S. HRG. 108–915

PREVENTING AND RESPONDING TO ACTS OF TERRORISM: A REVIEW OF CURRENT LAW

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

APRIL 14, 2004

SALT LAKE CITY, UTAH

Serial No. J–108–68

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

33–418 PDF WASHINGTON : 2007

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

ORRIN G. HATCH, Utah, *Chairman*

CHARLES E. GRASSLEY, Iowa
ARLEN SPECTER, Pennsylvania
JON KYL, Arizona
MIKE DEWINE, Ohio
JEFF SESSIONS, Alabama
LINDSEY O. GRAHAM, South Carolina
LARRY E. CRAIG, Idaho
SAXBY CHAMBLISS, Georgia
JOHN CORNYN, Texas

PATRICK J. LEAHY, Vermont
EDWARD M. KENNEDY, Massachusetts
JOSEPH R. BIDEN, JR., Delaware
HERBERT KOHL, Wisconsin
DIANNE FEINSTEIN, California
RUSSELL D. FEINGOLD, Wisconsin
CHARLES E. SCHUMER, New York
RICHARD J. DURBIN, Illinois
JOHN EDWARDS, North Carolina

BRUCE ARTIM, *Chief Counsel and Staff Director*
BRUCE A. COHEN, *Democratic Chief Counsel and Staff Director*

CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

Page

Feinstein, Hon. Dianne, a U.S. Senator from the State of California, letter, statement and attachment 156
Hatch, Hon. Orrin G., a U.S. Senator from the State of Utah 1
prepared statement 172

WITNESSES

Benowitz, Nanette, President, League of Women Voters of Utah, Salt Lake City, Utah 26
Bradley, Scott N., Utah Eagle Forum, Salt Lake City, Utah 32
Cohne, Bruce G., Chair, Utah Advisory Committee to the Commission on Civil Rights, Salt Lake City, Utah 35
Collins, Daniel P., Munger, Tolles & Olson, LLP, Los Angeles, California 37
Comey, James B., Jr., Deputy Attorney General, Department of Justice, Washington, D.C. 4
Eyer, Dani, Executive Director, American Civil Liberties Union of Utah, Salt Lake City, Utah 24
Flowers, Robert, Commissioner, Utah Department of Public Safety, Salt Lake City, Utah 30
Mylar, Frank D., Utah Grassroots, Salt Lake City, Utah 28
Turpen, Aaron, Libertarian Party of Utah, Salt Lake City, Utah 34
Warner, Paul, U.S. Attorney, District of Utah, Salt Lake City, Utah 7

QUESTIONS AND ANSWERS

Responses of Nanette Benowitz to questions submitted by Senator Hatch 50
Responses of Bruce Cohne to questions submitted by Senator Hatch 53
Responses of Daniel Collins to questions submitted by Senator Hatch 59
Responses of James Comey to questions submitted by Senator Hatch 63
Responses of Dani Eyer to questions submitted by Senator Hatch 81
Responses of Frank Mylar to questions submitted by Senator Hatch 88
Responses of Aaron Turpen to questions submitted by Senator Hatch 92
Responses of Paul Warner to questions submitted by Senator Hatch 94

SUBMISSIONS FOR THE RECORD

Benowitz, Nanette, President, League of Women Voters of Utah, Salt Lake City, Utah, prepared statement 97
Bradley, Scott N., Utah Eagle Forum, Salt Lake City, Utah, prepared statement 103
Burrus, James H., Jr., Special Agent in Charge, Department of Justice, Federal Bureau of Investigation, Salt Lake City, Utah, prepared statement 110
Cohne, Bruce G., Chair, Utah Advisory Committee to the Commission on Civil Rights, Salt Lake City, Utah, prepared statement and attachment 113
Collins, Daniel P., Munger, Tolles & Olson, LLP, Los Angeles, California, prepared statement 120
Comey, James B., Jr., Deputy Attorney General, Department of Justice, Washington, D.C., prepared statement and attachment 130
Edgar, Timothy H., American Civil Liberties Union, Legislative Counsel, Washington, D.C., , prepared statement 142
Eyer, Dani, Executive Director, American Civil Liberties Union of Utah, Salt Lake City, Utah, prepared statement 150

Page

Flowers, Robert, Commissioner, Utah Department of Public Safety, Salt Lake City, Utah, prepared statement 164
Green Party of Utah, Salt Lake City, Utah, prepared statement 168
Mylar, Frank D., Utah Grassroots, Salt Lake City, Utah, prepared statement 175
Turpen, Aaron, Libertarian Party of Utah, Salt Lake City, Utah, prepared statement 180
Warner, Paul, U.S. Attorney, District of Utah, Salt Lake City, Utah, prepared statement 184

PREVENTING AND RESPONDING TO ACTS OF TERRORISM: A REVIEW OF CURRENT LAW

WEDNESDAY, APRIL 14, 2004

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:00 a.m., at the S.J. Quinney College of Law, University of Utah, Salt Lake City, Utah, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senator Hatch.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. If we can have attention. If everybody will give their attention, we are going to start this hearing. I want to welcome everyone here today to this special hearing in our great state of Utah.

Today's hearing is another in a series of bipartisan hearings which the Senate Judiciary Committee has initiated under my direction to examine the adequacy of our Federal laws to protect the American public from, and of course respond to, acts of terrorism against the United States. I'm pleased to hold this hearing at home and I'm grateful for all the participants for taking the time to be with us today.

I would especially like to welcome Deputy Attorney General James Comey who has made a special effort to join us here in Utah. I'm very grateful that he would take time from what I know is a tremendous schedule, and a very important schedule, to come out here. It shows to everybody concerned how important this hearing is.

I would also like to acknowledge the many federal, state, and local leaders of our community, including Chief Judge Dee Benson of the United States District Court. We will also be privileged to hear from distinguished members of our community on both sides of these issues.

I would also like to thank our U.S. Attorney, Paul Warner, who is one of the most respected U.S. attorneys in the country, for hosting a Project Safe Neighborhoods breakfast this morning. And of course Dean Scott Matheson, Jr., an old friend who has done such a great job here. And of course the University of Utah and its Quinney College of Law for providing a forum for this hearing.

Let me note at the outset that, like our neighbors across America, we in Utah have much to learn from this cruel but real threat of terrorism. We can be proud, however, that Utah's experience

with the Winter Olympics provided the nation with tangible evidence of the importance of federal, state, and local law enforcement officials joining together with an informed citizenry to establish a safe and secure environment.

This took an immense amount of cooperation, and our state deserves a lot of credit. It took cooperation, it took coordination, and it took communication among many individuals and organizations. And I'm proud to recognize many of those responsible for that successful event and the security that we continue to enjoy here in Utah today.

Today's hearing will focus on the issue of protecting our Nation while, at the same time, observing our traditional civil liberties in the aftermath of the horrific September 11 attacks. Certainly September 11 and the war on terrorism are a reality and we are still addressing those today. The unprovoked and unjustified attacks on September 11 forced us to take appropriate steps to make sure that our citizens are safe, and that terrorists never strike again on American soil. We are doing our best to try to stop them from ever striking again.

The first duty of the national government is to protect our citizens from threats abroad, and we are not going to shirk this responsibility. Senator Leahy, the ranking Democratic member of the Senate Judiciary Committee, and I have worked together for a long time to examine these important issues.

In fact, when he was Chairman of the Committee we worked closely together to craft the PATRIOT Act in a bipartisan manner, which carefully balances the need to protect our country without sacrificing our civil liberties. Without the hearing leadership of Senator Leahy and the support of my fellow colleagues across the aisle in the Congress, we could not have acted so effectively after September 11 to have passed this measure in the United States Senate by a vote of 98–1.

Passing the PATRIOT Act did not finish our job. Congress has the responsibility to oversee these laws that we passed, and that they are implemented properly and as we intended. I am confident that we will continue to work as Democrats and Republicans cooperatively in the future as we continue this series of hearings.

There are some who say that the cost of protecting our country from future terrorist attacks is an infection upon our cherished freedoms. Some have suggested that our anti-terrorism laws are contrary to our Nation's historical commitment to safeguard civil liberties. I disagree. I believe that we must have both our civil liberties and national security or we will have neither.

Thomas Jefferson said, "The price of freedom is eternal vigilance." Congress and the nation must be vigilant. True individual freedom cannot exist without security, and our security cannot exist without the protection of our civil liberties. We must and we will have collective security and individual liberties.

Unfortunately much of the rhetoric regarding our Nation's anti-terrorism laws appears to be based on misinformation and unjust speculation. Additionally, some critics have tried to divert attention to those leading the implementation and the review of these laws, including me, Attorney General Ashcroft, and President Bush,

rather than making specific documented critiques of these laws and how they believe these laws have been enforced.

Our nation has strived to make a major and reasonable response to the tragic events of September 11, including fixing some significant deficiencies in the pre–9/11 law that Deputy Attorney General James Comey will address in his testimony today. And Deputy Comey should know, since he was one of the key prosecutors in the Khobar Towers trial, and in so many other prosecutions that occurred in his U.S. Attorney's office at the time. One of the most powerful and important offices in the country.

He will tell us why it was important to change the law to update our anti-terrorism provisions to include the same capabilities, methods, and technologies that are used against drug trafficking, pornography, and organized crime.

Today we will focus on evaluating the tools that are in place to protect us from the clear and present threat of terrorism on our soil. I want to look forward and make sure the tools we have in the law are implemented effectively and are not being abused. While we all share a common commitment to security and freedom, the question we are examining today is how best to do so in an environment where terrorists like the 9/11 attackers will continue to operate within our borders using the very freedoms that we so dearly cherish to carry out their deadly plots against our country and against us as individuals.

Let me remind everyone that the 9/11 attackers were able to enter into our country within the strictures of our immigration laws. They were able to enjoy the freedoms, secure for themselves all the necessary traffics of law abiding members of our society, and then carry out their terrible terrorist attacks under the radar screen of law enforcement, intelligence, and immigration agencies.

This hearing will examine the government's efforts to protect our freedoms; not just the freedom to live in a safe and secure society, but the freedoms that our country was founded on, the freedoms that we enjoy each and every day, and the freedoms that are the lifeblood of our society. I'm especially interested in hearing from today's witnesses about the details of any specific abuses that have occurred under our current laws.

We have invited several representatives and groups critical of our Nation's counter-terrorism laws to express their concerns today, and we want to listen to them. But I hope their concerns will be substantive concerns. We must not let the debate fall into the hands of those who spread unsubstantiated and false allegations when it comes to these important issues. We are interested, of course, in hearing thoughtful criticism and ideas about how this current law or any current law should be modified to better protect the national security as a whole, while maintaining our civil liberties.

If we need to refine the law, we will do that. It's going to come up for reauthorization next year. If we need to strengthen the law, we will. If the facts show that we have gone too far in one area or another we will make appropriate adjustments. But first we have to talk about the facts. We have to find out the facts. And that's what we are doing here today, and what we have done in the prior two hearings.

Today we are discussing a very, very serious matter: Our nation's security. I know that we will carefully examine these issues today, and we have a lot of good people here to help us.

I'm very pleased with the distinguished panel members that are joining us here today. On our first panel we have Deputy Attorney General Comey who will be followed by United States Attorney from the district of Utah, Paul Warner.

As I mentioned, Deputy Attorney General Comey brings a depth of experience, not only as a deputy attorney general but as a former lead prosecutor in this country. And I just mentioned, I think, Khobar Towers as one of them. We sure look forward to hearing your testimony today and are very grateful that you took time out of what we know is an impossible schedule to be with us. It shows how important these issues are that you would take this kind of time.

