARY HISTORY OF THE NORTH AMERICAN COLONIES, 5th Ser., 819 (1837-53). For more on this subject, *see* Robert F. Turner, "Secret Funding and the 'Statement and Account' Clause: Constitutional and Policy Implications of Public Disclosure of an Aggregate Budget for Intelligence and Intelligence-Related Activities, Prepared Statement before the House Permanent Select Committee on Intelligence, Feb. 1994, available online at: http://www.fas.org/irp/congress/1994_hr/turner.htm.

[43] In a 1780 letter to James Duane, General George Washington wrote with obvious frustration: "If Congress suppose the boards composed of their body and always fluctuating are competent to the great business of war (which requires not only close application, but constant and uniform train of thinking and acting), they will most assuredly deceive themselves." GEORGE BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 283 (1882).

When I say Congress deserves responsibility for the success of the 9/11 attacks, I have several specific things in mind. First of all, as will be discussed, when Congress snatched defeat from the jaws of victory in Vietnam it signaled the world's tyrants that America had lost its will—leading directly to several more armed conflicts that claimed more than a million lives.

This problem was exacerbated when Congress began seizing the constitutional powers of the President in foreign affairs, intelligence, and war. When Saddam Hussein invaded Kuwait in August 1990, many in Congress blamed the Department of State for having acknowledged in a public hearing that the United States had made no commitment to protect Kuwait. Those Members apparently did not recall the struggle of the late 1960s over the "National Commitments Resolution" denying the President any authority to make such commitments without Senate or legislative approval.

When President Reagan sent a contingent of U.S. Marines as part of an international peacekeeping force into Lebanon, Senate Democrats decided that this could be a great issue for the 1984 elections and demanded that he seek formal statutory authorization. Only two Senate Democrats voted to support the President, and the *Washington Post* and other papers noted both the highly partisan nature of the debate and the reality that if there were further casualties among the Marines Congress might withdraw the authority it had narrowly given to continue the mission another eighteen months. When Marine Corps Commandant General P.X. Kelley pleaded with the Foreign Relations Committee and warned that the partisan debate was endangering the lives of his Marines, he was ignored—and his argument was later ridiculed by key Senate Democrats. Soon thereafter, our intelligence people intercepted a message between two radical Islamic militia groups that said: "If we kill 15 Marines, the rest will leave." At sunrise on October 23, a terrorist truck bomb killed 241 sleeping Marines. I followed these events very closely, and I am absolutely convinced that those Marines would not have died had it not been for congressional partisanship.[44]

Indeed, the post-9/11 efforts by some in Congress to blame the FBI for not being able to examine the contents of Zacarias Moussaoui's laptop computer reminds me very much of efforts by legislators following the 1983 bombing to blame the results of their own misconduct[45] upon the surviving Marines. I found it as despicable then as I do now.

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[44] For a more detailed and documented discussion of these events, *see* ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY 138-46. See also, P.X. Kelley & Robert F. Turner, *Out of Harm's Way; From Beirut to Haiti, Congress Protects Itself Instead of Our Troops*, WASH. POST, Oct. 23, 1994.

[45] The deployment of Marine peacekeepers did not even arguably infringe upon the power of Congress to "declare War," but was founded instead upon claims under the clearly unconstitutional War Powers

I might add that the U.S. response to the 1983 Beirut bombing—driven largely by legislative usurpation of Executive power—was a contributing factor to the 9/11 attacks as well. Indeed, in 1998, Usama bin Laden told an ABC reporter in Afghanistan that the American withdrawal from Beirut in 1983 had shown him Americans were unwilling to accept casualties.[46] It is not a great stretch to conclude that his decision to launch the 9/11 attacks was in no small part a result of that perception.

VI. The Problem of Legislative "Lawbreaking"

During the past forty years America has witnessed an unprecedented[47] assault on the Constitution by members of the Legislative Branch. I have no doubt that many—and perhaps most—of the legislators who have taken part in this assault have done so in good faith and sincerity, assuming that what they were doing was perfectly permissible. But that does not change the fact that we have witnessed a shocking amount of unlawful behavior by Congress.

Some may wonder what I can possibly mean by congressional "lawbreaking." Under our Constitution, Congress *makes* the laws. And if it passes a new law that is inconsistent with a previous one, the result is not "lawbreaking" at all, but merely a change in the law.

But America has a hierarchy of laws, with the *Constitution*—not Congress or its statutes—at the pinnacle. Too many today seem to view Congress as the supreme authority in the American Government, forgetting that it is but one of three independent and co-equal branches, each serving the American people and governed at all times by the Constitution.

Resolution. I would add that any time anyone in Congress places the interests of his or her political party above those of our nation and the safety of our military forces, that constitutes prima facie "misconduct."

[46] *See, e.g.*, Scott Dodd & Peter Smolowitz, *1983 Beirut Bomb Began Era of Terror*, DESERET NEWS, Oct. 19, 2003, available online at: http://deseretnews.com/dn/view/0,1249,515039782,00.html. *See also.*, Brad Smith, *1983 Bombing Marked Turning Point In Terror: The U.S. reaction to the Beirut attack set off a chain of events, some say*, TAMPA TRIB., Oct. 23, 2003.

