Testimony of

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Chairman Specter, Senator Leahy, and members of the Judiciary Committee, thank you for inviting me here this morning. It is an honor to testify before this Committee, particularly on a matter of such importance to our national security.

I am currently an attorney in private practice in the New York area and a Senior Fellow at the Foundation for the Defense of Democracies, a non-partisan, non-profit policy institute here in Washington that is dedicated to defeating terrorism and promoting freedom. For close to eighteen years up until October of 2003, I served as an Assistant United States Attorney in the Southern District of New York.

While I held several executive staff positions in our Office and had the opportunity to participate in a number of significant cases, the most important work that I participated in, along with teams of dedicated Assistant United States Attorneys working arm-in-arm with our colleagues in the FBI and other federal and state law enforcement agencies, was in the area of counterterrorism.

From a time shortly after the World Trade Center was bombed on February 26, 1993, through early 1996, I was privileged to lead the prosecution against Sheik Omar Abdel Rahman and eleven others for conducting against the United States a war of urban terrorism that included, among other things: the WTC bombing, the 1990 murder of Meir Kahane (the founder of the Jewish Defense League), plots to murder prominent political and judicial officials, and a conspiracy to carry out what was called a "Day of Terror" - simultaneous bombings of New York City landmarks, including the United Nations complex, the Lincoln and Holland Tunnels (through which thousands of commuters traverse daily between lower Manhattan and New Jersey), and the Jacob K. Javits Federal Building that houses the headquarters of the FBI's New York Field Office (a plot that was thwarted).

After defending those convictions on appeal, I also participated to a lesser extent in some of our Office's other prominent counterterrorism efforts - including pretrial litigation in the prosecution against the bombers of the U.S. embassies in Kenya and Tanzania, and the appellate defense of convictions in the case involving the conspiracy to bomb Los Angeles International Airport during the Millennium observance. Finally, following the 9/11 attacks, I supervised the U.S. Attorney's command post in lower Manhattan, near ground zero, working closely with all our colleagues in the law enforcement and intelligence communities to try to do what we have been trying to do ever since that awful day: prevent another attack against our homeland.

I have not been in the trenches for a few years, but it is from the trenches that I come. And it is from that perspective that I thank this Committee, and the entire Congress, for its tradition of strong, bipartisan support for protecting our national security.

It was that tradition that caused members of both Houses and both parties to enact the Patriot Act in October 2001 by overwhelming margins. It was a good potential idea then. Nearly four years later, with no attacks on our homeland since 9/11, we can confidently say it is a good proven idea today. It has been a crucial ingredient in the American people's inoculation against the perilous disease that is militant Islamic terrorism. And it remains good, relatively pain-free protection that we badly need. Just as we do not eliminate or water down vaccines when we are fortunate enough to go three or four years without a major outbreak of disease, it would be foolish, and dangerous, to eliminate or water down eminently reasonable measures that promote the welfare of the American people.

Much, of course, has been said, pro and con, in our national three-year debate over the Patriot Act. I will later address some of the provisions that are slated to sunset absent new legislation. For present purposes, though, I believe it is more important to confront the larger, thematic issues implicated by our debate. I respectfully submit that a number of the premises on which we are proceeding - and which catalyze ill-conceived efforts, such as the proposed SAFE Act, to dilute the Patriot protections - are simply wrong and cry out for re-examination.

National Security v. Domestic Policing

A constant refrain on the proponent side of any discussion about the Patriot Act has been that, at least insofar as investigative techniques are concerned, what Patriot basically did was bring some old techniques up to date with 21st century technology while - and this is the important point - vesting federal agents conducting national security investigations with powers analogous to what agents conducting criminal investigations have had at their disposal for decades. The Justice Department has made this argument repeatedly. I have made it myself, as have a number of like-minded people, and even those who take the counterpoint on some Patriot provisions have often acknowledged that it is essentially true.

I am not here today to say it is not true - far from it. In retrospect, however, this unassailable point has led us to glide past, almost without notice, a rudimentary question: to wit, should national security investigations be akin to criminal investigations? Should they proceed along similar lines with similar assumptions under similar guidelines? The answer is that they most certainly should not. And simply because the investigative techniques used in both spheres resemble each other does not mean they should be functionally the same in both contexts. The contexts are crucially different.

As former U.S. Attorney General William P. Barr explained in October 2003 testimony before the House Select Committee on Intelligence, in the role of enforcing U.S. law, the executive acts in a field where government has a monopoly on the use of force and seeks to discipline an errant member of the body politic who has allegedly violated its rules. That member, who may be a citizen or an immigrant with lawful status, is vested with rights under the U.S. Constitution. In this ambit, executive action is properly subjected to great constraints: courts are imposed as a bulwark against suspect executive action and in favor of individual liberty; presumptions in favor of privacy and innocence raise the executive's burden, hindering it from taking investigative or prosecutorial action absent convincing evidence of wrongdoing; and defendants, as well as many investigative subjects who have not been charged, enjoy the assistance of counsel, whose task is to make maximal use of the individual's array of rights and privileges - rendering the government's enforcement and information-seeking efforts more burdensome.

The line our society has drawn here is very clear. We believe it is preferable for the government to fail than for an innocent person to be wrongly convicted or otherwise deprived of his rights. That is our criminal justice system. It is the envy of the world, and we would not want to change it a wit in its basic assumptions for those who are properly in it.