Also with us today is Paul Warner. The United States Attorney for the District of Utah and former head of the Attorney General's Advisory Committee for all attorneys general in the country. We have to be proud of Mr. Warner. Mr. Warner has worked closely with local, state, and Federal law enforcement agencies in a collaborative effort to combat terrorism. Mr. Warner, we are grateful that you took time out to be with us today.

And so are we ready to proceed? Mr. Comey we will start with you.

STATEMENT OF JAMES B. COMEY, JR., DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. COMEY. Thank you, Mr. Chairman. My written testimony I will submit to be part of the record.

Chairman HATCH. We will make all full statements part of the record.

Mr. COMEY. Thank you, sir.

First of all, thank you for inviting me here today. Thank you for holding this hearing, which is an opportunity for my first visit to this amazingly beautiful state and city. I am also honored to be sharing this table with my friend and colleague, Paul Warner, one of the real heroes of the Federal prosecutor ranks in this country.

I thank you for holding this hearing because I believe there has been no real informed public debate about the PATRIOT Act over the last 18 months to 2 years. Instead, we have found ourselves in a situation where town councils across the country, including in my former home of New York City, have voted to repeal the PATRIOT Act, and where people stand around at dinner parties and nod when someone talks about how awful the PATRIOT Act is. Those folks are good folks, those people in town councils and dinner parties across this country. But I don't believe they know what is in the PATRIOT Act. I don't believe that they could, and vote to repeal the PATRIOT Act.

The Act, as you know well, Mr. Chairman, includes such things as additional monies for the widows and children left behind by public safety professionals killed in responding to terrorism. It expresses the sense of the Congress that backlash crimes against Arab Americans and Sikh Americans are evil and we should work to prevent hate crimes against Arab Americans and Sikh Ameri-

cans. If people knew those things were in the PATRIOT Act, they wouldn't be voting to repeal the PATRIOT Act. So there has been no real debate.

I thank you for providing a forum for that debate and I thank you for inviting people who care, both people who will be critical of the PATRIOT Act and supportive of it. I believe, from reading their statements, that they are all people who care passionately about government power and how it is used. I know you do. I know I do.

This country was founded by people who cared about the limits on government power and who insisted upon a Bill of Rights for that very reason. Questions should be asked about government power and an informed debate should be had about government power. I believe if we actually have that, if people at dinner parties and at town councils and across this country demand the details, find the space in American life to have an actual informed understanding of the PATRIOT Act, they will realize that it is so smart, so ordinary, and so important, that they won't want to change it and that they wouldn't dare dream of repealing such an important piece of legislation.

As you said, sir, I'm not aware of any documented abuses of the powers under the PATRIOT Act. I'm aware of only one court decision that struck down any portion of the PATRIOT Act, and that was a decision by a district judge in California on a very technical constitutional interpretation ground saying that some of the provisions of the material support for terrorism statute were too vague and needed to be tightened up. That's it as far as I'm aware.

I want to touch on, though, a couple of specific areas that folks have gotten all excited about and concerned, that I believe folks don't know the details of that and that I know a great deal about from my experience as a career prosecutor; so-called "sneak and peek" search warrants. What we, in law enforcement, call "delayed notification" search warrants. It's something that has so much controversy in this country. It sounds awful, the "sneak and peek" search warrant. People conjure up visions of law enforcement sneaking into your bedroom and going into your drawers and closing them and sneaking back out of your house.

How is it really used? That's what people want to know. I have used delayed notification search warrants a number of times in my career, always in the most important and dire of circumstances. When I was a Federal prosecutor in Richmond, Virginia there was a drug gang moving into Richmond from New York. As I used to say, where all bad things come from.

And this drug gang was a violent group of crack dealers from Brooklyn, New York City who were trying to gain a foothold in the city of Richmond. And we couldn't get into them. We had one informant who had contact to them, and he explained that they were really bad guys and he didn't know exactly who they were. But he knew one thing: They had just delivered five kilos of cocaine to an apartment in the west end of Richmond.

So we had a problem, we had a dilemma, a choice to make. Do we go get a search warrant and seize the drugs, exposing the informant, risking his life, blowing the investigation, and jeopardizing the chance to ever bring to justice these violent drug crimi-

nals? Or do we let five kilos of cocaine walk onto the streets and be distributed and used by people in Richmond?

We didn't have to make that choice between those two options because we had a third option. And prosecutors in the country have had the third option for generations and have used it when necessary. We went to a Federal judge and explained what I just explained to you, in a sworn affidavit laid out our probable cause, and the judge authorized a search warrant and authorized the Drug Enforcement Administration to make the search look like a burglary.

So the agents went in, they seized the five kilos, they took the TV, stereo, and they broke a window. They then left. Two leaders of the drug organization came to the apartment and called the police. A marked unit responded. The police officer had been briefed by the DEA, he knew who he was dealing with, and he asked, "Who are you?" And they identified themselves.

"And is this your apartment?"

"Yes, this is our apartment."

"What was taken?"

"A stereo and the TV."

"Anything else taken?"

"No."

"But this is your apartment?"

"Yes."

"And this is your address and this is your Social Security number?"

"Yes, yes, yes."

By that act, we protected the streets of Richmond from those drugs, we identified the leaders of the organization, we delayed for 60 days notification of the search, and during that 60 days locked up all of them, protecting the informant's life. And then we arrested them. We turned over the search warrant, returned the TV, returned the stereo, paid to fix the window.

When I explain that story to people, from whatever point on the political spectrum, they say, "Gee, I wouldn't want you not to have that tool." All the PATRIOT Act did was take that tool, which was judge-created by Federal judges, Democrat and Republican, because it was necessary to have that tool to save lives in this country, and put it in the statute and laid out the standards and said when it could be used.

That's what's in the PATRIOT Act. If we lose that, we will lose it for terrorists, for murderers, for Mafia dealers, and for drug lords. People in the United States do not want that. That's why they need to demand the details.

I would just like to quickly touch on two other things Mr. Chairman. So-called roving wire taps. Drug dealers in the 1980's started to use cell phones and they knew that we could get wire taps on cell phones so they started changing cell phones regularly, throwing out a phone and getting a new one.

Congress then gave we drug prosecutors the authority, in 1986, I believe, to get a wire tap that followed the bad guy, not the phone. We would go to a judge, establish probable cause, this drug dealer was using phones and changing phones to do his business, and we could then, when he swapped phones, continue to listen to

his calls without having to run back to a judge and say, "We think he is on a new phone."

All the PATRIOT Act did was give us that same authority with terrorists, so that terrorists, who are every bit as smart and, in my experience, smarter than drug dealers, who swap phones that they buy at 7–Eleven every day or week, we don't have to go back to a judge in a different jurisdiction or back to the same judge day after day after day. We can follow the terrorists without missing a beat. And if we have learned anything from the 9/11 hearings it is that we cannot afford to go dark for any period of time. We cannot miss a beat in battling these enemies.

The PATRIOT Act also did something radical, something earth shattering, something breathtaking that nobody talks about. The PATRIOT Act broke down the wall that separated intelligence investigators tracking terrorists from criminal investigators tracking terrorists. Prior to the PATRIOT Act, those two groups could not talk to each other.

My good friend, Patrick Fitzgerald, now the U.S. Attorney in Chicago, was one of the leaders of an effort to do a criminal investigation of Osama Bin Laden in the late 1990's. And he was building a criminal case, talking to informants, talking to witnesses, doing surveillances, trying to get wire taps. In the course of that effort, he and the agents working with him could talk to police officers, they could talk to foreign police officers, they could talk to foreign citizens, they could talk to Al Qaeda members who had come to our side, had defected.

There was only one group of people they could not talk to because of that wall, and that was the FBI agents upstairs conducting an intelligence investigation of the very same targets. The two groups had to follow the same people without talking to each other, wire tap the same people without talking to each other. And as Pat Fitzgerald says, a world in which those two groups could not talk to each other, where he could talk to Al Qaeda but not to the FBI, is a world where we are not safe enough. He said, and I couldn't say it better, "The PATRIOT Act was not rushed. It came 10 years too late."

So I welcome this debate. I believe that government power is so important that it should be laid out in the sunshine of public discussion, which is the best disinfectant. I will do anything I can to discuss and debate. That's why I'm so grateful and happy to come here to this beautiful place to talk and to listen and to hear how we are using these important tools. So I thank you for the forum.

[The prepared statement of Mr. Comey appears as a submission for the record.]

Chairman HATCH. Thank you, Mr. Comey. We appreciate you being here and appreciate your comments. I have some questions for you in just a minute. Mr. Warner?

STATEMENT OF PAUL WARNER, U.S. ATTORNEY, DISTRICT OF UTAH, SALT LAKE CITY, UTAH

Mr. WARNER. Thank you. Good morning, Mr. Chairman. Thank you for the kind introduction.

I consider it an honor to be here today with Deputy Attorney General, James Comey, an outstanding former United States Attorney and a good friend.

I appreciate the opportunity to testify today about the USA PATRIOT Act. I have served as the United States Attorney for the District of Utah almost 6 years. I have seen many changes in how our country has dealt with the threat of terrorism during that time.

From 1998 to the end of 2000, I chaired the Subcommittee on Terrorism for the Attorney General's Advisory Committee of the United States Attorneys. I was frustrated at that time with the obvious lack of tools necessary for us to properly investigate threats of terrorism.

As an example, the Attorney General's investigative guidelines, as they existed at that time, handcuffed and blindfolded the FBI. For instance, they were not allowed to attend meetings that were otherwise open to the public or to research materials on internet sites that virtually everyone else in the public was free to access.

Further, because of then-existing provisions of law and policy regarding the Foreign Intelligence Surveillance Act, or FISA, information sharing between criminal investigations and intelligence investigations was virtually nonexistent. Likewise, the investigative tools that we did have available for terrorism were often outdated, insofar as technology was concerned.

With the passage of the USA PATRIOT Act shortly after 9/11, Federal law enforcement and Federal prosecutors were given many new tools to deal with the reality of terrorism as we had come to know it. Some provisions of the USA PATRIOT Act gave investigators and prosecutors new tools for fighting terrorism. Other investigative tools, used for years in a wide range of other types of criminal investigations, are now explicitly permitted in terrorism cases under the provisions of the Act.

Let me give two quick examples. First, Section 213 of the USA PATRIOT Act allows Federal agents, with court approval, to give delayed notice that a search warrant has been executed, in certain narrow circumstances. Critics have referred to this provision as "sneak and peek," and claim that it has expanded the government's ability to search private property without notice to the owner.

However, the truth is that delayed notification warrants are a long-existing crime- fighting tool upheld by courts nationwide for decades in organized crime, drug, and child pornography cases. Section 213 of the PATRIOT Act simply codified the authority allowing law enforcement to seek and execute delayed-notice search warrants, an authority that had already received judicial approval. Indeed, the U.S. Supreme Court has declared delaying notice of a search to be constitutional.

Second, Section 215 of the Act allows Federal agents to obtain ex parte orders from the FISA court to require the production of any tangible items, including books, records, documents, and the like, in an investigation to protect against international terrorism or clandestine terrorism activities. Obtaining business records is a long- standing law enforcement investigative tool. Ordinary grand jury subpoenas, with no court approval necessary, have been used for years to obtain all kinds of business records including records of libraries and bookstores. And, of course, Section 215 contains a

number of safeguards that protect civil liberties, including providing for Congressional oversight of the Department's use of this tool. The Department of Justice reports to Congress on a semi-annual basis regarding requests for ex parte orders made pursuant to this section.