[47] By "unprecedented" I do not mean to suggest that Congress has never before attempted to seize powers vested elsewhere by the Constitution or to violate that instrument in other ways. No one familiar with our history could assert such a claim. But in the national security realm, there has never in our history been such a dramatic and sustained assault on presidential power as we have witnessed during the past four decades.

Early in the administration of President George Washington, Secretary of State Thomas Jefferson provided this account of his July 10, 1793, conversation with "Citizen Genet," the French Minister to Washington:

> He asked me if they [Congress] were not the sovereign. I told him no, they were sovereign in making laws only, the executive was sovereign in executing them, and the judiciary in construing them where they related to their department. "But," said he, "at least, Congress are bound to see that the treaties are observed." I told him no, there were very few cases indeed arising out of treaties, which they could take notice of; that the President is to see that treaties are observed. "If he decides against the treaty, to whom is a nation to appeal?" I told him the Constitution had made the President the last appeal.[48]

The basis of the President's extraordinary responsibilities for the conduct of America's foreign relations—including his *exclusive* control over the collection of foreign intelligence—is clear. The Founding Fathers understood that the conduct of war, diplomacy, and the like was by its nature "executive" business, and they vested this power in the President in Article II, Section 1, of the Constitution.

In April 1790, Jefferson cited this grant of the nation's "executive power" to the President in a memorandum to President Washington and explained: "The transaction of business with foreign nations is executive altogether; it belongs, then to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly."[49] Madison,[50] Hamilton,[51] Washington,[52] and Chief Justice John Jay[53] shared Jefferson's view. As I am sure you know, Madison, Hamilton, and Jay were the authors of the *Federalist Papers*. In 1821, Chief Justice John Marshall observed:

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[48] *Quoted in* 4 JOHN BASSETT MOORE, DIGEST OF INTERNATIONAL LAW 680-81 (1906).

[49] *Jefferson's Opinion on the powers of the Senate Respecting Diplomatic Appointments,* April 24, 1790, in 3 THE WRITINGS OF THOMAS JEFFERSON 16, 17 (Mem. ed. 1903) (bold italics added).

[50] See, e.g., *Madison to Edmund Pendleton*, 21 June 1789, *in* 5 WRITINGS OF JAMES MADISON 405-06 n. (Gaillard Hunt, ed. 1904); and Washington's description of Madison's views in his Diaries, *infra* note 52.

[51] 15 THE PAPERS OF ALEXANDER HAMILTON 39 (Harold C. Syrett ed., 1969) ("[A]s the participation of the Senate in the making of treaties, and the power of the Legislature to declare war, are exceptions out of the general "executive power" vested in the President, they are to be construed strictly, and ought to be extended no further than is essential to their execution."

[52] 4 DIARIES OF GEORGE WASHINGTON 122 (Regents' Ed. 1925).

[53] *Id.* (Jay's position summarized by Washington).

> The opinion of the Federalist has always been considered as a great authority. It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed.[54]

The "uniform opinion" of both Federalists and Republicans that, with a few specified exceptions, the external relations of our nation were the province of the President and not Congress or the Senate was illustrated by the language Congress used year after year in appropriating funds for foreign intercourse:

> [T]he President shall account specifically for all such expenditures of the said money *as in his judgment may be made public*, and also for the *amount* of such expenditures *as he may think it advisable not to specify*, and cause a regular statement and account thereof to be laid before Congress annually . . . .[55]

As Thomas Jefferson explained in an 1804 letter to Treasury Secretary Albert Gallatin:

> The Constitution has made the Executive the organ for managing our intercourse with foreign nations. . . . The Executive being thus charged with the foreign intercourse, no law has undertaken to prescribe its specific duties. . . . From the origin of the present government to this day . . . . it has been the uniform opinion and practice that the whole foreign fund was placed by the Legislature on the footing of a contingent fund, in which they undertake no specifications, but leave the whole to the discretion of the President.[56]

Certainly there are important "exceptions" in our Constitution to the general grant to the President of power over foreign intercourse. The Senate–when sitting in "Executive Session," as what Columbia Law School Professor Louis Henkin has referred to as the "Fourth Branch" of government—has a "negative" (or veto) over diplomatic and military appointments. One-third-plus-one of the Senate has an absolute negative over the ratification of treaties. And, of course, each house of Congress has a negative over a

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[54] *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 246, 418 (1821). In a letter to Madison, Jefferson described the *Federalist Papers* as "in my opinion, the best commentary on the principles of government, which ever was written." 7 THE WRITINGS OF THOMAS JEFFERSON 183 (Mem. ed. 1904).

[55] 1 STAT. 129 (1790) (emphasis added).