Not so the ambit of national security. In this wider realm, where government confronts a host of sovereign states and sub-national entities (particularly terrorist organizations) who claim the right to use force, the executive is not enforcing American law against a suspected criminal. Rather, government here is exercising national defense powers to protect against external threats and, as Attorney General Barr put it, "preserve the very foundation of all our civil liberties." The galvanizing national concern in this realm is to defeat the enemy and preserve our constitutional order. The line drawn here is that government cannot be permitted to fail - not in the confrontation with forcible threats from without, and not in the confrontation with hostile foreign agents operating within the United States.

The fact that terrorists and terror networks can sometimes be countered by the criminal justice system does not mean that terrorism is a criminal justice problem to be addressed with a criminal justice mindset. We want constitutional rights to protect Americans from oppressive executive action. We do not, however, want constitutional rights to be converted by enemies of the United States into weapons in their war against us. We want courts to be a vigorous check against overbearing governmental tactics in the investigation and prosecution of Americans for ordinary violations of law; but we do not - or, at least, we should not - want courts to degrade the effectiveness of executive action targeted at enemies of the United States who seek to kill Americans and undermine their liberties. And while we would prefer to see guilty drug dealers or racketeers or frauds go free than see a single innocent person convicted of one of those crimes, who among us would really prefer to have terrorists to operate freely, threatening us broadly, simply to avoid infringements that are generally minor and either exceedingly rare or predominantly hypothetical?

This backdrop is critical to any assessment of the Patriot Act. The tools that Congress gave national security investigators would be considered well within constitutional norms even if we were judging them under the rigorous standards of the criminal justice system. That is the point made by the refrain that Patriot merely put intelligence agents on a par with their colleagues in criminal enforcement. In point of fact, however, we are not talking about domestic policing here. This is national security, and Congress could have done more - and would no doubt do precisely that if the exigencies of an imminent or a completed terrorist assault required it for the protection of the American people.

Thus, for all the rhetoric, the Patriot Act was a measured response to a dire and continuing threat. Watering it down in an effort to bring it more into line with domestic policing, or to deal with hypothetical threats to civil liberties - particularly in the absence, after nearly four years, of any meaningful record of actual violations - would make no sense and would short sell our greater obligation to the collective safety of the American people.

The lack of an empirical record of infringements is telling here. Naturally, it says a great deal about the kind of people we have in the trenches these days - something I will address in a few moments. But it also tells us other important things. First, the Patriot Act is reasonable. If it were unreasonable you'd know it because you could simply point to the way it operated.

Second is the role of oversight and politics - and here, I mean politics in the best sense of the word in a well-functioning democracy. The Justice Department does not overreach very often, but when it does in the criminal justice arena, that can't be kept a secret for very long. Even if Justice were not as ethical as it has traditionally been in investigating and disclosing its own missteps, defense lawyers are too skillful and the judiciary too vigilant to permit misfeasance or malfeasance to escape notice and condemnation.

But national security is primarily the responsibility of the political branches. While all criminal justice roads lead to the courthouse, the vast majority of what is done in furtherance of national security is in no way intended for judicial proceedings. Relations between the United States and foreign enemies are a political issue. Discovery procedures under the modern interpretation of due process make trials an impractical response to many, if not most, international enemies - educating them and empowering them to imperil us. Moreover, as the 9/11 Commission, among other investigations, has detailed, the state of our human intelligence is such that we rely heavily on information from foreign intelligence services - vital pipelines that would quickly dry up if those who confided in us came to believe their methods, sources and secrets would be revealed in American court proceedings.

Consequently, even if we were all in agreement that the courts were equipped and suitable to be a major check on the executive's national security powers - and I don't think we will ever have consensus on that - they will never be the primary check. The primary check will always be this Congress. This Congress and the American people.

The best national security is broad discretion in the executive branch to act swiftly and comprehensively against threats to the public welfare. The best defense of civil liberties in the national security arena is not further extending the reach of the judiciary. It is aggressive oversight by Congress, and particularly by this Committee whose members are so well versed in the foreign counter-intelligence operations of the Justice Department and the FBI.

It is this Committee, not the federal courts, which is best equipped to determine whether the Justice Department has, for example, reasonably exercised its authority to compel production of library or hospital records; whether it has misused its license to seek roving wiretaps with less particularity in exigent circumstances; whether it has abused its national security wiretapping authority as a pretext to conduct what in reality is a criminal investigation.

Some contend that relying too much on congressional oversight and not enough on courts will return us to the bad old days of abuses of power, of spying on those who pose no threat and are merely exercising their First Amendment right to dissent, and other dark chapters of the past. I respectfully submit, however, that this gives too little credit to our collective capacity to learn from our errors and our scandals. It is because of that past that executive branch officials are well aware of what they may not do, and of what they should avoid - when possible - even the appearance of doing. It is because of that past that Congress is well aware of what must be watched and what questions must be asked. And it is because of that past that we all know what the American people, who so cherish their civil liberties, will not tolerate.

I respectfully submit that reaching the ideal for which we are all striving, an America that is both truly safe and truly free, is dependent on remaining mindful of these critical differences between domestic policing and national security.

Those who challenge some of the Patriot Act provisions - especially those scheduled to sunset - have raised important issues and legitimate concerns about the vibrancy of our liberties. In virtually every case, however, the prudent course is to renew the Patriot powers with a commitment to searching oversight that relies on the expertise of Congress and the good sense of the American people as our best protection. It is not to remove or restrict necessary powers - powers that are being exercised responsibly - on the off chance that they might at some point be abused.