The USA PATRIOT Act also gave us tools allowing investigators and prosecutors to effectively deal with terrorists' use of modern technology in the planning and execution of their operations. For example, the so-called roving wiretap provisions in Section 206 now give us the authority in terrorism investigations to use the tools we had used in a wide range of criminal cases, including drug and racketeering cases, since 1986. At the same time, we can now use new technology to track wireless phone calls, reflecting the realities of our digital world.

Likewise, the USA PATRIOT Act has greatly facilitated information sharing and cooperation among government agencies so they can now better connect the proverbial dots. The Act removed the legal impediments that kept the law enforcement and intelligence communities from sharing information and coordinating activities in the common effort to protect our National security.

Here locally in Utah, we have enjoyed an unprecedented amount of information sharing among federal, state, and local law enforcement agencies. And, for the first time in our history, Assistant U.S. Attorneys from my office regularly sit down with local FBI agents to review intelligence investigations, and to coordinate matters where criminal and intelligence issues intersect. Our local FBI Special Agent in Charge, Chip Burris, is an enthusiastic partner with me in the sharing effort.

I am aware that almost as soon as the USA PATRIOT Act was passed, many well-intentioned people raised concerns about the Act in terms of the potential denigration of civil liberties and rights of privacy. In communities throughout the nation, there has been much public debate about the Act. I have participated in a number of these discussions. The public debate of these issues is important, and consistent with our cherished freedom of speech. It is also in keeping with the great traditions of our country. All of us are concerned with the delicate balance of protecting our freedoms without destroying them in the process. However, terrorists must not be allowed to use our cherished liberties as a shield to escape prosecution for their acts. If so, they will thereby be afforded an unimpeded opportunity to destroy us and the freedoms we all hold so dear.

The concerns about the USA PATRIOT Act have often focused on the potential abuse of the new investigative tools that have been provided to law enforcement. Yet, as with any set of tools, they can be used constructively to help build a solid defense against terrorists, or, they potentially can be abused in ways that infringe on the rights of law abiding citizens. To a certain extent, there is always a risk when you put a new tool in someone's hands. But this risk is minimized significantly when the tool is put in the hands of professionals who are closely monitored, not only by the Department of Justice, but also by the courts and by Congress. That is the case with the USA PATRIOT Act. I am personally much more fearful of unchecked terrorism in America, for a lack of tools to fight it,

than I fear the potential for abuse of the law by the Federal agents and prosecutors we have entrusted with these tools.

In the wake of 9/11, Attorney General Ashcroft clearly articulated the importance of preventing terrorist acts from happening in the first place, by disrupting terrorist plotting and planning. Accordingly, prevention and disruption have become our primary goal since 9/11.

This paradigm shift meant there had to be a change in the means and methods of investigating if we were to prevent and disrupt terrorism. Prosecutors and investigators must make more effective use of tools already in place in order to prevent and disrupt terrorist activity, rather than merely react by prosecuting such activity after the fact. Likewise, the USA PATRIOT Act also provided new tools necessary to do the job. Hence, Sections 213 and 215, which I have referred to earlier, are vital parts of our strategy of prevention and disruption, detecting and incapacitating terrorists before they are able to strike.

Unfortunately, I believe that to a certain extent we are victims of our own success. Because so far there have not been any successful attacks here in the United States since 9/11, many people have become complacent. Such complacency is a mistake, in my opinion. Some of those who criticize the USA PATRIOT Act focus unreasonably on the perceived potential abuses that could occur by way of the Act, rather than real success that has already been achieved and the absence of any actual abuses.

Finally, I certainly respect those who disagree with my views, and likewise support and defend their right to express that disagreement. I must add, however, that it is easy to sit on the sidelines and criticize those who are actually in the arena, and who have the responsibility to keep us safe, and who are trying to do the job to the best of their abilities consistent with the rule of law and our Constitution. The good news is that two and a half years after 9/11, we are much safer and much better at what we do in fighting terrorism. But much still needs to be done. Let us not make the mistake of again putting the handcuffs and blindfolds on Federal law enforcement that existed prior to 9/11, and yet continue to ask them to protect us in our post–9/11 world. We must have the tools necessary to do this job. The USA PATRIOT Act gives us many of these tools and is critical to ensuring the safety of our country.

Mr. Chairman, I thank you for the opportunity to appear before the Committee today. And I would be pleased to answer questions at this time.

[The prepared statement of Mr. Warner appears as a submission for the record.]

Chairman HATCH. Thank you, Mr. Warner and Mr. Comey. Let me ask some questions of you so that we can clarify some of these things.

Mr. Comey, you have prosecuted a number of the major cases in this country and have had tremendous experience as a prosecutor and you have front line experience of bringing terrorists to justice as well. In your new capacity as Deputy Attorney General of the United States, you now help direct our Nation's efforts to identify, stop, and punish potential terrorists. From both a statutory and

law enforcement priority, resource and coordination perspective, is the United States in a better position to prevent and respond to acts of terrorism than it was on 9/11?

Mr. COMEY. Yes, Mr. Chairman. In two dramatic ways. The first is that thanks to the heroic efforts of the men and women in the United States military and our intelligence services, we have, for the first time, taken the fight to the enemy. Taken it around the world to strike them where they are in their training camps and in their hideouts. That has been a huge, huge accomplishment. It has made the American people immeasurably safer that we have disrupted and destroyed the camps and arrested or killed so many of the significant Al Qaeda leaders.

Here at home we are much safer than we were before September 11 for a number of reasons, some of which I touched on in my opening comments. By giving law enforcement some of the smarter tools we have used against drug dealers for decades, we have made the American people safer.

But most importantly, by taking down that wall that was built in about 1995 that separated the bright, energetic people on the criminal side from the bright, energetic people on the intelligence side, both going after terrorists. By taking that wall down we are much, much safer. I don't say that we are safe. We are not safe. We are safer.

Chairman HATCH. That's interesting. Could you please specifically comment on whether our law enforcement and the FBI are working more closely and sharing information with our National security apparatus or with our National intelligence agencies such as the CIA than they were before 9/11?

Mr. COMEY. Yes, dramatically so.

Chairman HATCH. You are saying they really couldn't talk to each other before then because of the artificial bars that were put up.

Mr. COMEY. Yes. We had built a wall, both by law and culture and practice, that made FBI agents working on either side of the wall afraid that if they talked to somebody on the other side it would be, to use a phrase that was common in the FBI, a career ender. That you simply had to almost put up an antiseptic separation curtain between criminal investigators investigating the very real threat of crimes of terrorism from the intelligence investigators trying to gain information to prevent attacks.

We are in a much better place today. We can always improve, but the stove pipes that separated people within the FBI and separated the CIA from the FBI, all those things have been addressed dramatically.

Chairman HATCH. Had they had the PATRIOT Act before 9/11, they would have been able to cross-analyze the various findings that both of them were coming up with; but without a law cross, analyzation couldn't be put together effectively. Am I correct in that?

Mr. COMEY. Yes, you are Mr. Chairman. I think that's one of the things that the 9/11 commission, on a bipartisan basis, is going to conclude; that it was a huge mistake to have this wall and that we are very much safer by not having it. I know that that's across the board, Democrats and Republicans, all say that that was broken

and the PATRIOT Act fixed it. And people who know the PATRIOT Act who understand the details, whether or not they are critical of other parts of it do not want that wall put back up. And that is going to be put back up if we allow this bill to sunset next year. That's why when the president said we have to focus on this; the legislation is going to sunset but the terrorist threat is not going to sunset by the beginning of the next year. So we have to focus it now.

Chairman HATCH. So it is of great concern to you and other law enforcement officials that if this sunset comes through and we don't continue to re-authorize these law enforcement priorities, we will be back to where we were before 9/11 in some aspects.

Mr. COMEY. Yes. In very, very important respects we will. We will be set back technologically, we will be set back in terms of information sharing. Which is why, as I said, I'm so grateful to someone like you and your colleagues for trying to find the space in American life to have an informed discussion about this, to hear from people who have concerns, who are good folks. Some of them are here today. "What do you think is broken about the PATRIOT Act and why," so that we don't find ourselves in 2005, not having the discussion and facing the bumper stickers of, "Isn't it evil?" It is not evil. And if people understood how it is being used by the men and women of the FBI, they would see that, as well.

Chairman HATCH. Now, I have to say that many of these tools that we have given you in the PATRIOT Act—I'm one of the prime authors of it, and the Justice Department played a major role in it as well, and the Democrats and Republicans got together and passed it 98–1 in the Senate. It was over a long period of time. It wasn't just a sudden urge that we had. I have been arguing for some of these law enforcement provisions for years; decades, as a matter of fact.

Is it fair to say that a number of these provisions that we have in the PATRIOT Act that bring domestic anti-terrorism law enforcement actions were already tools that law enforcement had to go against common criminals, organized crime, child molesters, and pornographers? Is that fair to say?

Mr. COMEY. Absolutely fair to say. And it's the—

Chairman HATCH. So these aren't brand new ideas, necessarily?

Mr. COMEY. No.

Chairman HATCH. These are tools that you had for these other crimes, but we just hadn't brought our anti-domestic-terrorism laws up to speed. Is that a fair comment?

Mr. COMEY. That's absolutely fair. People say, "My gosh, you cooked up this PATRIOT Act in two or three weeks. It can't be the real deal."

As you pointed out, Senator, these were things that responsible people in government, Democrats and Republicans and in Congress, had been trying to get done for years. And the political will, your political will was there but the political will of a lot of people in Congress was simply not there to give these tools. Some of the tools were asked for by the Clinton administration. So this is prosecutors who worked terrorism and drugs noticed that they could get a roving wiretap on a drug dealer but you couldn't get it on a terrorist. You could do a "sneek and peek", a delayed notification

search warrant in some circumstances, but you couldn't do it with a terrorist. We saw that for a long time.

September 11 was a great tragedy. I would do anything to undo it. But I'm somebody who believes that we have an obligation, whether you are a religious person or not, to try to make some good come from evil. We will never justify the evil, but your obligation is not to let evil hold the field. Among the things that happened after September 11 that was good, was that the political will was found to give these tools that should have been there all along.

Chairman HATCH. The so-called "sneak and peek" provisions, are these really new? I mean, are these really new or have those been provisions used by law enforcement in other criminal matters for years?

Mr. COMEY. Federal judges created the doctrine of delayed notification searches.

Chairman HATCH. Why did they do that? Why did they do such a lame-brained thing in the eyes of some people?

Mr. COMEY. Because they had encountered the same situation all over this country like I encountered in Richmond. We need to save lives and protect the community. The Fourth Amendment said searches shall be reasonable, and they concluded this was a reasonable thing to delay notification of a search warrant to save lives and protect critical investigations.

Chairman HATCH. So the criminals wouldn't be notified in advance of what is going on, so you could literally follow through and get all the criminals, not just one or maybe insignificant ones?

Mr. COMEY. Absolutely. It was done here in the Ninth Circuit, which is considered judicially to be a liberal place. It was done in the Fourth Circuit, which is the southeast. It was done in the northeast in the Second Circuit. It was a tool that was necessary in the Supreme Court, as my colleague said, and it was constitutional. And it is smart.