[56] 11 WRITINGS OF THOMAS JEFFERSON 5, 9, 10 (Mem. ed. 1903).

decision to "declare war"—although when "narrowly construed" that power is today as much an anachronism[57] as the accompanying power to "grant Letters of Marque and Reprisal . . . ."[58] But none of these enumerated powers give Congress any role in the collection of foreign intelligence[59] or the conduct of diplomacy[60] or war.[61]

Some may seek authority in the "general welfare" or "necessary and proper" clauses, but the Founding Fathers made it very clear that this clause did not permit Congress to do anything it thought might promote the general welfare—its powers were to be limited to those enumerated by the Constitution.[62] A statute that pretends to usurp the powers vested by the people in another branch is by definition "improper."

Then there is the old fall-back—Congress has exclusive authority over expenditures from the treasury, and thus some contend that by attaching "conditions" to appropriations Congress may indirectly control the powers vested in other branches. This is a complex issue and beyond the scope of this letter. If Congress refuses to raise an army or to appropriate money for its support, it is true it can lawfully constrain the President's

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[57] *See, e.g.,* Robert F. Turner, *The Relevance of Congressional Power to "Declare War,"* 25 HARV. J. L. & PUB. POL. 519 (2002).

[58] U.S. CONST., Art. I, Sec. 8, cl. 11.

[59] *See, e.g., Federalist* No. 64, quoted *supra* at note 41 and accompanying text.

[60] In the landmark *Curtiss-Wright* case (299 U.S. 304 [1936]), the Supreme Court explained:

> Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. *Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it.* [Emphasis added.]

[61] In *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006), Justice Stevens—writing for the Court majority—quoted with approval these words from Chief Justice Chase's 1866 concurring opinion in *Ex parte Milligan*:

> The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President.... *Congress cannot direct the conduct of campaigns* . . . . [emphasis added].

[62] Note the difference between Article I, Section 1, of the Constitution vesting in Congress only those "legislative powers *herein granted*," and the comparable sections of Articles II and III vesting "*the* executive Power" in the President and "*the* judicial power" in the courts (emphasis added).

ability to carry out his duties as Commander in Chief.[63] Congress may also deny the President any funds for foreign intelligence collection, and reduce the appropriations for the judiciary to the point of undermining its effectiveness.

But what Congress may *not* properly do is place conditions on appropriations to seize all of the powers of government unto itself—resulting in what James Madison warned as the "very definition of tyranny."[64] Congress may no more tell the President how to fight a war or to collect foreign intelligence than it may tell the Supreme Court how to decide a pending case.

Speaking of the Supreme Court, I would remind you that when Congress in 1870 attempted to use its acknowledged control over even the very existence of the Court of Claims to alter that tribunal's jurisdiction so as to subvert the legal effect of presidential pardons, the Supreme Court quickly struck down the statute:

> The rule prescribed is also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive . . . . It is the intention of the Constitution that each of the great coordinate departments of the government—the legislative, the executive, and the judicial—shall be, in its sphere, independent of the others. To the Executive alone is intrusted the power of pardon; and it is granted without limit. . . . Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration.[65]

Nor has the Court been silent on the scope of the "power of the purse." When Congress attached a rider to an emergency military appropriations measure—that could not be vetoed by President Roosevelt without jeopardizing the lives of our military personnel fighting World War II—a proviso that denied funds to pay the salaries of three named individuals identified by the House Committee on Un-American Activities, the Supreme Court struck down the rider with this clear language:

> We . . . cannot conclude, as [Counsel for Congress] urges, that [the section] is a mere appropriation measure, and that, since Congress under the Constitution has complete control over appropriations, a challenge to

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[63] U.S. CONST., Art. II, Sect. 2, Cl. 1.
[64] THE FEDERALIST, No. 47 at 324 (Jacob E. Cooke, ed. 1961) (Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.")
[65] *United States v. Klein*, 80 U.S. (13 Wall.) 128, 145, 147-48 (1872).

> the measure's constitutionality does not present a justiciable question in the courts, but is merely a political issue over which Congress had final say....We hold that [the section] falls precisely within the category of congressional actions which the Constitution barred by providing that 'No Bill of Attainder or ex post facto Law shall be passed."[66]

To enumerate all of the legislative infringements upon presidential power during the past forty years would take far more time than I have available. Certainly one of the most flagrant was the 1973 War Powers Resolution, about which I have written two books[67] and which just last year the unanimous bipartisan National War Powers Commission declared to be unconstitutional.[68]

Another flagrant example of legislative lawbreaking is repeated time and again every year, and it is one in which I have a longstanding interest. As a Senate staff member in 1976 I drafted a lengthy floor statement for my boss at the time, Senator Robert P. Griffin, that in very clear terms and with numerous citations declared "legislative vetoes" to be unconstitutional.[69] Seven years later, the Supreme Court agreed—for largely the same reasons.[70] One might have thought that legislators who took their oath of office seriously would conscientiously seek to identify existing statutory provisions in this category and remove them from the statute books. Instead, Congress has since the *Chadha* decision was announced in 1983 enacted more than five hundred *new* flagrantly unconstitutional legislative vetoes. By far the most frequent basis for presidential "signing statements"—be they by President Reagan, both Presidents Bush, President Clinton, or President Obama—has been new "legislative vetoes" attached to important legislation by Congress.