The Targets and Effects of Regulation

Because there is such scant evidence of Patriot Act authorities actually being abused, much of the debate about the Act has been hypothetical. So it is posited: What if agents, to satisfy nothing but their presumed prurient interests, were to snoop into the reading, viewing and Internet habits of Americans? What if agents, freed from requirements to be specific about either the person or location of a roving wiretap application, were to eavesdrop on all conversations in a large building, or a city block, or a whole town? What if agents, unable to generate enough evidence to justify a regular criminal wiretap, were to pretend their subjects were national security threats as a pretext to using FISA wiretap authority? And so on.

These are the types of what-ifs on which our regulating proceeds: The presumption that absent this or that prohibition or hurdle, the default position of agents will be disregard, if not outright contempt, for individual rights. Even further

blinking reality, it is presumed that these over-extended officials (in the FBI's case, some percentage of about 11,000 agents seeking to protect nearly 300 million Americans) in fact enjoy a leisurely existence, and thus that absent laws precluding or restricting various investigative activities, they have not merely the inclination but also the time to pry into the personal and constitutionally protected activities and interests of ordinary Americans.

Perhaps - although I doubt it - there is a place for such skepticism in the arena of domestic policing, where, as I mentioned earlier, such a premium is placed on avoiding conviction and other infringements against the innocent. But there is simply no place for it in the realm of protecting the welfare of the American public from hostile forces. More to the point, the presumption is delusional.

The agents and Justice Department attorneys who are the objects of our concern here are far from perfect. They are human beings thrust into a challenging, high-stakes, stressful calling in which tough judgment calls have to be made, often on the fly and never in the perfect calm of hindsight. Errors are inevitable - and I say that as one who has made more than his share. But as a rule, they are the polar opposites of rogues. They are honorable and conscientious. They got into this line of work out of a sense of duty and a desire to protect people's rights, not transgress them. They are Americans themselves who care deeply about civil liberties. They are, due to their work, more knowledgeable about and cognizant of the Constitution than most Americans - the Constitution they take an oath to uphold; an oath that, in my experience, they tend to take very seriously.

With due respect to all involved, I believe the Patriot Act debate has overlooked this root reality. As a result, the American people are being presented a distorted view of what goes on in the FBI field offices and U.S. Attorney's offices throughout the country where the rubber meets the road.

As a rule, agents and government attorneys tend to be cautious - sometimes too cautious, as we have learned through such inquiries as the 9/11 Commission and the February 2003 Interim Oversight Report to this Committee by Senators Leahy, Grassley and Specter. It is not an unusual thing for a prosecutor to be awaked in the wee hours by a call from agents in the field who want to verify before taking needed action that they will not be stepping over the line by making an arrest or conducting a search. Most day-to-day investigative decisions require consultation and at least one supervisory rung of approval; more unusual tactics require approvals up several rungs of the chain-of-command - and some even call for inter-agency approval; and virtually anything that legally calls for an application to the Foreign Intelligence Surveillance Court (FISC) will be scrubbed by lawyers at the FBI and the Justice Department before it ever gets there.

Agents and attorneys are overworked. Investigations of international terror networks and other enemies of the United States are large and complex. They often call for mastery of voluminous intelligence materials and open source materials, as well as familiarity with the vagaries of legal systems across the globe. They are challenged by the immense difficulty of getting accurate information about facts on the ground in remote parts of the world, and even in our own country given the quantity and very uneven quality of foreign language translations.

And there is tremendous stress. A mistake in a drug investigation may mean a shipment gets through. Similarly, some omission in a fraud investigation may cause an innocent victim lots of money, while an investigative error in a violent gang case may cost a victim his life. All of these problems - the risks criminal investigators live with on a daily basis - are bad, but they are manageable. National security is different in degree as well as kind. The terrorists who confront us have already killed thousands of Americans, have cost our society untold billions of dollars, and have impelled us to place brave young American men and women in harm's way overseas. We know that the terrorists are not done. We know that they not only threaten us still but that they seek weapons of a destructive capacity that could literally dwarf the impact of the 9/11 atrocities. The price of a mistake in this thicket is incalculable, and the pressure to avoid such a mistake is an enormous one that our dedicated agents and government attorneys bear every day.

This is our reality. The government officials whose conduct, actual and potential, is at the heart of our inquiry here are not anything near Big Brother. They are not even slightly interested, as a general matter, in what Americans are reading or what websites they are accessing. They are not desirous of poring over personal healthcare or financial information unrelated to some good-faith investigative imperative. In point of fact, in this information age, they are awash in data and severely challenged to sort the wheat from the chaff - which is to say: they don't have enough time to read and process the things we actually want them to read and process.

It would be counterfactual and perilous to legislate based on the assumption that honorable people will behave badly. It is also unbecoming. When a federal court is confronted with a claim that Congress has acted unconstitutionally in passing a piece of legislation, it operates with a presumption of regularity - it deferentially assumes that Senators and Representatives who enact bills and Presidents who sign them do so mindful and respectful of their constitutional obligations. When sovereign states regard each others' official acts and judgments, they similarly and appropriately do so with a presumption of regularity. This hardly means mistakes are never made or that these presumptions are never overcome. But it is a salient aspect of the dignity that impels our society to respect its institutions - the very respect which undergirds the rule of law - that we operate from a premise that our officials are neither reckless nor roguish, and that they act responsibly.

I respectfully submit that the agents and government attorneys who are sworn to uphold the law should be entitled to nothing less. The stakes here are high, implicating not only the safety of Americans but also their civil liberties. Consequently, it is imperative that Congress perform its crucial oversight function to ensure that the broad powers wielded by the executive branch are wielded appropriately. But our law should presume regularity. It should not erect a priori bars or unwarranted hurdles to the government's access to information that may save lives based on a badly flawed assumption that the power of access will be systematically abused.