It was used in New York to retrieve a gun from under the floorboards of a Mafia safehouse, in a case I'm familiar with. In the middle of the night, we heard the mobsters talking in their house about how they had this weapon under the floor. The FBI went and got it under delayed notification search warrant, took it to the lab, tested it, fingerprinted it, took the firing pin out, and then put it back so the mobsters wouldn't know we were listening to their conversations.

Then when they were all arrested, we pulled up the floorboards, grabbed the gun and told them, "We've been listening to you. Not only that, we took your gun and we fingerprinted it, and now we can connect it to a murder." When people hear about that they say, "That is smart." And that is not only smart, it's constitutional.

All the Act did was lay out, in a statute now, Congress acted for the first time, what's been going on from the judicial supervision for generations in this country, and we really can't do without.

Chairman HATCH. And it made it possible for us to, without warning terrorists in advance, to be able to conduct appropriate law enforcement activities against suspected terrorists.

Mr. COMEY. Yes, sir. The key to terrorist investigations is finding one guy, and then finding the rest. So you can imagine circumstances—simply, there's no margin for error. You can't get

eight of nine cell members. You have to get all nine or the American people are in great peril from the last one blowing himself up and killing people.

So you can imagine circumstances where you would need to be able to sneak into a place that the terrorists are using to mix chemicals, which we have seen in the past, or where their records are, get them and back out of there without letting them know we are on to them. Because the alternative is going in there with raid jackets on and knocking down the door and grabbing eight guys—

Chairman HATCH. And missing all the rest.

Mr. COMEY. And the ninth, who has a suicide invest, God forbid, disappears. We cannot take that chance.

Chairman HATCH. Sometimes it takes patience on the part of law enforcement and prosecutors to be able to follow through so they don't just get the initial up-front guys but the ring leaders besides.

Mr. COMEY. Yes.

Chairman HATCH. And if you didn't have that delayed notification, which you have had in other criminal matters, you would be giving advance notice to the terrorists, and they simply abscond and continue their activities. Is that a fair comment?

Mr. COMEY. It's a fair comment. And also, the statute provides that it should be used only in extraordinary cases and lays out basically lives in danger, witness tampering, obstruction of evidence or obstruction of investigation. I think we have done it nationwide since the PATRIOT Act maybe 47 times. Made 47 applications. Again to Federal judges—we don't do this on our own. You've got to go to a Federal judge, lay it all out in a sworn affidavit.

Chairman HATCH. And assert probable cause.

Mr. COMEY. Exactly. We have applied 47 times, is my recollection, and we had 47 applications granted by Federal judges, who are no pushovers whether they are appointed by a Republican president or a Democratic president, in my experience. There's no such thing as a rubber stamp Federal judge.

Chairman HATCH. I think it is important for people to understand that these aren't brand new tools that we have given. These are tools that have been used in the past that now can be used against terrorists.

There are so many other questions that I have. But there's been a lot of criticism of the trap and trace provisions that we have put into this bill. The idea of getting or having the right, in law enforcement, to get the phone numbers out of a terrorist's phone and the numbers going into a terrorist's phone. Tell me why that is essential to law enforcement.

Mr. COMEY. We in law enforcement, for years, have connected the dots in drug organizations by going to a Federal judge and getting what's called a pen register, which is a device that doesn't give us the content of any calls but gives us the numbers calling into a phone or calling out from a phone. We have used that to find the spokes in a conspiracy; the players, the couriers, the leaders. To find who is involved. That is very, very important in drug conspiracies. You want to find who all the players are.

It is lifesaving in terrorism cases. We need to find all the dots, all the members of that cell. All the PATRIOT Act did was allow

us to use that tool in intelligence investigations against terrorists. Go to a Federal judge. Get an order.

Chairman HATCH. You don't have a right to just unilaterally do this.

Mr. COMEY. Oh, no, sir.

Chairman HATCH. You have to go to a Federal judge.

Mr. COMEY. Yes.

Chairman HATCH. And you've got to show probable cause.

Mr. COMEY. That's a common misconception about the PATRIOT Act. The provisions of the PATRIOT Act that apply tools from regular criminal investigations to intelligence counter-terrorism investigations require us to go to Federal judges, make showings, to be supervised. This is not something that the government, meaning the executive branch, can do on its own.

Chairman HATCH. Compare that to grand jury proceedings. Do they need to go to a Federal judge to do some of the things that law enforcement can do at grand jury proceedings?

Mr. COMEY. No. And this is, again, one of the many myths that we are hoping to find the space in our life to have people understand is a myth. To get records, business records, from a car rental agency or a library, in a criminal case a prosecutor can just cut a subpoena and give it to an agent. No judicial involvement, or showings, no writings. Subpoena gone. Records obtained.

Chairman HATCH. That's without any judicial—

Mr. COMEY. No judicial involvement whatsoever. Just out goes the subpoena. In comes the records. 215 has the librarian—

Chairman HATCH. Talking about Section 215 of the PATRIOT Act?

Mr. COMEY. Yes. Section 215 of the PATRIOT Act that has so many people concerned about libraries, and it has not been used—anyway, for a lot of reasons it is not a concern. It requires an agent doing a counter-terrorism investigation to go to a Federal judge, file an affidavit in writing, and get a court order that allows you to get the records from the car rental agency or the library. It is actually much more onerous.

Chairman HATCH. Or any other record.

Mr. COMEY. Or any other record. It involves judges in a way that criminal investigations don't. What we've got is we have taken some of the power of the criminal investigator and made it harder, and put into the PATRIOT Act.

Chairman HATCH. In other words, by grand jury you could do that without even consulting with a judge. The prosecutor could. But under this law, you have to have judicial approval to be able to do these investigations into whatever the recordkeeping outfit is.

Mr. COMEY. That's correct. We have to go to a Federal judge to get that approval.

Chairman HATCH. As I understand it, wasn't the Unibomber case partially broken because of being able to go in—but this was grand jury, I believe. But being able to go into a library and see what he was reading and be able to connect the dots to capture him and put him away?

Mr. COMEY. Yes. In his obscure, bizarre writings, his manifesto, he referred to some fairly obscure texts. And the FBI, in an effort to find out who it was, went to libraries to find out who had

checked out these particular very obscure and unusual books to see if we can connect them.

Now, that is something else that goes on. Librarians, themselves, do not want libraries, I don't believe, to be a sanctuary for criminal behavior; that if someone is in there checking out books about bomb making or radiological dispersion devices I have to believe, I do believe, that librarians want us to be able to find that out and track that down. And so it's a question of how are we using these tools and what is reasonable?

Chairman HATCH. Grand Jurys can use that power against common criminals. Why wouldn't we be able to use that power, under judicial supervision and approval, with regard to suspected terrorists?

Mr. COMEY. I agree completely. The other thing that folks don't realize is under the PATRIOT Act, if the government uses that power to get records from a library—as Paul Warner said, libraries aren't mentioned in the PATRIOT Act but they become a focus of concern. If we use that provision to obtain records from a library or credit card agency or car rental agency, every 6 months we have to report to Congress on how we used it, how many times we used it. And that is much more onerous—

Chairman HATCH. We put that in there as a protection of civil liberties.

Mr. COMEY. It is much more oversight than in grand jury context.

I am a big fan of librarians and I'm not just saying that because the president is married to a librarian, but I believe that they are some of our best, most public-spirited citizens, and some of the best readers, frankly. I would hope that they will read and demand the details to know about what these tools are, how they are being used.

Nobody wants a sanctuary in a library for a pedophile or a terrorist. That would be crazy to allow people to use computers—and we have a lot of internet access in libraries—to allow terrorists or pedophiles to go into a library, use the computers to either lure children or communicate with terrorists, knowing that we couldn't follow them there; that it was a sanctuary for criminal behavior. That would be crazy. And I have seen some of that happening.

I have seen software in major libraries in this country that scrubs the hard drive after each user. When I first saw that, I saw it in the context of a terrorist investigation, because someone went there to use it, my reaction was, "What are we doing? What are we doing as people who care about saving lives?" I don't care what your political background. That is something that has to concern you. We need to strike the balance in an appropriate way.

Chairman HATCH. You have been really helpful here. I have a lot more questions but let me turn to Mr. Warner for a minute or two.

People cast their eyes towards Washington, D.C. when engaging in debate over laws dealing with national security. However, many of those laws require action by those in the field across the country. People just like you.

I was wondering from both the national perspective, serving as the head of the Attorney General's Advisory Committee of all U.S. Attorneys in this country, as well as the local perspective having

served as a state and Federal prosecutor here in Utah, and your leadership role in helping plan security for the Olympics, would you share with us your perspectives on what steps have been taken and remain to be taken by law enforcement in Utah and other states to combat terrorism?

Mr. WARNER. Thank you, Mr. Chairman. I will try and be brief. But there's a lot of really great things that are happening here in Utah in regard to the question.

I think that the Olympics were a real blessing to this state from the standpoint of your question, because long before some of these issues came to the forefront with 9/11, we were looking at addressing these issues in preparation for possible terrorism events at the 2002 Winter Olympics. That brought federal, state, and local law enforcement together in Utah many years ago in a way that really was not being done elsewhere in the country as a result of our preparation for the Olympics.

We have developed some real expertise here in Utah and I think that one of your other witnesses, Mr. Flowers, our State Public Safety Commissioner, will talk a little bit about some of the things that are going on. But we have this great intelligence network between our Joint Terrorism Task Force here in Utah and the Homeland Security Folks in the state of Utah, who are working hand in glove. We built an intelligence architecture that allows sharing in unprecedented ways in the state.

We have taken specific steps in at least two examples I will quickly mention towards this prevention and disruption paradigm that I talked about in terms of sharing information and using that.

Shortly after 9/11, in December of 2001, we were the first district in the country to do an Operation Tarmac type approach to safeguard our airports. In this case we did so in order to hopefully provide security before the Olympic games were to begin in February. That operation has been repeated in virtually all the major airports around the country. We used that from the standpoint of not only closing a gap but also obtaining intelligence and using that intelligence to protect ourselves.

Recently, a few months ago, in another joint federal, state, and local effort, we went after some real weaknesses in the issuance of commercial driver's licenses with the assistance and cooperation of Commissioner Flowers and his good people. That has been a great operation from the standpoint of not only closing the gap, but intelligence-sharing again. And also preventing and disrupting problems before they can occur.

As an example, just quickly, if somebody were to get a commercial driver's license without really testing for it, being able to buy it, in essence, we don't know who they are, we don't know where they are from. They now have the ability to drive a tanker truck anywhere, use that as a mobile bomb, for all intents and purposes. We are closing these kinds of gaps and we are doing it because we are sharing, we're talking. The FBI and the state authorities and the local sheriffs and police chiefs are now talking and sharing information in ways we have never done before.

Chairman HATCH. Thank you.

Mr. Comey, if you would care to comment, there's been a lot of criticism of Section 215 of the PATRIOT Act, and we are going to

hear some of that criticism, as I understand it, from the second panel. Let me read to you what one of my constituents wrote to me about Section 215, and I'd like you to respond to this. If you have that letter in front of you, the fifth paragraph here.

It says, "I have not read the entire USA PATRIOT Act, but because of its implications Section 215 has become a focus of my concern. In Section 215 the Act gives the Department of Homeland Security the right to secretly search homes and other aforementioned personal information without warrant and without notifying the subject of the investigation. It is pertinent to bookstores and libraries because the Act permits law enforcement to demand records of the books borrowed or bought without the subject being notified or charged with a particular crime."