Put simply, in the past four decades Congress has been "off the constitutional reservation" and out of control. In so doing, it has endangered our constitutional system of government. Writing in *Federalist* No. 48, James Madison warned of the dangers of legislative tyranny:

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[66] *United States v. Lovett*, 328 U.S. 303, 313, 315, (1946).

[67] ROBERT F. TURNER, THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE (1983); ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY (1991).

[68] The report of the National War Powers Commission, which included among its distinguished members former Representative Lee Hamilton, is available online at: http://millercenter.org/policy/commissions/warpowers/report.

[69] A copy of this statement as it appeared in the *Congressional Record* on June 11, 1976, is available on line at: http://www.virginia.edu/cnsl/pdf/Griffin-Congressional-Record_6-11-1976.pdf. (1983).

[70] *INS v. Chadha*, 416 U.S. 919 (1983).

> "Will it be sufficient to mark with precision the boundaries of these departments in the Constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American Constitutions. But experience assures us, that the efficacy of the provision has been greatly over-rated; and that some more adequate defence is indispensibly necessary for the more feeble, against the more powerful members of the government. The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex."[71]

Thomas Jefferson, of course, was in Paris when the Constitution was drafted, but eleven days after the new Constitution went into effect, Jefferson wrote to Madison: "The executive, in our governments is not the sole, it is scarcely the principal object of my jealousy. The *tyranny of the legislatures* is the most formidable dread at present . . . ."[72]

This concern has been repeatedly recognized by the Supreme Court:

> The dangers of congressional usurpation of Executive Branch functions have long been recognized. "[T]he debates of the Constitutional Convention, and the *Federalist Papers*, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches." [Citation omitted.] Indeed, we also have observed only recently that "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." [Citation omitted].[73]

FISA Was One of Several Unconstitutional Usurpations of Executive Authority

As someone who was there at the time and firmly believed the FISA statute—for all of its convenience—was flagrantly unconstitutional, I am not surprised that it played a role in permitting the success of the 9/11 attacks. The Founding Fathers understood that

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[71] THE FEDERALIST, No. 47 at 332-33 (Jacob E. Cooke, ed. 1961).
[72] *Jefferson to Madison,* March 15, 1789, in 14 PAPERS OF THOMAS JEFFERSON 659 (1958).
[73] *Bowsher v. Synar*, 478 U.S. 714, (1986) (quoting *Buckley v. Valeo*, 424 U.S. 1, 129 (1976), and *INS v. Chadha*, 462 U.S. 919, 951 (1983).

Congress could not keep secrets or act with speed and dispatch, and they intentionally excluded it from "the business of intelligence."[74]

Does this mean that the President is totally unconstrained in his conduct of intelligence activities? Not at all. He is constrained like all three branches of our government by the language of the Constitution itself. In war as in peace, for example, he must comply with the Fourth Amendment and other provisions of the Bill of Rights. But Congress may not impose additional impediments in his path in intelligence, any more than it can interfere in diplomatic negotiations[75] or the conduct of war[76]--of which intelligence collection is a core component.

Indeed, I would submit that in the current conflict with al Qaeda, the intelligence function is by far the most important single element. There is no doubt about the ability of the American military to destroy the best al Qaeda can field against us—the problem is finding out where the terrorists are and what there plans are. And those are *intelligence* missions.

Why do I say FISA was (and is) unconstitutional? Because, as already discussed,[77] the Founding Fathers—by vesting the Nation's "executive" power in the President—entrusted that office with exclusive discretion over our relations with the external world, save for those "exceptions" expressly vested in the Senate or Congress. None of those exceptions even arguably give Congress control over foreign intelligence collection.

As Chief Justice John Marshall explained in perhaps the most famous of Supreme Court cases, *Marbury v. Madison*:

> By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . [A]nd *whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.* The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, *the decision of the executive is conclusive.*[78]

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[74] *See supra*, note 41and accompanying text.
[75] *See supra*, note 59 and accompanying text.
[76] *See supra*, note 60 and accompanying text.
[77] *See supra,* notes 49-53 and accompanying text.
[78] *Marbury v. Madison*, 5 U.S. [1 Cranch] 137, 165-66 (1803) (emphasis added).