Again, I am not saying mistakes will not be made. Investigation is a human process, meaning missteps are inevitable. We have very fine people on the front lines, so fortunately the mistakes are relatively infrequent. But they do inevitably happen. Sometimes, such as in the case of Mr. Mayfield in Portland, the mistakes will be egregious and embarrassing. Nevertheless, no set of laws, however carefully tailored to promote civil liberties, is going to repeal error. Meanwhile, in the national security context, it is simply a fact that every legislative measure fashioned to meet real or imagined violations of individual liberty necessarily renders less certain the public's equally significant - indeed, more significant - communal right to safety. Making a power more difficult to use inevitably results in its being used less often, and in at least some failures to use it when it is needed. We have already seen this unavoidable rule of human nature play out prior to the 9/11 attacks, particularly in the context of the regulatory wall that obstructed information flow between intelligence agents and criminal investigators (which I will address later). We will not connect the dots if we make it needlessly difficult to know what the dots are.

Finally, if Congress legislates counterfactually, assuming government officials will be rogues unless they are hemmed in by laws more exacting than the Constitution demands, it is worth a commonsense appraisal of what that accomplishes. Rogues are not merely rare; they are rogues exactly because they will flout the rules regardless of what the rules are. Bad faith actors cannot be effectively regulated; they need to be weeded out and dispensed with. To the contrary, the only officials who are actually impacted when laws are passed making their tasks more difficult are the vast majority of honorable ones - the ones who will conscientiously try to follow the rules no matter what the rules are. These, of course, are the ones whom it was unnecessary to target with more burdensome rules in the first place because their default position is a healthy respect for the constitutional rights of their fellow Americans.

Rules, moreover, have a dynamism in practice that - and I say this with the utmost respect - sometimes seems lost on those who enact them. Responsible officials will not, as a rule, operate on the margins of their authority. They will be fearful of even the appearance of stepping over the line. It is a fact of bureaucratic life that whatever officials may technically be authorized to do, they will in practice do less of, so to avoid suspicion or criticism. Indeed, it has been observed with some force by raconteurs of life under the aforementioned "wall," including the Foreign Intelligence Surveillance Court of Review, that perhaps more damaging than the regulations themselves was the ethos instilled by the regulations - the seeping conceit that certain investigative activity had been made more difficult precisely because it was inherently unseemly and thus to be avoided whenever possible.

If, for example, you make it more difficult to get a business record, a pen register, or a roving wiretap, you will in practice find that some number - perhaps a large number - of business records, pen registers and roving taps that you believed your legislation authorized, and that you as the public's representatives would want agents to seek, will not be sought. As a practical matter, no one's individual liberties will have been advanced in any meaningful way, but the public's collective safety may be gravely imperiled because information that might have disrupted terrorism will have been missed.

The record demonstrates that the powers vested in agents and government attorneys by the Patriot Act were necessary and have been used judiciously. This should come as no surprise; indeed, we should have expected nothing less. Concerns about abuse are hypothetical, but they are not unimportant and should be handled, as they have been handled for nearly four years, by vigilant congressional oversight. Laws that have helped protect the American people from a repeat of 9/11 should not be diluted.

I will proceed to address some of the Patriot Act provisions that are currently scheduled to sunset at the end of this year. As time is short, I will not endeavor to address all of them but will be prepared to discuss them if the Committee believes that will be helpful.

Business Records: Section 215

None of the Patriot Act's enhancements of government's investigative arsenal has been more assiduously libeled than Section 215. Indeed, in the public mind, it has become the "library records" provision notwithstanding that libraries are nowhere mentioned. While there are points of legitimate concern, most of the controversy is a tempest in a teapot. Section 215 is a good law. It merits being made permanent, albeit with some tailoring to provide expressly for the now-implicit ability of production-order recipients to seek judicial narrowing. Beyond that, altering this provision out of overwrought suspicions about potential abuse would likely, and perversely, result only in greater potential abuse.

Section 215 modified FISA in two ways. The first relates to what information may be compelled. Formerly, this was restricted to travel, lodging and storage records. Section 215 broadens the scope to include not merely such business