"It additionally states that booksellers and librarians are prohibited from notifying the person investigated or anyone else of the search, including legal counsel. This is a dangerous assault on civil liberties."

Would you care to respond to that? I'd like you to respond to that assertion or those assertions.

Mr. COMEY. Yes, Senator. This is fairly typical of concerns I have heard both in writing and in person. And I'm sure, obviously I don't know your constituent, but that he cares enough to write about this sort of thing, and this is the sort of citizen I think we want in this country. But he needs information.

First of all, Section 215, as we have discussed, allows the FBI, not the Department of Homeland Security, to go to a Federal judge and get a court order allowing the FBI to obtain records from businesses. Doesn't mention libraries.

Chairman HATCH. You have to go to a Federal judge.

Mr. COMEY. Right. You have to go to a Federal judge and get an order to do that. It doesn't permit searches. It is not about searches.

It does, however, allow the Federal judge to order that the person who is providing the documents not tell the target. And that is something that I hope librarians will take a second to think about. Because people who care about privacy, as I do and I know you do, would not want the FBI telling anyone who they are investigating or why they are investigating. To go into a library and say, "I'm investigating this guy, Paul Warner, down the street. Here is what we think it is about." Nobody would want us to do that.

So the librarian or other recipient won't have all the facts about what we are investigating, and shouldn't. Because we care about privacy. So how is it, then, that a librarian or credit card agency or car rental place should be in a position to make the decision about whether to tell the target that they have obtained these records?

Should a librarian have been able to call Ted Kaczynski and say, "Hey, Mr. Kaczynski, the FBI is in here looking at your records"? No. And I don't think that is an unreasonable restriction. It is one imposed by a Federal judge, and frankly one that has not been used. But it is a reasonable balance between the need to obtain critical information and the need to protect privacy.

Chairman HATCH. You don't know when or where you might have to use it in the fight against terrorism.

Mr. COMEY. No. And people say, in response to that, "Well, if you have never used it, why don't we take it out of the PATRIOT Act?" And my response is that many police officers go through their career, thank goodness, never drawing their gun from their holster but they need that gun and the gun should be there. Nobody wants to take guns away from them.

This is a very important tool that might become critical if we are subject to another terrorist attack which, as my colleague, Mr. Warner said, people dismiss and don't focus on enough. We are in great peril in this country. There are people lying awake at night all over the world trying to think of ways to kill our citizens. Thank goodness we have men and women awake all night trying to stop them. But we are by no means safe. We are safer.

Chairman HATCH. Thank you. So far, much of the debate has focused on the PATRIOT Act. Mr. Warner, you may want to comment on this, too—but isn't it true that many of the statutes that have been on the books for a long, long time such as the laws pertaining to mail fraud, subpoenas, wiretaps, forfeiture, and hijacking, also come into play? Could you explain what provisions of law you use to go after potential terrorists beside the PATRIOT Act and explain how the PATRIOT Act complements existing laws, laws that have existed for decades.

Mr. COMEY. What I think the PATRIOT Act does, as I've said a couple times, most importantly is allow us to blend a criminal and an intelligence response to terrorism. We have to use every possible tool to disrupt terrorists. We need to lock them up for credit card fraud, for immigration fraud, for mail fraud, for money laundering. Whatever we can do.

What the PATRIOT Act does is homogenize those tools. It allows us to move seamlessly from counter-intelligence response to terrorism, to a criminal response to terrorism, and back again; with judges involved, with standards involved, with sunshine all over the place. That's a very, very important thing.

And again, I think one of the things that the 9/11 commission will tell all of us is you had too many walls, too many stove pipes, too many hesitations before September 11. We need to be able to play the entire field, stay in bounds -and this is something I have devoted my life to—stay inside constitutional bounds, but cover the entire field in the effort to defeat this enemy.

Chairman HATCH. Paul, do you care to comment on that?

Mr. WARNER. Just a comment. I think you hit it on the head in the sense that there are multiple tools out there, and as one who is using the tools I want all the tools available. I may not use every one of them every day but I don't want any of them taken away or locked in a box and I can't have them when I need it.

You have mentioned grand jury subpoenas. We use them every day.

Chairman HATCH. That's without judicial approval.

Mr. WARNER. Without judicial approval.

Chairman HATCH. Other than that the law provides you can do that.

Mr. WARNER. Absolutely.

Chairman HATCH. And has for as long as I can remember.

Mr. WARNER. Indeed it has. And we use them regularly and we use them effectively, in my opinion, and we try and use them in absolutely professional and ethical ways.

I might add, though, that Section 215, as an example, is a good adjunct, a good corollary tool to be used when necessary with grand juries or instead of a grand jury subpoena.

But my point is simply this: Any tool can be used or it can be abused. We have talked about this a little bit earlier but I emphasize it again. The fear that people have about particular sections of the PATRIOT Act really, in my opinion, are a fear of abuse, and I understand that. But I don't think we should allow our fear that tool will be abused to keep us from having the tool. If, in fact, these tools are abused, as Mr. Comey indicated, there's many types of oversight that are in place between the Department of Justice, between the Congress and the courts, that allow for review of the use of these tools. But I think in the post 9/11 world, we need the tools and it would be a real shame to say because they might be abused, you can't have them.

Chairman HATCH. Well, I think you can say any criminal law might be abused. We have to make sure that we oversee and that we do things appropriately. That's what your job is in many respects, as well as a prosecutor. Yours, too. You have to oversee the people in the field and make sure they abide by the law and their civil liberties are protected and not endangered. And that's one of the major jobs you have in justice, and one of the major jobs that I have in the Senate, and the people in the Judiciary Committee have.

I guess you could say any anti-crime law could be abused by rogue law enforcement people. Our key here is to not take away the tools that good law enforcement people need just because some rogue person could abuse them. And that's hopefully what the PATRIOT Act is doing.

Now, let me just ask this question. Many of the witnesses on the second panel here today are supporting legislation that would impose a seven-day limit on delayed notification search warrants. And this seven-day period could be extended by a judge, I think someone would argue that that might be the case. Now, I'm not sure that a seven-day limit is practical in the case of terrorists.

In my experience and knowledge of terrorism in this country and how long it takes to get them, and how carefully we have to be that they are not notified and be able to cover their tracks, it seems to me that 7 days may not be right. What do you think about that, and what about a 30- or 60-day limit or some other limit which would be expandable by the courts?

Mr. COMEY. I don't think it is an unreasonable thing for people to say we have a seven-day limit on delayed notification search warrants. My response though is why. Why not, because a Federal judge is supervising it, allow the Federal judge, as the PATRIOT Act does, a reasonable period because each case is different. And I don't see that anything is broken there so I don't know why we would try to fix it by imposing a seven-day window. Like I said, it's not a crazy thing to say and I don't react by saying, "That person is out to lunch." But I don't know why we would do that when we have a standard laid out in the statute, a Federal judge super-

vising based on sworn affidavits that allows the Federal judge to react to the circumstances of each case.

Every one is different. A Mafia safe house case, you may need to stay up on the bug in the Mafia safe house for months but you can't leave a murder weapon under the floorboards, because that might disappear, without going in and taking it. If you impose the seven day limit on yourself then every 7 days you have to go back to the judge. I don't know why that is more reasonable than saying a Federal judge shall supervise and determine what is reasonable given a particular investigation. In terrorist cases would be the most extreme example.

Chairman HATCH. And one of the main considerations by the judge or by the prosecutor himself or herself is that in certain circumstances, if you don't have that delayed notification, then you may never get to the bottom of the crime. You may never get to the bottom of the terrorist act, you may never get to the bottom of the terrorist activity. And it has to be supervised by a judge. But it's for the purpose of not notifying the perpetrators so that they can escape or avoid or otherwise get away with what their criminal activity is. Am I correct in that?

Mr. COMEY. Absolutely, Senator. And people who understand the nature of our work, even those who are critical of many aspects of our work, I think, understand the importance of that tool. When you tell good folks, "This is the way we use it to save lives," their response always is, "Okay. That's reasonable. I didn't understand that." And that's part of the challenge we face in the PATRIOT Act debate.

When people hear about "sneak and peek," they think, "'Sneaking' and 'peeking' are both bad things. I'm against bad things." But this is a very good thing used cautiously but used when it really, really matters. And I think it's reasonable for people to discuss ways in which we use these tools. But reasonable people, I think, unite in the understanding that we have to have this basic tool.

Chairman HATCH. I think that's right. If Congress does not take any action, several vital sections of the PATRIOT Act are going to expire in 2005. Could you explain to us here today what impact these provisions which are to sunset in 2005 have had on the Department's efforts to fight terrorism. And could you also explain how the Department's efforts to prevent terrorism will be affected by these provisions, or should I say will be affected if these provisions are not re-enacted by Congress.

Mr. COMEY. I'm not someone who is given to hyperbole. But the effect of the sunsetting, particularly of the information-sharing provisions that allow criminal people to share with Intel, and Intel back, lives will be lost. That will return us to the dangerous situation we were in before September 11. We cannot allow that to happen.

Another example is if we lose the roving wiretap authority, I mean, either I or the Attorney General have to personally approve every Foreign Intelligence Surveillance Act search or surveillance in the United States. And they come to me around the clock and lay out these circumstances for me before they go to a judge and I have to approve them. We are up on roving wiretaps of people involved in international terrorism.

Chairman HATCH. By being "up on" you mean you are following them.

Mr. COMEY. We are following, we are listening to their conversations. They are switching phones. If that sunsets and we go dark, we have put ourselves in a very dangerous situation. That can't be allowed to happen. And that's why the sunset date, when the president said, "The legislation may sunset, but the terrorist threat does not sunset," that is not just some punchline from a speech. That is a very, very important day, that day in 2005 when the sunset is supposed to happen, which is why it is so important we have this discussion now. Because we would be failing the American people if, like kids not doing their term paper until the night before, we started trying to figure out whether we need these tools the day before they were to sunset that. Because that would put us in great peril.

Chairman HATCH. It's been very helpful. I have read Dick Clark's book and found it interesting. It is a substantive guide. I'm also on the Joint Committee on investigating these matters on intelligence. And I heard his testimony when he came and testified in closed hearings before us. And that testimony was not the same as what his book has said. Of course, his book is much more detailed. But the testimony did not lay out some of these defects that he feels exist today.

Plus, I have been watching whenever I can. I'm so busy I don't have enough time to follow the 9/11 Commission's hearings. But I have been reading what they were saying, I have been watching them when I can. And virtually everybody, Democrats, Republicans, including Dick Clark, have said that the PATRIOT Act is crucial in the fight against terrorism. Am I exaggerating that?

Mr. COMEY. No, sir. Janet Reno was asked that question yesterday and endorsed the PATRIOT Act very strongly. And because, as I said, if people know our business, Democrats or Republicans, if you know what we do for a living and how we use these tools, which is what we are trying to get everyone else to understand, you will say, "You need to have that. You need to be able to follow drug dealers and terrorists in the same way." Frankly, you ought to be able to follow terrorists more easily than you follow drug dealers, but now we at least have a level playing field.

So your understanding of the 9/11 Commission, it's a bipartisan commission and I believe it's going to end up with a bipartisan conclusion that we need this act.

Chairman HATCH. That's certainly the experience that I've had. The people who really understand it and really know, especially law enforcement people, will tell you that without that act we are going to place our country and our people in jeopardy. There's no question about it. I have concluded from what you have said that that is true. Am I catching you correctly?