That is to say, the decision of the Executive may not be "second guessed" or controlled by either Congress or the courts. And the next lines in this landmark Supreme Court opinion should dispel any doubt that Marshall was talking primarily about the President's constitutional control over the nation's external intercourse:

> The application of this remark will be perceived by adverting to the act of [C]ongress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. . . . The acts of such an officer, as an officer, can never be examinable by the courts.[79]

Every power of government must be exercised consistent with the other provisions of the Constitution. As the Supreme Court observed in *Curtiss-Wright*:

> It is important to bear in mind that we are here dealing [with] . . . the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress but which, of course, *like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.*[80]

Some point to the Fourth Amendment and conclude that the President may not engage in electronic surveillance (or any other search or seizure) within the United States without a judicial warrant. But the Supreme Court has repeatedly rejected that thinking, carving out a series of "exceptions" to the warrant requirement of the Fourth Amendment when "special needs" related to public safety are involved. Typical of these exceptions (although this one has never been formally affirmed by the Supreme Court, since every circuit to address the issue got it right) is the search of passengers and their luggage at commercial airports across the nation. There is no "probable cause" to believe that these individuals have committed a crime or intend to do so, and such searches actually succeed in discovering a firearm about 0.0004 percent of the time. As the Supreme Court explained in *von Raab*:

> While we have often emphasized, and reiterate today, that a search must be supported, as a general matter, by a warrant issued upon probable cause [citations omitted], our decision in Railway Labor Executives reaffirms the

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[79] *Id.* at 166.
[80] *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936) (emphasis added).

> longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance. [Citations omitted.] As we note in Railway Labor Executives, our cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.[81]

In a footnote, the Court added:

> The point is well illustrated also by the Federal Government's practice of requiring the search of all passengers seeking to board commercial airliners, as well as the search of their carry-on luggage, without any basis for suspecting any particular passenger of an untoward motive. Applying our precedents dealing with administrative searches [citations omitted], the lower courts that have considered the question have consistently concluded that such searches are reasonable under the Fourth Amendment.[82]

Although the Supreme Court has never specifically held that such airline searches without warrants or probable cause are lawful, the *Raab* footnote leaves no doubt about its view. One can draw a similar conclusion, I submit, from its behavior when confronted with cases involving warrantless foreign intelligence wiretaps.

Indeed, when the Supreme Court in the 1967 *Katz* case first decided that a telephone wiretap was a "seizure" and thus required a warrant, the majority opinion added a footnote to clarify that its decision did not affect the power of the President to authorize national security wiretaps.[83] Five years later, when Justice Lewis Powell for a unanimous Court held that a purely *domestic* national security investigation with no connection to a foreign power required a search warrant for electronic surveillance, he not once but *twice* emphasized that his holding did not restrict warrantless wiretaps when a foreign power or its agent in this country was involved.[84]

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[81] *Treasury Employees v. von Raab*, 489 U.S. 656, 666 (1989).
[82] *Id.* n.3.
[83] *Katz v. United States*, 389 U.S. 954 at n.23 (1967).
[84] *United States v. United States District Court*, 407 U.S. 297 at 308, 321 (1972).

Over the years, the Supreme Court has had numerous opportunities to constrain the use of warrantless foreign intelligence wiretaps by the Executive. Because every circuit to decide the issue has upheld a foreign intelligence exception to the warrant requirement of the Fourth Amendment, the Court has apparently never found a need to grant cert.

The Foreign Intelligence Surveillance Court of Review

When Congress enacted FISA, it created not only the FISA Court hut also an appellate court composed of circuit court judges appointed by the Chief Justice. Since Congress continues to routinely ignore the Supreme Court's decision in *Chadha* by enacting new legislative vetoes every session, perhaps one should not expect it to pay attention to the decisions of the Foreign Intelligence Surveillance Court of Review. But it is nevertheless worth noting that in 2002 this appellate court unanimously declared:

> The *Truong* court, as did all the other courts to have decided the issue, held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information. . . . *We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President's constitutional power.*[85]

Congress through FISA "could not encroach on the President's constitutional power." That ought to be hornbook law and unexceptional, but Congress has continued to encroach upon those powers.

In a more recent decision, the same appellate court took note of some of the "exceptions" to the Fourth Amendment's warrant requirement carved out by the Supreme Court, and reasoned:

> [T]here is a high degree of probability that requiring a warrant would hinder the government's ability to collect time-sensitive information and, thus, would impede the vital national security interests that are at stake. . . . Compulsory compliance with the warrant requirement would introduce an element of delay, thus frustrating the government's ability to collect information in a timely manner. . . .
>
> For these reasons, we hold that a foreign intelligence exception to the Fourth Amendment's warrant requirement exists when surveillance is

[85] *In re Sealed Case*, 310 F.3d 717, 742 Foreign Int. Surv. Ct. Rev., November 18, 2002 (NO. 02-002, 02-001).

> conducted to obtain foreign intelligence for national security purposes and is directed against foreign powers or agents of foreign powers reasonably believed to be located outside the United States.[86]

Courts normally decide constitutional cases on the narrowest ground necessary to the case, which may explain the final clause of this opinion. In a case involving surveillance of a foreign power or agent thereof located outside the United States, there was no need for the court to address whether the exception might be broader—as each of the four circuits to address the issue has found.