records but "any tangible things (including books, records, papers, documents, and other items)."
This is not nearly as dramatic as it appears. For decades, Rule 17(c), Fed.R.Crim.P, has authorized compulsory production of "any books, papers, documents, data, or other objects" to criminal investigators by mere subpoena. Given the incontestable breadth of the federal criminal statutes implicated by terrorism and espionage, coupled with the broad license grand juries have to conduct investigations, there is no item now obtainable by Section 215 that could not already be compelled by simple subpoena (and thus made accessible to intelligence agents, who are now permitted to share grand jury information).
Why such extensive access with virtually no court supervision? Because the items at issue here are primarily activity records voluntarily left in the hands of third parties. As the Supreme Court has long held, such items simply do not involve legitimate expectations of privacy. See, e.g., Smith v. Maryland, 442 U.S. 735, 744 (1979). This renders them categorically different from the private information at issue in the context of search warrants or eavesdropping, in which the court is properly imposed as a bulwark, requiring a demonstration of cause before government may pierce established constitutional safeguards that are the entitlement of American citizens and many aliens.
Thus while the Patriot Act plainly expanded FISA powers, the reality is that prior law governing national security investigations was unnecessarily stingy, especially in contrast to rules that empower criminal agents probing far less serious matters, like gambling. Such incongruities are intolerable in the post-9/11 world, where public safety is critically dependent on intelligence.
Here, one must address the theater over library records, risibly evoking visions of DOJ Thought Police monitoring, and thus chilling, the reading preferences of Americans. First, as demonstrated above, government has long had the authority to compel reading records by subpoena; yet there is no empirical indication of systematic prying into private choices - else we'd surely have heard from the robustly organized librarians. Second, leaving aside that agents (who are also Americans) generally lack voyeuristic interest in the public's reading and viewing habits, investigations in the Information Age are simply too demanding for such shenanigans. Naturally, one could never eliminate the occasional rogue - no matter what precautions were in place; but in the 21st Century, voluminous information streams and finite resources leave no time for this sort of malfeasance. Third, and most significantly, it does not diminish our society's high regard for personal liberty to observe that an a priori ban on investigative access to reading records would be both unprecedented and dangerous.
In point of fact, literature evidence was a staple of terrorism prosecutions throughout the 1990's. Terrorists read bomb manuals, and often leave fingerprints on pages spelling out explosive recipes that match the forensics of particular bombings (like the 1993 attack on the World Trade Center). Possession of jihadist writings is also relevant in the cases of accused terrorists who, having pled not guilty, put the government to its burden of proving knowledge and intent.
More importantly, as Deroy Murdock of the Hoover Institution (and my colleague at National Review Online) has recently detailed in two important articles, at least seven of the nineteen 9/11 hijackers in fact made liberal use of libraries in the United States and Europe in the run-up to the attacks. Others, including Junaid Babar who pled guilty last year to providing material support to terrorists, and the infamous Unabomber, Theodore Kaczynski, are known to have used libraries to carry out their crimes. We simply cannot afford to allow libraries to be a terrorist safe harbor in our midst.
Of course we don't want FBI agents snooping around libraries for no good reason; but do we really want terrorists immunized from the properly prejudicial effects of probative evidence - the type of evidence that has proven key to past convictions? Americans value many species of privacy but sensibly allow them to be overcome when relevant evidence of even minor crime is at stake. It would be extremely unwise to create hurdles for library evidence that don't exist for items stored in a person's own bedroom, or to create impediments in national security cases that don't exist in, say, routine drug investigations.
The second major change wrought by Section 215 involves the showing required before a FISA production order is issued. Previously, agents were called on to provide "specific and articulable facts giving reason to believe that" the records pertained to an agent of a foreign power. Now, the order must issue upon the government's representation that it seeks to obtain intelligence concerning non-U.S. persons, or to protect against international terrorism or espionage.
Practically speaking, this change is, again, less dramatic than appears on the surface. Consider the contrast: in criminal investigations, there is no court supervision at all over government's issuance of subpoenas. Section 215, moreover, expressly prohibits FISA investigations based "solely on ... activities protected by the First Amendment"; criminal probes carry no such protection.
Concededly, however, defenders of Section 215, rather than explaining why court supervision of investigations would be improper, tend counterproductively to stress the court-order requirement. Illustrative is the Justice Department's highlighting that "Section 215 requires FBI agents to get a court order." (See "Dispelling the Myths"; www.lifeandliberty.gov/subs/add_myths.htm#_Toc65482101) (emphasis in original). Though accurate, this assertion

may inadvertently imply searching judicial review. In fact, Section 215 provides no such thing: if the government makes the prescribed representations, the FISA court is without discretion to deny the order. This is precisely as it should be, but people who have assumed a degree of judicial scrutiny understandably become alarmed upon learning it is a false assumption.

Yes, Section 215's judicial exercise is ministerial, but that does not make it unique or inconsequential. It is analogous to familiar pen register law, under which a judge must issue the authorization upon the request of criminal investigators, with no demonstration of cause. Why? Because our system is premised on separation of powers. Investigation is an executive function. The judicial role is not to supervise the executive but to protect U.S. persons against improper invasions of legitimate expectations of privacy. People do not have such expectations regarding the phone numbers they dial, thus a ministerial judicial role is appropriate: the order issues on the court's power, but it is not the judiciary's place to question bona fides of a co-equal branch carrying out its own constitutional function.

In matters of national security more than any other investigative realm, it is crucial to remain mindful of the court's institutional competence. The judiciary's limited role is to protect established constitutional interests, not create new ones as a means to micromanage investigations. When neither U.S. persons nor legitimate expectations of privacy are involved, as is generally the case with Section 215, a court has no cause to demand an explanation of the basis for the FBI's application.

So why require going to the court at all? Because, as is the case with grand jury subpoenas (which are court orders though issued without court supervision), it is appropriate that the directive to comply comes from the judicial power. Moreover, Section 215 prudently charges Congress with the responsibility of ensuring that the executive branch is not abusing its authority. By requiring the FBI to make solemn representations to the court, and mandating that the Attorney General report semi-annually on this provision's implementation, Section 215 provides suitable metrics for oversight and, if necessary, reform.

Finally, the formerly mandated articulation hinders proper investigations. Emblematic is the pre-9/11 Zacharias Moussaoui scenario. There are times when the FBI will have solid reason to suspect that a person is a terrorist operative (as Moussaoui's flight school behavior aroused suspicion), but not yet have developed enough evidence to tie the suspect to a particular foreign power (such as al Qaeda). In such a case, given that the Fourth Amendment poses no obstacle to the FBI's access to third party records, the safety of Americans assuredly should not be imperiled for the benefit of a non-U.S. person by burdening investigators with a legally unnecessary showing it may be difficult, if not impossible, for them to meet.