Mr. COMEY. Yes, sir.

Chairman HATCH. I want to personally express my gratitude to both of you. I know the great work that you both have done. Unfortunately, in Utah, Paul, most people don't know what you do. But day in, day out, you and our state and local law enforcement people are protecting our state. And not just our state but the whole country because of what comes in and out of our state. And I really ad-

mire and appreciate what you are doing and all the law enforcement people in our state. Our state and local people are great, too. And we need to give them the tools that they need.

Mr. Comey, I've watched your career for a long time. And there's no better prosecutor in the country than you. And I think you have exhibited that here today. And for you to take the time to come out here and be at this hearing, I know you consider it that important. And it is that important. I think it is very important that you be here.

We hear your testimony because a lot of people misconstrue what is in the PATRIOT Act. It is a tough set of laws. But they are laws that are designed to protect us while, at the same time, balancing the civil liberty concerns that all of us have and all of us don't want to be infringed upon. So that delicate balance you have to maintain. I count on you, Paul, and others throughout this country in the Federal Government to make sure we do that. We want to thank you both for being here. I will end with that. Thanks so much.

Mr. WARNER. Thank you, Mr. Chairman.

Mr. COMEY. Thank you, Mr. Chairman.

Chairman HATCH. Let me take a second and draw the second panel up.

[Recess.]

Chairman HATCH. It's an extremely interesting hearing and it's extremely important in regard to the PATRIOT Act. And I'll take from this all that I can. So if we could have order.

I'm pleased to introduce our second panel of witnesses. We have a diverse selection of supporters and critics of the PATRIOT Act from all over the political spectrum. First we will hear from Dani Eyer, executive director of the ACLU here in Utah. Glad to have you with us.

Nanette Benowitz, with the League of Women Voters of Utah. Welcome.

And Robert Flowers, Security Commissioner who is a hero to me, having gone through all of the protections that we worked together on during the Olympics. He's Commissioner of the Utah Department of Public Safety and one of the great law enforcement people.

Scott Bradley is here to represent the Eagle Forum of Utah. Glad to have you with us.

Aaron Turpen is the secretary of the Libertarian Party of Utah. Aaron. Glad to have your point of view, as well.

Bruce Cohne, an old friend of mine from a long time. I don't want to hurt your reputation by that, but he's a good guy, a smart lawyer. He's Chair of the Utah Advisory Committee for the United States Commission on Civil Rights, and Bruce we are glad you took time out of your schedule to be here with us.

And finally, we would be pleased to hear from Dan Collins. Dan Collins is the Former Associate Deputy Attorney General and currently with Munger, Tolles & Olson, one of the great law firms of Los Angeles, California. So we think it is wonderful of you to take time to come to the University of Utah with us today and participate in this hearing.

We are grateful to all of you because you are serving your country by letting us know what you feel, what your criticisms are, and

your feelings of law enforcement and this particular bill. And we are grateful to have you here. I intend to listen. And we will start with you, Ms. Eyer, and go from there.

STATEMENT OF DANI EYER, EXECUTIVE DIRECTOR, ACLU OF UTAH, SALT LAKE CITY, UTAH

Ms. EYER. I'm told we are supposed to hold this down while we speak?

Chairman HATCH. No. I think once you push it—

Ms. EYER. I think we have to hold it down.

Chairman HATCH. That's a little difficult.

Ms. EYER. Chairman Hatch, on behalf of the ACLU of Utah, I am pleased to be here to explain our concern with four sections of the USA PATRIOT Act. As a former high school civics teacher in Utah and a political science major and graduate of BYU's law school, I have deep respect for our system of limited government that balances power by giving each branch, executive, legislative, and judicial, a role in protecting our liberty and security. And I have heard from many Utah citizens from the right, left, and center who are interested in more open government, judicial review and accountability.

The PATRIOT Act has become a symbol for excessive executive branch power. The Act was the product of an extraordinary time just after September 11 in which Congress and the administration were working quickly, under pressure, to give law enforcement and intelligence agencies new surveillance powers.

Given that context, it is not surprising that some of the provisions need adjustment. An excellent bipartisan first step would be to pass the Security and Freedom Enhanced, or SAFE Act of 2003, sponsored by Republican Senator Craig from Idaho and Senator Durbin from Illinois. I have read that some senators are hesitant about passing the SAFE Act because it "repeals" parts of the PATRIOT Act. I do not think that is accurate. The SAFE Act does not repeal any portion of the PATRIOT Act; rather, it modifies three surveillance sections and broadens the sunset clause, essentially amending four out of 158 provisions of the Act in order to restore checks and balances while specifically preserving those powers for use in terrorism.

I have submitted an attached memorandum which explains in detail how passage of the SAFE Act would still leave government with substantially more power than it had before the PATRIOT Act was passed. But, in sum, the four sections the SAFE Act would affect, one, to restore judicial safeguards for search warrants; two, to require articulable suspicion of connection to a terrorist before a court may approve demands for personal records from a third party. This is a standard far lower than "probable cause" but more than nothing. Third, require—and I was misquoted in The Tribune today—require that roving wiretaps in intelligence cases—

Chairman HATCH. Join the crowd, okay?

Ms. EYER. Require that roving wiretap in intelligence cases have the same standards as in criminal cases in order to guard against interception of innocent conversation. And fourth, expand the sunset clause to require Congressional review of three new surveillance provisions.

These safeguards would not prevent the government from using "sneak and peek" searches, secret court orders for records, or roving wiretaps even in nonterrorism cases. They simply require more meaningful judicial scrutiny.

For better or worse, in the public mind the issue of the PATRIOT Act has also grown to include the entire array of new government policies adopted after 9/11. Utahns have a strong tradition of skepticism for government power, particularly surveillance power.

As an example, Utah has recently rejected the MATRIX system, a surveillance plan that combines billions of records about individuals from government and private databases, creating an entity that could track every private life without safeguards and court oversight. These notions of intrusive surveillance offended Utahns across the board, and the MATRIX plan was quickly ushered out.

Utahns are equally leery about provisions of the PATRIOT Act involving the secret surveillance, where and to what extent those provisions have been used remain a mystery.

This law, the law imposes a gag rule on those who receive surveillance orders. Utahns are fearful that private aspects of their lives can be searched more easily without their knowledge and without any ability to challenge.

As for Section 215 and the power to obtain records held in the hands of third parties, I offer a local perspective. I once owned and ran an independent bookstore in Utah County. I know many booksellers and librarians in Utah and I want to convey why it is that Section 215 carries with it a message of alarm.

An extremely sensitive relationship exists between booksellers, librarians, and customers. People who walk into bookstores carry with them a burden of insecurity. They worry about their intellect, they worry about their choice of reading material, and that someone might be watching or judging them. It's the duty of librarians and booksellers to calm those fears and create an atmosphere of inclusion and trust.

This is the living, breathing manifestation of our concept of freedom of press, freedom of expression, and freedom from government intrusion and personal information gathering, or privacy. In America we must be able to obtain written material without worries about surveillance.

If, in fact, the government has not utilized Section 215 to obtain personal records, then it makes no sense to further alienate people with threats of intrusion into areas that are so instinctively protected. This should prompt further review of Section 215 to find the balance between its efficacy and the problems of perception that it creates, which could at least be mitigated by a restriction of its use to those for whom there is individualized suspicion.

At the end of next year, 17 sections of the act will expire and Congress should review those provisions and ask tough questions. Congress plays a crucial role in assuring the public that its liberties are protected. A public that is afraid that the government wants unchecked power will become suspicious even of legitimate anti-terrorism efforts. Congress must preserve that real oversight.

Last, I appreciate the fact that you, Senator Hatch, have noted that your constituency is worried. And I agree it is noteworthy in a state known for its patriotism that its two leading newspapers,

The Tribune and The Deseret News have published several editorials expressing concern about the PATRIOT Act. It is also remarkable that the ACLU of Utah joins not only the League of Women Voters but the Eagle Forum, Grass Roots—the Conservative Caucus, and the Libertarian Party in expressing concern related to the PATRIOT Act. This is a combination we do not often see here in Utah.

Chairman HATCH. It's once in a lifetime.

Ms. EYER. Thank you for the opportunity.

[The prepared statement of Ms. Eyer appears as a submission for the record.]

Chairman HATCH. Thank you. We appreciate you coming and appreciate your suggestions and kind remarks.

We will turn to you, Ms. Benowitz?

STATEMENT OF NANETTE BENOWITZ, PRESIDENT, LEAGUE OF WOMEN VOTERS OF UTAH, SALT LAKE CITY, UTAH

Ms. BENOWITZ. Benowitz.

Senator Hatch, and members of the Committee, I would like to thank you for the opportunity, also, to testify at this hearing.

I share the views of many Americans that we need new measures to protect against terrorism while maintaining fundamental protections of democratic society. As a member and president of League of Women Voters of Utah I welcome the opportunity to share our organization's thoughts with you.

Our membership expressed concern about the USA PATRIOT Act at our state convention last May. Since then, many have chosen to study this issue, either through public meetings or at smaller, more intimate gatherings. I have included individual comments from our members in our written testimony. The most telling, I believe, was from Bonnie Fernandez who said, "There is no valid reason to abrogate the constitutional protections of civil liberties, even in the name of national security. When national security supersedes the Constitution, we are in greater danger than any danger the terrorists might present."

In fact, we members all over the United States have been steadfast in our convictions that we must balance the need to protect against threats to America with the need to preserve liberties that are the very foundation of this country. A government open to citizen scrutiny with checks and balances among the legislative, executive, and judiciary branches, including independent judicial review of law enforcement and limits on secret, indiscriminate searches are essential to guarding our liberty.

Let me start by saying that we support the overall intent of the USA PATRIOT Act. We recognize that law enforcement must be able to address new forms of terrorism. However, we urge Congress to perform review and oversight that they did not have the luxury of performing in September and October of 2001. We urge you to review exactly what the PATRIOT Act has accomplished and to revise the provisions that we believe have unnecessarily infringed upon our civil liberties.

I have three concerns I would like to express today. Issue number one, citizens fear that by supporting laws designated to protect them, they have given up many of their basic liberties.

Our country has survived the Cold War and other serious dangers to our National security. Throughout these difficult times, all three branches of our government have examined and refined the protections afforded to all under the Fourth Amendment. This careful constitutional balance should not be set aside without concrete evidence that new powers have prevented or would have prevented attacks.

Revelations about abuses of surveillance and potential powers have created a climate of distrust between the citizenry and law enforcement that we simply cannot afford at this time. We have heard a wide variety of commentary on secret searches with delayed notification and even gag orders on third parties who hold information that should, by right, remain private.

Issue number two. We support the Security and Freedom Enhancement Act because it addresses some of the problematic provisions of the PATRIOT Act. The League supports provisions in the SAFE Act to limit "sneak and peek" searches first authorized by the PATRIOT Act. The SAFE Act would allow serving a search warrant only to be delayed when the government can show secrecy is truly a need to prevent flight, destruction of evidence, or danger to life or physical safety, and only for renewable seven-day periods. This would allow judges to exercise oversight using meaningful standards that uphold our Fourth Amendment protection against unreasonable search and seizures.

We also support SAFE Act limits on law enforcement's request for business records. In contrast to the PATRIOT Act, evidence would be required to show that requested records actually relate to a spy, terrorist, or other foreign agent. Businesses such as banks, doctors, universities, libraries hold sensitive information about our private lives, and most importantly our private thoughts, including political thoughts. This information should not be available to the government without suspicion of wrongdoing.