Congress itself has not been silent on the scope of presidential power in this area. When Congress first enacted wiretap legislation in the immediate aftermath of the *Katz* case, it emphasized that it was not attempting to usurp the constitutional powers of the President over foreign intelligence:

> Nothing contained in this chapter . . . shall limit the *constitutional power of the President* to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, *to obtain foreign intelligence information* deemed essential to the security of the United States, *or to protect national security information* against foreign intelligence activities.[87]

President Carter Agreed to Comply With an Unconstitutional Statute

When Attorney General Griffin Bell testified on the pending FISA legislation before the House Permanent Select Committee on Intelligence in 1978, he observed that Congress could not take away a presidential power by statute, but declared that FISA could still work because President Carter was willing to comply with it:

> [C]landestine intelligence activities, by their very nature, must be conducted by the executive branch with the degree of secrecy that insulates them from the full scope of these review mechanisms. Such secrecy in intelligence operations is essential if we are to preserve our society, with all its freedoms, from foreign enemies. . . .
> [T]he current bill recognizes no inherent power of the President to conduct electronic surveillance, and I want to interpolate here to say that *this does*

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[86] *In re: Directives*, Foreign Intelligence Surveillance Court of Review, 2008___ F.3d ___, (Aug. 22, 2008).
[87] 18 USC § 2511(3) (1970) (emphasis added).

> *not take away the power of the President under the Constitution.* It simply, in my view, is not necessary to state that power, so there is no reason to reiterate or iterate it as the case may be. It is in the Constitution, whatever it is. *The President, by offering this legislation, is agreeing to follow the statutory procedure.*[88]

There is nothing in the Constitution prohibiting a President from acquiescing to legislation that usurps the powers of his office. But no sitting President can by such acquiescence convey permanently to Congress the powers conferred on the presidency by the American people through the Constitution.

VII. The Harm Caused by Legislative "Lawbreaking"

I might add that the successful efforts of misinformed congressional Liberals to undermine America's eighteen year commitment to protect non-Communist Indochina from aggression played a decisive role[89] in our losing that war, which resulted in the loss of millions of lives[90] and the consignment to Communist tyranny of tens of millions of others. I understand this is a strong accusation, and I do not make it lightly. While most of my scholarship in the past three or four decades has focused on U.S. constitutional and

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[88] Testimony of Attorney General Griffin Bell, FOREIGN INTELLIGENCE ELECTRONIC SURVEILLANCE, HEARINGS BEFORE THE SUBCOMMITTEE ON LEGISLATION OF THE PERMANENT SELECT COMMITTEE ON INTELLIGENCE, HOUSE OF REPRESENTATIVES, January 10, 1978 at 14-15 (emphasis added).

[89] Consider this assessment from former North Vietnamese Army Colonel Bui Tin—who commanded the tank unit that smashed through the gates of South Vietnam's presidential palace on April 30, 1975, and accepted the surrender of South Vietnam from General/President Duong Van "Big" Minh: Col. Tin said the American anti-war movement "was *essential* to our strategy. . . . Every day our leadership would listen to world news over the radio at 9 a.m. to follow the growth of the American antiwar movement. Visits to Hanoi by people like Jane Fonda . . . gave us confidence that we should hold on in the face of battlefield reversals." *How North Vietnam Won the War*, WALL STREET JOURNAL, August 3, 1995 at 8 (emphasis added). *See also,* TRUONG NHU TANG, A VIET CONG MEMOIR 58 ("None of us had any illusions about our ability to gain a military decision against the immensely powerful American war machine," and thus "the political front was primary.") Tang served as Minister of Justice in the Viet Cong's "Provisional Revolutionary Government." *See also,* John Lewis Gaddis, *Grand Strategy in the Second Term,* FOREIGN AFFAIRS, Jan./Feb. 2005, ("Historians now acknowledge that American counterinsurgency operations in Vietnam were succeeding during the final years of that conflict; the problem was that support for the war had long since crumbled at home.")

[90] In tiny Cambodia alone, the Yale University Cambodia Genocide Project estimated that 1.7 million people—more than 20 percent of the entire population—was slaughtered by Pol Pot's tyranny. Available on line at: http://www.yale.edu/cgp/. Add the hundreds of thousands of "Boat People" who perished fleeing Communist Vietnam, and the total quickly exceeds two million without even counting those who were slaughtered or died in "reeducation camps" in the former South Vietnam and Laos.

international law related to U.S. national security, I served extensively as an expert on North Vietnam and the Viet Cong with the U.S. Embassy in Saigon during the war and continue to teach seminars about Vietnam. I've authored or edited several books on the war, including the highly acclaimed[91] first major English-language history of *Vietnamese Communism* in 1975. I very much share the view of former DCI William Colby—who had first served in Saigon as CIA station chief in the 1950s and knew Vietnam as well as virtually any American—and scholars like Lewis Sorley (*A Better War*) and Mark Moyar (*Triumph Foresaken*)—that we had the war virtually won when Congress, in May 1973, passed a statute making it *unlawful* to spend money defending victims of Communist aggression in Indochina.