Section 215 should be amended to clarify that order recipients may move the FISA court to quash or narrow production. This remedy is available in the analogous context of grand jury subpoenas, the Justice Department has appropriately taken the position that it is implicit in Section 215, and it will incentivize investigators to minimize their applications responsibly.

Further modification would be legally unnecessary, as well as unwise policy. Raising the access bar would simply encourage government to proceed by grand jury subpoena or national security letter - guaranteeing less judicial participation, more difficult congressional oversight, and the inefficiency of quash litigation in district courts throughout the country, rather than in the FISA court (a salient reason for whose creation was to develop specialized expertise in the sensitive issues unique to intelligence investigations).

Arguments that we should grant carve-outs from government access for certain types of records in deference to individual interests in financial and health-care privacy, or the privacy of reading and Internet viewing habits already addressed above, are unwise because they give short shrift to the national security threat. If we were not actually facing a public safety challenge, such individual privacy interests might sensibly be elevated. We need, however, to be at least equally concerned with the collective rights of Americans. National security is the highest public interest and the most profound duty of government. When it is truly threatened, as it is now, it makes no sense to give individual interests primacy over the public's need to have foreign enemies thoroughly investigated - particularly when the Supreme Court has made plain that there are no expectations of privacy in third-party records.

Another frequent and understandable complaint about Section 215 revolves around its so-called "gag rule," which prohibits recipients to disclose the fact of a subpoena. To be sure, the desirability of openness as a check on government over-reaching is unassailable if national security is not threatened. A public safety threat, however, requires reasonable balance between the public interest in disclosure and the reality that disclosure makes our enemies, to be blunt, more efficient at killing us. It can alert them to the fact of an investigation which may thwart our ability to identify key players and locations that threaten Americans. It may endanger the lives of informants or dry up other crucial sources of information (such as wiretaps) since, once terrorists - or, for that matter, members of any criminal organization - realize the government knows enough to seek certain records, their first priority often becomes attempting to determine how they have been compromised. Finally, it may trigger a planned attack. On this last score, it is again important to note that terrorists are not like other criminals. They are not in it for the money, and they are not as apt to flee and live to fight another day if they believe their cover is blown. Many of them are devoted to their

missions to the point of committing suicide to accomplish them. Publicly revealing an investigation before agents have reached the point of being able to thwart an ongoing terrorist plot may serve to accelerate the terrorist plot. The appropriate balance here, as argued above, is to presume that Justice Department personnel will perform their functions honorably, but to expect searching congressional oversight to ensure that the government is not misusing Section 215. It bears observing that, as a practical matter, the vast majority of third-party subpoena recipients have no interest in disclosure. Given the stakes involved, any modification of the gag rule should put the onus on the few who do to explain why they should not remain mum.

Pen Registers - Section 214

Issues flowing from the Patriot Act pen register provision, Section 214, are closely related to the business records provision, Section 215. Section 214 sensibly extends the pen register/trap-and-trace device procedures already available for telephone communications to the newer technologies of email and Internet. Importantly, this does not permit government to invade the content of communications; all that is at stake here is routing and addressing information.

Prior FISA law required government to certify that the monitored communications would likely be those either of an international terrorist or spy involved in a violation of U.S. criminal law, or of an agent of a foreign power involved in terrorism or espionage. This was an unnecessary and imprudently high hurdle. The Supreme Court, as noted above, has long held that pen registers do not implicate any Fourth Amendment interests - they are not searches, they do not invade legitimate expectations of privacy, and there is no constitutional reason to require investigators to seek court authorization for them at all.

Consequently, Section 214's modification of prior law is both modest and eminently reasonable. Agents are still required to obtain a court order before installing a pen register. In addition, they are still required to make a solemn representation to the court. Now, however, that representation is limited to certifying that the information sought would be relevant to an investigation to protect against international terrorism or clandestine intelligence activities. Though less extensive than before, this still easily passes constitutional muster. It is also comfortably analogous to criminal practice, where investigators must be granted pen register authority upon merely certifying that "the information likely to be obtained is relevant to an ongoing criminal investigation[.]" (18 U.S.C. Section 3122(b)(2)). And, as was the case with Section 215, Section 214 may not be employed to conduct an investigation based solely on activities protected by the First Amendment - a safeguard that does not exist in criminal investigations.

Section 214 should neither be modified nor permitted to sunset.

The Wall - Section 218

No subordination of national security to hypothetical fears of civil liberties abuse was more emblematic of the pre-9/11 world than the metaphorical "wall" erected to obstruct the information flow between intelligence and criminal investigators.

Section 218 of the Patriot Act dismantled this construct by amending its literal underpinning - the basis for the ill-conceived "primary purpose" test by which FISA was misinterpreted for nearly a quarter-century, to disastrous effect. As the wall was founded on a skewed interpretation of law, Section 218 was theoretically unnecessary. Nevertheless, it was entirely appropriate and its enactment proved to be critical.

Post-9/11, discussions focus on explaining the genesis of the wall rather than defending it. Indeed, former Attorney General Janet Reno, who did not originally erect the wall but on whose watch it was heightened and solidified in internal Department guidelines, testified to the 9/11 Commission that, more critical to national security than realigning the intelligence community would be "to knock down walls, to promote the sharing of information, and to enhance collaboration in the fight against terrorism." And in 2002, the Foreign Intelligence Surveillance Court of Review, in its first ever opinion, provided a detailed explanation of the wall's fatal flaws.