Finally, we support the SAFE Act proposals to require "sneak and peek" warrants and national security letters, which allow access to personal records without a court order. They should be included in the PATRIOT sunset provisions.

And the last issue we have, as the League has studied this issue, it seems clear that what is needed is not additional powers but the better use of existing powers. The PATRIOT Act and subsequent bills have called for revisions to the Foreign Intelligence Surveillance Act. We are concerned that FISA warrants no longer limited to foreign intelligence gathering will become the warrant of choice because they are easier to secure than traditional warrants.

FISA was enacted specifically to restrict the use of these powers for domestic criminal investigations and prosecutions because of government abuses targeting individuals, political and religious groups in the 1950's and the 1960's. The potentially chilling effect of extensive surveillance and detention powers on both healthy political debate and effective cooperation between citizens and law enforcement is simply too great.

The case of alleged hijackers, Zacarias Moussaoui, indicates it was not FISA restrictions that kept law enforcement from learning more about 9/11 hijackers, but the failure of the officials to seek

a warrant at all, to lack of cooperation between FBI, CIA, and French intelligence.

We ask that you give law enforcement resources the need to communicate with each other and do their job better, not undermine laws that hold these officers to higher standards. Simply put, relaxed warrant requirements make it easier to add hay to the pile but not any easier to find the needle.

In conclusion, I would ask this Committee to address all of the provisions of the PATRIOT Act, not just the sunset provisions. We feel strongly that this Act is too important not to be given the attention it deserves. We ask you to support the SAFE Act and to add oversight and review to the PATRIOT Act that would provide appropriate protection for innocent Americans from unrestricted government surveillance.

And finally, we encourage law enforcement to more effectively coordinate, implement, the use of the information they already have. I would like to thank you, Senator Hatch, and the Committee for holding these hearings and giving all of us the opportunity to express our thoughts on this Act. The League was eager to participate in the diverse coalition that was formed to encourage open dialogue on the PATRIOT Act. Sitting at a table in Utah with Utahns from many cultures, including from the Middle East, empowered me and renewed my respect for the diversity of this country. This hearing has been an important process for educating Utahns about the steps our government is taking to review the PATRIOT Act. Thank you.

[The prepared statement of Ms. Benowitz appears as a submission for the record.]

Chairman HATCH. Thank you for your time and efforts you put forward.

Mr. Mylar.

STATEMENT OF FRANK MYLAR, UTAH GRASSROOTS, SALT LAKE CITY, UTAH

Mr. MYLAR. Chairman Hatch, and honorable members of this Committee, I am pleased to be able to present information today.

Chairman I know that you cherish the Constitution and you would have a desire to see if there's any problems by holding this hearing so we can correct those. I very much appreciate that.

My name is Frank Mylar. I'm a private attorney in private practice emphasizing law enforcement and civil rights issues and I also previously served as Utah Special Assistant Attorney General for over twelve years ago. I'm very cognizant of the challenges facing law enforcement in the 21st century.

I'm not here as a paid lobbyist. I'm here because of personal convictions and I was asked by Utah Grass Roots caucus to address these issues that they also are in agreement with.

I unequivocally support President Bush in his administration and his reelection campaign. However, our President and Congress, in our zeal to try and stamp out terrorism can sometimes have tunnel vision especially during difficult times like we have gone through since September 11. I also am very disturbed at many of the things going on with that commission because I think that everyone can have better vision with 20/20 hindsight and I think that

they are missing the boat; however, that there still are important issues that are raised by this hearing and with this Act that need to be looked at.

Even if Congress passed the most restrictive laws imaginable, we will not prevent future acts of terrorism. But if we did so, we would forever change who we are as a people and a nation beyond recognition. And it's for this reason that we must proceed with caution and courage in how we draw those lines as to what the Federal Government can and cannot do, because indeed it is not questioned that they certainly can do a lot more things than they used to be able to do to intrude into the citizens' lives.

We really haven't even significantly debated this whole concept of the facts that the CIA and the FBI can work as a team now. There may be some benefits from that, but I think we need a lot more debate and caution on that particular area for several reasons.

One of the things that I think is very significant here is that with Section 215, and when you look at also Section 213, which I won't particularly talk about, you don't have to be a target of someone that has committed a crime, actually, before they take those records. In fact, you don't have, under FISA, of course, the question is whether you actually are a terrorist or not or involved in terrorist activities.

I'm particularly concerned, and I think the Committee needs to be concerned, not whether the two gentlemen who spoke here are going to abuse this act, but who could reasonably use this act to abuse power in the future. So it isn't just sufficient for us to come forward—especially when this has only been an act for two and a half years, and only one administration—to be able to find actual horror stories of how this has been abused. But we need to think in the future, the implications that this act might have on other administrations, which brings particular concern to me.

The Fourth Amendment should not be easily set aside, and I know you don't want to do so. It strikes an important balance between the Biblical concept that it is equally detestable to acquit the guilty as it is to condemn the innocent. I think the PATRIOT Act, in several areas, improperly tips this balance and it needs to be reevaluated.

The fact that health records, employment records, financial records, and firearms even themselves could be seized without any individual suspicion that that person who it is seized from has committed any crime at all, that is certainly of a concern. It is also of a concern that under Section 213 you may never know that your items have been looked into, computer files and so on.

And it is not sufficient just to say that a judge reviews it. We both know Federal judges are busy. They don't have time to review all the different investigative files. But under traditional criminal law enforcement, there was a criminal investigation file that would have to be filed showing that these people were alleged to be involved in criminal activity. I don't believe we have that same or similar individualized suspicion under the PATRIOT Act, and I think that that also needs to be dealt with.

There's also, of course, the catch-all provision regarding the delay that prosecutors may use. My concern is that, again, prosecutors

are busy. Judges are busy. This can be used I think far too frequently. There needs to be safeguards put in place on that.

I have no doubt that "sneak and peek" searches authorized under the PATRIOT Act are efficient tools. However, I would rather be hampered by the burdens of freedom than shackled by the efficiency of tyranny, and I think we need to look at that carefully to see how these could be applied.

Of crucial importance to conservatives regarding the PATRIOT Act is how it might be co-opted in future administrations. I'm not concerned particularly on how President Bush might use this. I know he has a heart and soul that wants to fight terrorism. However, it was suggested, and there may have been some evidence that Attorney General Janet Reno may have used even the RICO laws to inappropriately target pro-life organizations, even though they weren't involved in criminal activity. But they were using the racketeering laws as justification to do that.

This Act broadens that even more. We need to look at what potentially could happen under future administrations to target pro-life, pro-defensive marriage organizations, and pro–Second amendment organizations because they could be politically thought of to be somehow involved in terrorism inappropriately.

I, for one, would not trade my liberty today even if you could tell the American people that we could stop all and avoid all future terrorist acts. And I know we can't. The most dangerous and formidable foe to tyrants throughout the ages has always been those who are truly free, because they have something to live for. It's such courage that caused Patrick Henry to say, "Give me liberty or give me death."

We, as a nation, have been entrusted by those before us to preserve liberty. Let us not forget the words and actions of our Founding Fathers by setting aside these principles for which they paid the ultimate price. For our country and our childrens' sake, let us boldly wage the war against terrorism as free people and with our liberty intact.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Mylar appears as a submission for the record.]

Chairman HATCH. Thank you.

We turn to Commissioner Flowers now.

STATEMENT OF ROBERT FLOWERS, COMMISSIONER, UTAH DEPARTMENT OF PUBLIC SAFETY, SALT LAKE CITY, UTAH

Mr. FLOWERS. Thank you, Mr. Chairman.

It is an honor to be here and sit at the table with such diversity of opinion. Ms. Eyer and I will be debating much on the MATRIX program because we have different takes on it. I'm eagerly awaiting the debate, almost.

I would like to take a moment and express my appreciation to you about the Olympic games. Most people don't understand what we went through during that time, and we were able to use you to get into doors we weren't able to get into otherwise. People just don't know what unraveling times they were for me and my staff. And your leadership, the private meetings I was able to hold with you, and I knew you were extremely busy, and I just want to ac-

knowledge that publicly because I haven't had a chance to do that in a meaningful forum.

Chairman HATCH. Appreciate that.

Mr. FLOWERS. I'd like to read a portion of my statement for time's sake.

Chairman HATCH. When this goes red, you are supposed to stop.

Mr. FLOWERS. I don't have a problem with that. As a public safety official, I have become increasingly concerned with the continual attacks on an effective and much-needed law enforcement tool. It seems to me the critics of the Act may not have an understanding of the challenges law enforcement faces on a daily basis.

The Utah Department of Public Safety is tasked with the responsibility of addressing issues of prevention, response, and mitigation in fighting the war on terrorism locally. These three terms when spoken in bureaucratic sentences seem to lose power. I translate those terms into protect, protect, and protect. This becomes a very powerful charge from the citizens I serve.

I have been charged with the responsibility to protect the citizens of the state of Utah, a role that I accept. However, with that responsibility must come the ability to do that. The PATRIOT Act takes a major step towards giving law enforcement the tools it needs to protect the public. The ability to gather, analyze, and share information so critical to our charge is essential. Our success of prevention, response, and mitigation will largely depend on our ability to gather, analyze, and share information. Which, at every hearing you watch, information sharing and the ability to gather, it seems to be the center of a lot of that.

Our enemies have moved among us, even here in Utah, using our very laws to hide, gather resources, and then turn those resources upon us in an effort to destroy us. They use asymmetrical tactics that will require extraordinary efforts previously unknown inside the United States. While some merely want to debate the efficacy of the PATRIOT Act, law enforcement doesn't have the luxury to sit and wait while discussions rage on. The tools provided in the PATRIOT Act today to enable us to address the critical issues of public safety are of most importance.

There's a couple things I would like to talk about from personal experiences I have had with this with the breakdown. Several years ago when I was the police chief in St. George, we were dealing with the White Supremists. And I met with two groups of individuals from the FBI. And one was the intelligence aspect of it and one was the criminal investigation. I did not know at that time that the two did not speak.

And I remember we had quite a bit of information. It was quite an ugly investigation we had going on. Personal threats to members of our community. I had my lawn killed and a number of things by these individuals.

When I went to gather information, try to get information from agencies, the FBI agents, whose hearts are of gold and wanted to, said, "We simply can't give you that information because of the criminal investigation." A concept that I did not understand at that point.

Another time I was, as part of the same investigation, I asked an individual a question, I had received information from this

group. And he was surprised that I was talking to the intelligence group because he was in another part of this particular organization and there was not a lot of contact going on between us. So I found that disturbing, but I found out later that was by design. That's the wall that we talked about.

During the Olympic Games we had our intelligence infrastructure and we had our criminal investigation, and they had to be kept separate. We couldn't even go in the same rooms, and I thought that was not a good way to run a security operation.

Since the PATRIOT Act, we are doing things we have never done before. We are sharing information, sitting around the room. I talk almost weekly with our Assistant Attorney General and Chip Burris of the FBI. And it has worked extremely well.

My point is this: I understand the debate. It's a good one and needs to be had. And we need to come to some conclusion on this. But if the PATRIOT Act is not reinstituted, I can't imagine the environment we will be in if we have to go blind in the new environment that we are in. So anything that I can do, any place that I need to go, I will be willing to do that. Thank you.

[The prepared statement of Mr. Flowers appears as a submission for the record.]

Chairman HATCH. Thank you, so much.