In a very real sense, Congress snatched defeat from the jaws of victory in 1973. That signal that America had lost its will was a major factor in Moscow's decision to transport tens of thousands of Cuban forces to Angola to subvert the scheduled democratic elections. When Congress passed another statute cutting off funds to assist the two non-Communist factions in Angola, Moscow continued its intervention and the number of Cubans increased from a few hundred to an estimated 40,000 or more. By the time Congress realized its mistake and repealed the Clark Amendment, an estimated half-million Angolans had died in the war. (I followed this issue closely in the 1970s, and my employer, Senator Bob Griffin, took the lead in trying to block the funding cut-off with the 1975 "Griffin Amendment.")

Moscow's decisions to invade Afghanistan (creating the Taliban and costing another million or so lives[92]), authorize Moscow-line Communist parties in Latin America to shift to armed struggle (100,000+ died[93]), and unleash "civil war" to undermine an effort at democracy in Angola (500,000 killed[94]), were also greatly influenced by the perception that America had lost its *will* to resist Communist aggression. Above all else, that was a decision conveyed by Congress.

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[91] The *American Political Science Review* described it as the "definitive account of Vietnamese Communism," while the *American Historical Review* proclaimed:

> Turner's volume is certainly one of the most refreshing to appear in several years on the subject of Vietnam, and it rekindles confidence that there is quality work again appearing after an interlude of emotional and severely biased pieces. In fact, Turner's work must rank as a landmark in the treatment of Vietnamese communism.

[92] *See, e.g., Death Tolls for the Major Wars and Atrocities of the Twentieth Century*, available on line at: http://users.erols.com/mwhite28/warstat2.htm#Afghanistan; Piero Scaruffi, *Wars and Genocides of the 20th Century*, available on line at: http://www.scaruffi.com/politics/massacre.html.

[93] *Id.*

[94] *Id.*

Undermining our Intelligence Community

Sadly, in recent decades Congress has time and again subverted our Intelligence Community, at serious cost to our nation. I remember the 1975-76 Church Committee, and its House counterpart the Pike Committee (whose highly-classified final report was leaked to the *Village Voice* even before it could be considered by the Members of this chamber). With much publicity and an equal measure of partisanship, Senator Frank Church declared the CIA was a "rogue elephant"—admitting only after his investigation was completed that, no, in fact, the CIA had done nothing to which he had objected that had not been requested or approved by presidents or their senior political appointees. A massive volume examining CIA "assassinations" concluded that, in fact, the Church Committee had found not a single instance in which the CIA had ever "assassinated" anyone—although decisions were made to assassinate Fidel Castro and Patrice Lumumba. A recent article in the *Indiana Law Review*[95] looked at every charge of illegality raised by the Church Committee and concluded that but a single one clearly violated U.S. law at the time. That was a program involving LSD testing upon unsuspecting and non-consenting Americans, which had been terminated during the Kennedy Administration more than a decade before the Church Committee was formed.

Since the establishment of the congressional intelligence committees, leaks of classified information have been unprecedented. Some result from nothing more than ignorance about the entire business of intelligence and the need for secrecy. In the mid-1980s I was charged with explaining to a Republican member of the House, who had just submitted a trip report on a junket to a Central American nation that was involved in a serious guerrilla struggle, that he had done serious harm by "thanking"—and in the process publicly naming—our CIA station chief in that country. He was as nice as he was clueless, and he kept assuring me that he was a great fan of President Reagan and would never do anything to hurt this country. The station chief's job had been hard enough, because in the wake of the Church Committee report the Carter Administration had shut down that station—so he had been forced to start all over developing reliable sources. But for his own safety we had to pull him out.

Other leaks are more partisan and less forgivable. When I worked with the Foreign Relations Committee, Senator Joe Biden was notorious for leaking secrets to the media, and years later he even bragged about forcing the Reagan Administration to terminate

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[95] Daniel L. Pines, *The Central Intelligence Agency's "Family Jewels": Legal Then? Legal Now?*, 84 IND. L. J. 637 (2009).

covert operations that had been reported to him as a member of the Senate Select Committee on Intelligence merely by threatening to leak them.[96]

Whatever the purpose, such leaks do serious harm to the ability of our Intelligence Community to get critically important information from foreign intelligence services and foreign intelligence sources as well. But this is hardly a shock, as the Founding Fathers explained that the inability of Congress to keep secrets was why "the business of intelligence" had been entrusted to the President's sole discretion in the first place.[97]

The FISA "Chilling Effect" and the "Risk-Avoidance" Culture in the Intelligence Community

Oliver "Buck" Revell was a respected senior FBI official charged at one point with overseeing all counterintelligence and counterterrorism operations. He has told me that in the wake of the Church and Pike hearings, it was virtually impossible to persuade FBI agents to volunteer for duty in those fields. Agents valued their careers and their jobs, and they feared that Congress would become upset about something they did and it might destroy their careers. When the Carter Administration decided to make "examples" by prosecuting Mark Felt and Edward Miller for violating the civil liberties of relatives of domestic terrorists—and even refused to discuss a plea bargain, as they might have with a violent criminal—the message was not missed within the Intelligence Community. (I would note that Attorney General Griffin Bell later remarked to Buck Revell that approving the Felt and Miller prosecutions was his "greatest regret" in his years as Attorney General.)