The relevant history traces to the 1978 enactment of FISA. A reaction to Vietnam and Watergate era domestic-intelligence abuses, FISA authorizes the specially created FISC to regulate and monitor the executive branch's conduct of electronic surveillance and physical searches in the context of national security investigations. This is in contrast to ordinary investigations, where the use of those techniques is governed by the criminal law.

In the latter, agents must present probable cause of a crime to obtain a warrant. FISA, on the other hand, is not principally about rooting out crime; it is about national defense, targeting foreign enemies, including international terrorists. Thus, rather than requiring probable cause of a crime, FISA permitted government to "obtain foreign intelligence information" if "there is probable cause to believe that ... the target of the electronic surveillance is a foreign power or an agent of a foreign power[.]"

The difficulty here is that any theoretical divide between criminal and intelligence matters would not track reality. Espionage, for example, is both a dire national security issue and a felony. Similarly, terrorists commit many crimes (e.g., immigration fraud, identity theft, money laundering, seditious conspiracy, possession of precursor explosives,

and bombing, to name just a few) in the course of plotting and attacking. Thus, whether an agent's investigative authority comes from FISA or the criminal law, what emerges is evidence that constitutes both national security intelligence and proof of quotidian crimes.

This should pose no problem. Agents conducting a proper investigation uncover information. Free to compare notes and study multiple options for dealing with threats to public safety, they can wisely choose the approach that makes the most sense in light of the entire informational mosaic. Prosecution of a crime will get a dangerous person off the street and, equally important, may motivate him to cooperate about the inner workings of a terror network. On the other hand, sustained monitoring might reveal the nature of a terror enterprise while allowing government to prevent attacks without triggering disclosure obligations that attend a prosecution (which educate terrorists about the state and sources of government's intelligence). Plainly, national security dictates a fully informed strategy, taking advantage of the tactics that best fit the circumstances. Prior to 9/11, however, development of such a strategy was hamstrung by a hypothetical and wrong-headed concern: viz., that permitting use in criminal cases of FISA-generated evidence might induce agents to resort to FISA when their "real" purpose was to conduct a criminal investigation.

This was irrational. First, the existence of a crime or national security threat is an objective reality, entirely independent of the investigators' subjective mindsets about why they are investigating. As for agent motivation, our concerns should be whether they have a good reason for investigating and whether the facts they present to a court are accurate. If those things are so, and agents happen to uncover evidence they did not anticipate finding, that should be cause for celebration, not suppression. Thus, it has for decades been the law that (i) evidence of Crime A is admissible even if it was seized in the execution of warrant based on probable cause to believe Crime B had been committed; but (ii) evidence of a crime is suppressed if the probable cause predicating its seizure was dependent on intentional misstatements of material fact.

Second, it is not sensible to suspect systematically dishonest resort to FISA. FISA applications require a specialized and rigorous internal approval process before presentation to the court. Assuming for the sake of argument (and against the facts in all but the most aberrant of circumstances) an agent willing to act corruptly, it would be far easier and less detectable for such an agent to fabricate the evidence necessary to get an ordinary criminal wiretap than to fabricate probable cause to believe the subject is a national security threat so that FISA may be employed.

Finally, FISA as written posed no obstacle to the use of FISA evidence for criminal prosecution. From a national security perspective, this made eminent sense given the aforementioned propensity of terrorists to commit crimes and the consequent centrality of prosecution as a means to win cooperation and thus secure vital intelligence.

Regrettably, this common sense came unmoored over time. FISA required that a high executive branch official - typically, the FBI director - represent that "the purpose" of the investigation was to obtain foreign-intelligence information (as opposed to building a prosecution). This was simply intended to be a certification; it did not purport to restrict either the scope of the investigation or the permissible uses of any resulting evidence. Unfortunately, soon after FISA took effect, the Justice Department began construing the certification not as a mere announcement of purpose but as something more restrictive: a substantive limitation on the use of FISA evidence in criminal cases.

As the Review Court opinion elaborated, over time this erroneous interpretation of the certification requirement led to a "false dichotomy": a futile endeavor to sort FISA-derived information into the purportedly distinct categories of mere intelligence and criminal evidence. Moreover, given the government's apparent fear that there might be impropriety in the acquisition of criminal evidence via FISA, it should have come as no surprise that the federal courts, too, began fashioning safeguards not found in FISA's text. Thus was born the "primary purpose" test, under which FISA-derived evidence could not be used in criminal prosecutions unless the government demonstrated that its primary purpose had been to collect intelligence, not build a criminal case.

To the contrary, as the Review Court held in 2002, FISA as enacted "clearly did not preclude or limit the government's use ... of foreign intelligence information, which included evidence of certain kinds of criminal activity, in a criminal prosecution." (Emphasis in original.) But rather than challenge the primary purpose test, the Justice Department bolstered it, by internal 1995 regulations, into the finished product that is now commonly referred to as "the wall." This procedural edifice instructed "the FBI and Criminal Division [to] ensure that advice intended to preserve the option of a criminal prosecution does not inadvertently result in either the fact or the appearance of the Criminal Division's directing or controlling the [foreign intelligence (FI) or counterintelligence (FCI)] investigation toward law enforcement objectives."

As already discussed, this directive, the Review Court found, was "narrowly interpreted" to "prevent the FBI intelligence officials from communicating with the Criminal Division regarding ongoing FI or FCI investigations." The guidelines and the ethos they forged effectively cut intelligence investigators off not only from criminal agents but also from Assistant United States Attorneys who, by virtue of investigating and prosecuting several terrorism cases in the 1990's, were among the government's best resources regarding al Qaeda and its affiliates.