To make it clear that Congress was not kidding about keeping our intelligence agencies from inconveniencing Americans who were in communication with Hanoi, Moscow, Beijing, or more recently al Qaeda, Congress made violation of FISA a *felony*. As a direct result, when al Qaeda terrorists showed up in San Diego, and were spotted by alert FBI personnel, a decision was made to leave them alone rather than risk violating FISA.

General Michael Hayden, who served as Director of the National Security Agency for more than six years starting in 1999, has publicly stated with respect to the Terrorist Surveillance Program so many in this chamber struggled so hard to destroy: "Had this program been in effect prior to 9/11, it is my professional judgment that we would have

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[96] STEPHEN F. KNOTT, SECRET AND SANCTIONED: COVERT OPERATIONS AND THE AMERICAN PRESIDENCY 176 (1996).

[97] *See supra,* note 41 and accompanying text.

detected some of the 9/11 al Qaeda operatives in the United States, and we would have identified them as such."[98] General Hayden did not connect the dots and suggest that, once having identified al Qaeda terrorists in our midst, our government might have monitored their activities and ultimately prevented the attacks, but that's not an unreasonable conclusion.

The chilling effect of FISA and other constraints on the collection of foreign intelligence information on those involved in the Moussaoui investigation is clear from reading the Inspector General's report discussed above. One of the things Coleen Rowley got right was that some FBI professionals lived in a "climate of fear" because colleagues who had made honest mistakes in handling FISA cases saw "their careers plummet and end."[99] The IG report noted that the FISA Court had recently reprimanded the FBI for such mistakes, and a related IG investigation "contributed to the FBI's conservatism in seeking FISA requests."[100] The deputy counsel in the Office of Intelligence Policy and Review was quoted in the IG report as stating that "the FBI allowed a number of FISAs to expire because agents were concerned that they would find themselves under investigation or banned by the FISA Court for errors in applications."[101]

If our Intelligence Community personnel are afraid they will lose their jobs if they make a mistake, it is predictable that a risk-avoidance culture will replace the "can do" attitude that characterized their predecessors. Surely the threat of being convicted of a felony if they engage in electronic surveillance of a foreign terrorist outside the parameters of FISA will be a greater disincentive to aggressive pursuit of our nation's enemies than the risk of being reprimanded or even fired.

VIII. Conclusions

Mr. Chairman, you will hear testimony that the "lone wolf" amendment is no longer needed, and indeed it was never needed—the problem was the FBI did not understand FISA. That's not true. As the Department of Justice Inspector General's report clearly demonstrates, the lack of this authority prevented the FBI from carrying out a critically important investigation of Zacarias Moussaoui—an investigation that if done in a timely manner might have secured information that could have prevented the 9/11 attacks.

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[98] A copy of General Hayden's address to the National Press Club on January 23, 2006, can be found on line at: http://www.fas.org/irp/news/2006/01/hayden012306.html.
[99] DOJ INSPECTOR GENERAL MOUSSAOUI REPORT, *supra* note 10 at 198.
[100] *Id.* at 197.
[101] *Id.* at 199.

But even were that not the case, the "lone wolf" provision should be made permanent. Because there is a chance we will face such a threat in the future—a free-lance admirer of bin Laden with no visible ties to any foreign power. Indeed, had convicted "shoe bomber" Richard Reid made his way to America without being apprehended, he would have clearly been a "lone wolf" international terrorist. Timothy McVeigh was a "lone wolf" of sorts, although as a U.S. Person with no apparent ties to a foreign power he would not have been covered by the provision under discussion today. But assume for a moment that we get another Richard Reid or Zacarias Moussaoui from Pakistan or Saudi Arabia, intent on setting off a large bomb or dispensing lethal toxins inside Grand Central Station or the U.S. Capitol Building—or perhaps setting off a tanker truck bomb in the Lincoln Tunnel at rush hour? Do you really want to enable such people in the interest of safeguarding the privacy rights of non-U.S. Persons who may well wish us ill? We are at war, Mr. Chairman, and if the draw the balance between safeguarding the liberties we grant to foreigners who are temporarily among us and protecting the lives of our own people too far on the liberty side, the consequences in terms of American lives could be severe. I would only add that the Fifth Amendment seeks to secure the values of "life, liberty, and property." It is not an alphabetical list. If we act in such a way as to endanger the lives of our citizens, that decision will equally place at risk all of their liberties.

An earlier Congress tied the hands of those we entrust with the task of watching our enemies and keeping us save. Thousands of innocent people died as a result. If we never again see a lone wolf threat, then keeping this language on the books will have no effect. If we do have such a threat, there is a chance this provision will permit our government to prevent the attack. If the FBI is yet again kept from taking reasonable measures to protect America from the threat of international terrorism by a Congress focused more upon securing the civil liberties of foreign terrorists than upon protecting the lives of the constituents of its members, my expectation is that we will see a lot of new faces after the next election.

Respectfully,

Robert F. Turner, SJD

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