The best known pernicious consequence of all this occurred in August 2001. Relying on the wall, FBI headquarters declined to allow criminal investigators to assist an intelligence investigation seeking to locate probable terrorists

Khalid al-Midhar and Nawaf al-Hazmi. A few weeks later, on 9/11, the pair helped hijack Flight 77 and pilot it into the Pentagon.
Section 218 makes a seemingly small but crucial adjustment: it guts the primary purpose test by requiring a government to certify that foreign intelligence is merely a significant purpose, rather than the purpose, for the FISA application. This strikes the correct balance: It recognizes that there is nothing inherently wrong with collecting criminal evidence by FISA, but ensures that FISA will not be employed unless there is some worthy national security purpose.
Section 218 was perhaps legally unnecessary. The Justice Department, after all, could, absent legislation, have changed its internal guidelines and argued that FISA had been misconstrued. Yet, it was certainly appropriate and wise for Congress itself to address a key cog of pre-9/11 intelligence failure. Furthermore, given that the FISA court, post-9/11, improperly attempted to institute the wall procedures as an exercise of judicial supervision, it was no doubt immensely significant to the Court of Review - in reversing the FISA court in 2002 - that the wall had been rejected not just by DOJ but by an act of Congress that carried the force of law.
Section 218 is vital. The sunset should be removed, and the provision should otherwise remain as is.

Roving Wiretaps - Section 206
Roving wiretaps - that is, multi-point electronic surveillance targeted at persons rather than particular communications devices (e.g., telephones or computers) - have been available to criminal investigators for nearly twenty years. As one would expect, there seems to be consensus that they should be available in national security cases as well, and that was accomplished by Section 206 of the Patriot Act. It has been contended, however, that the roving tap authority is too broad, particularly after additional changes to FISA wrought by the 2002 Intelligence Authorization Act, and that the authority should be narrowed. I respectfully submit that these concerns are overwrought and that Section 206 should remain as is.
The central complaint about FISA roving wiretaps is two-fold. First, it is alleged that they do not require stringent identification of the person who is the target of the surveillance - that is, FISA permits a target whose identity is not known to be described rather than identified. Second, roving taps are sometimes claimed to be insufficiently particular to satisfy Fourth Amendment muster because they are issued without "particularly describing the place to be searched." Although that contention would seem to be fatally undermined by the fact that federal appellate courts have upheld roving wiretaps over particularity challenges in the criminal context, critics seize on the fact that FISA does not contain a safeguard found in the criminal wiretap statute: the so-called "ascertainment requirement."
Both these claims are underwhelming, especially viewed in practical terms. It bears remembering that a FISA roving tap cannot be approved by the FISC unless the government satisfies a judge that there is probable cause to believe that the target of the surveillance is a foreign power or an agent of a foreign power. Moreover, the warrant may not issue unless the FISC is also convinced there is probable cause to believe that the facilities to be surveilled are being used, or are about to be used, by that target. Thus, even absent apodictic identification of the target, it is inconceivable that a description could be so vague and imprecise as to be rendered meaningless, as critics allege, and yet still meet the high, dual-pronged probable cause standard. The Justice Department is not apt to allege, and a federal judge is even less apt to find, probable of terrorist agency and likely use of communications facilities with respect to a target who cannot be described with a reasonable degree of confidence.
The "ascertainment" argument is not persuasive. This requirement in the criminal electronic surveillance law calls for agents, in certain circumstances, not to begin monitoring until they are reasonably certain that the target is in the place where eavesdropping is to occur. But even in the criminal context it is applied only to "oral" communications - i.e., those captured by an eavesdropping device (a "bug") hidden in a location - not to "wire" and "electronic" communications over telephone lines or the

Internet.
By suggesting that the ascertainment requirement be extended to wire and electronic communications in FISA, critics are thus seeking greater constraints on agents conducting national security investigations than on agents doing investigations of ordinary crimes (even comparative trifles like gambling). This makes little sense given the grievous stakes involved and the fact that, if push came to shove, it is dubious, to say the least, that the Constitution (as opposed to FISA) would require any warrant at all for the executive branch to eavesdrop on a foreign enemy operative plotting sabotage against the United States - especially if the operative was a non-U.S. person who lacked a sufficient basis to claim Fourth Amendment protection.
Section 206's searching judicial review, bolstered by the afore-described probable cause requirements, strikes the right balance between civil liberties and national security. It also imposes a minimization regime which provides that surveillance must stop upon the monitor's determination that innocent conversation has been intercepted - further protecting innocent Americans from undue invasions of privacy. These elements, combined with responsible

oversight by Congress, clearly work: there is no record of abuse of roving wiretap authority in the national security context in the nearly four years it has been available.
Given the adequacy of these checks, the urgent need to develop intelligence on terrorists operating domestically, and the peril in which lost information could place Americans, Section 206 is appropriate as written. It should be renewed.

Conclusion
The Patriot Act has been a crucial component of our nation's post-9/11 success in countering the terrorist threat. The investigative powers it granted were measured and respectful of civil liberties. They have been exercised responsibly, as we should have expected they would be and as we should expect they will continue to be. They have been vigilantly and appropriately monitored by this Committee, other congressional committees, and the courts.
On the domestic front, the best antidote to terrorism is robust executive authority checked by searching congressional oversight. I respectfully submit that this is what we have now. It would be a mistake to dilute the Patriot Act powers in response to hypothetical concerns about civil liberties abuse. Given the threat we face and the carnage we have endured, it would be a mistake we cannot afford.
I thank the Committee for its time and attention.