Mr. Bradley. Turn to you.

STATEMENT OF SCOTT BRADLEY, EAGLE FORUM, SALT LAKE CITY, UTAH

Mr. BRADLEY. Thank you. Appreciate the opportunity to present thoughts on this critically important issue. My name is Scott Bradley. I'm speaking on behalf of the Eagle Forum. And I have previously submitted, as you are aware, an expanded version.

Chairman HATCH. We will put all the expanded versions, as written, into the record.

Mr. BRADLEY. Thank you.

It is from a historical perspective and that of the foundation principles that the nation was originally founded upon that I express concerns about the USA PATRIOT Act. Due to their personal experiences, the founders of this Nation sought to forestall the tendency of government to overreach its proper role. They carefully crafted a government which had a clearly defined scope and balance.

For example, the Fourth Amendment was a direct outgrowth of search and seizure abuses experienced under the British rule in the colonial era. During that period of time, Writs of Assistance were general warrants carried by officials of the British government which allowed them to enter a premise, search for anything they felt might be against the law, to seize any unlawful material they discovered, and arrest anyone they suspected might have some connection to the matter.

To counter and protect against this form of tyranny, the Fourth Amendment was ratified. By it, the founders wished to prevent any future similar violations, so they required extreme specificity in the warrants which might be issued by government officials.

Unfortunately, it may seem that there are parallels between the writs of the 1700's and the powers inherent in the PATRIOT Act

of today. In both spirit and letter, it may be argued that the PATRIOT Act has stepped away from the exact requirements and specificity called for in the Fourth Amendment, and seems to open a path which could lead America to a circumstance in which modern day Writs of Assistance become common instruments of investigation and potentially destroy God-given rights.

A full review of concerns of the PATRIOT Act would require a document exceeding the size of the Act itself. Perhaps a few general examples may suffice today.

One, the Act dramatically expands Federal Government powers of surveillance, search and arrest, and sets potentially harmful precedence for future encroachments on personal liberties. Some of these expanded powers may be unconstitutional and would likely have been found so in another day and time.

Two, the Act greatly expands the legal use of "black bag" searches in that there are broad powers granted to police agencies to conduct secret searches without notifying the subject of the search until after the search was conducted, if at all. This power appears to extend to all suspected criminal circumstances, not only to potential acts of terrorism or war.

Three, roving wiretaps, which allow investigators to tap multiple telephones used by a suspect, may now be carried out nationally on a single court order. Previously such wiretap orders were generally allowed only in a jurisdiction of a judge issuing the order and were subject to constraints which reduced the potential that abuses would occur.

And four, the Act also allows the CIA to access foreign intelligence information obtained by domestic grand jurys, as well as other information obtained through investigations and by law enforcement agencies, effectively creating an environment in which the CIA could spy on American citizens in violation of long-standing U.S. policy.

Overall, the PATRIOT Act limits and reduces judicial oversight in the gathering of evidence, diminishing the distinction between the gathering of foreign intelligence and domestic law enforcement and allows many of these provisions to be allowed not just against foreign agents of foreign governments or against terrorists, but in many cases against citizens of the nation who may, under some construction of law, be deemed a threat.

It would seem that other better ways are available to the nation to deal with threats as they face us in this dangerous world. Those ways would include more diligent protection of our borders from potential threats and those who would enter or who have entered illegally. It is tragic that the nation's lax immigration and visa policies gave the terrorists who attacked the nation on September free access to target our citizens. It appears that at least 15 of the 19 hijackers should never have been issued visas to the United States if consular officials had diligently followed the law.

It is incomprehensible that a nation which is at war with terrorism and has been victim to a vicious attack has not taken the most simple and logical steps to protect our borders from future potential attacks. And the argument could be made that we are taking steps to create even less secure borders, making overtures

which will likely encourage that type of illegal entry into the nation.

The solution to terror, as it has been thrust upon us, is not to destroy the liberty of loyal Americans but to interdict those who would bring that threat upon us. Perhaps this issue may be reviewed in greater detail in a future hearing. Please consider these concerns as the PATRIOT Act is reconsidered.

Thank you very much.

[The prepared statement of Mr. Bradley appears as a submission for the record.]

Chairman HATCH. Thank you, Mr. Bradley.

Mr. Turpen. We will take your remarks.

STATEMENT OF AARON TURPEN, LIBERTARIAN PARTY OF UTAH, SALT LAKE CITY, UTAH

Mr. TURPEN. Thank you for having me here today. My name is Aaron Turpen. I'm the Secretary of the Libertarian Party of Utah. I've submitted a written statement and I'll let that stand on its own. Instead, I want to speak to you, and through you, the Committee, personally just as a concerned American citizen. I will be very frank. I will be very forthright. I won't mix a lot of words. That doesn't mean I'm going to swear at you, though.

Chairman HATCH. You wouldn't be the first one to do that.

Mr. TURPEN. I noticed today, once again, the group that we have here and the wide breadth of people that we have represented today. I find myself sitting next to Mr. Bradley—Gail Ruzika is someone I have argued with more than once on several issues.

Chairman HATCH. How did you make out? Maybe I shouldn't use the words "make out", but how did you get along?

Mr. TURPEN. I think the trick is the louder voice.

I did want to note a few things. I listened to the testimony of the two attorneys at the beginning, and I applaud what they are doing. But I believe that part of the problem around the PATRIOT Act and part of the problem in general that we are having is that, as Henry Thoreau said, we are striking at branches instead of the root. I believe that what we need to really be looking at is what the root of the problem is, not what can we do to fix all these symptoms that are happening.

In doing that, I would say that we have to look at ourselves as a nation. We have to look at our government as what it is and the power that it has. And we have to wonder did something happen, did something go awry? Do we need to fix something there? Is our reaction to create more laws really the proper reaction? Should, instead, we be looking at the fundamentals of what we are doing and reconsidering what we have done to fix the basic problem that is happening, rather than just adding more to it?

In thinking about that, I carry this around with me, the little "Citizens Rule Book". In this book is a copy of the Constitution and the Declaration of Independence and several other things which are very useful. I would recommend that they hand these out in school because, in reading this, I started to understand that the government, according to our Constitution, has very specific and limited powers. And I believe that part of the problem is that possibly the

government has overstepped those powers or has used them in a way that maybe it shouldn't have.

I have read a lot of things in my thirty years on this planet, and one of the things I read, the book The People's Pottage, by Garet Garrett, I walked around and I talked to several people. I happen to live in a neighborhood that has two or three old folks' homes. I went and talked to these people. People who are old enough to remember the 1930s and even the 1920s. And in talking with them, it was reinforced what I read in this book—that in the 1930s it was common to refer to it as "our government". And sometime between then and now it has changed. We refer to it as "the government", as if it is separate and an entity to its own that is going to—or that exists whether we like it or not.

And in looking through the PATRIOT Act and looking through several of the provisions again in my written statement, I found that I was appalled, as a libertarian, at some of the powers that the government has. You quoted earlier Thomas Jefferson, and it's a very astute quote. I'm very glad that you brought it up because as you know—the Libertarian Party would be called the Jefferson Party if we were to rename it right now.

Thomas Jefferson was one of the most instrumental people in this Nation. And something that he said, and I will paraphrase it a little bit but, something that he said is, "I do not add within the limits of the law." He is talking about liberty and the—I'll just do the whole thing: "Of liberty I would state that, on the whole plenitude of its extent, it is unobstructed action according to our will. But rightful liberty is unobstructed action according to our will within limits drawn by the equal rights of others. I do not add 'within the limits of the law,' because law is often but the tyrant's will, and always so when it violates the rights of an individual."

So all I ask the Committee, and you specifically, Mr. Chairman, all I ask that you do is that you look at the PATRIOT Act and you consider it from your personal perspective as a citizen of the United States—not as a Senator, not as a chairman, just as a regular Joe. Consider it and think, "Is this going to violate me? Is it going to hurt my individual sovereignty?" If anything in the PATRIOT Act is going to do that, then I would ask that you throw it out. That's all I ask. Thank you, sir.

[The prepared statement of Mr. Turpen appears as a submission for the record.]

Chairman HATCH. Thank you, Mr. Turpen. Appreciate you being here.

Mr. Cohne, your testimony.

STATEMENT OF BRUCE COHNE, CHAIR, UTAH ADVISORY COMMITTEE TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS, SALT LAKE CITY, UTAH

Mr. COHNE. Thank you. It's a pleasure to be with you here this morning.

I have learned much since I got the invitation to speak here today, but one thing I have learned is that I have to make another disclaimer in addition to all the disclaimers in my written statement. I have to affirmatively disclaim that I am not speaking on behalf of the United States Commission on Civil Rights.

Chairman HATCH. Make sure your mike is on.

Mr. COHNE. Is that okay? I'll start over.

One disclaimer I have to make is that I'm not here on behalf of the United States Commission on Civil Rights. I am only speaking as Chairman of the Utah Advisory Committee to the United States Commission on Civil Rights.

There is much good in this legislation as was pointed out earlier. Part of what is good is the inter-agency cooperation and the ability to share information has come out from the 9/11 Commission hearings. This was a fatal gap in our intelligence.

However, like any piece of legislation, there is much to look at in this legislation. This legislation was carefully drafted and is impossible for the average citizen to read, you cannot read this piece of legislation as a single act. As a matter of fact, it is not a single act. It is two acts in one. And one is Section 3.

Section 3 of this Act is the International Money Laundering Abatement and Anti–Terrorist Financing Act of 2001. This portion of the Act imposes tremendous costs on our commercial estimate. If you talk to people in banking and in the finance industry, trying to comply with these provisions are extremely expensive and onerous. And it should be looked at in terms of the cost to commerce that these provisions create.

Secondly, the Act itself needs a little bit of tweaking. And because of what was said earlier, I have proposed two amendments to the Act, to be specific. First of all, Section 215 in the Act is actually an amendment of 501 FISA of 1978. I would suggest that in light of what you were stating earlier, the issue of probable cause, I would suggest that the Act be amended in section C1 of 501 FISA to read as follows: "Upon an application made pursuant to this section, the judge, upon a showing of probable cause, shall enter an ex parte order as requested or as modified, approving release of records if the judge finds that the application meets the other requirements of this section."

What this does is eliminates certain language and opens us up to the probable cause standard, which currently does not exist. The section reads, "Upon application made pursuant to this section, the judge shall enter an ex parte order." There is no discretion on the judge. And if I'm right, and I'm not a criminal lawyer, and if you don't do your first criminal case you can't do your second, so I'm somewhat at a disadvantage here. But if I'm right, this is not an order issued by any ordinary court. It is issued by a court under the FISA. And therefore, the probable cause standard being applied here would apply across the board, and I think that's appropriate.

Your statements to the two gentlemen earlier indicated that you felt it was a probable cause standard. They were both very careful not to use the term "probable cause" but "upon an order by affidavit". And there's a world of difference, as we both know. So that would be my amendment to Section 215. And Section 501 of FISA.

The other section, which has not been discussed at all today, and I'm glad there's something left to discuss that nobody else has, and that's Section 802. 802 currently reads as follows. In defining domestic terrorism it says, "Engaging in that activity," excuse me, "activity that involves acts dangerous to human lives that violates

the laws of the United States or any state and appear to be intended," and then goes on to modify.

I would suggest that three words be added, and one word deleted. I would suggest that the section be amended to read, "Activity that involves acts inherently dangerous to human life that violate the criminal laws of the United States or any state and are calculated to," deleting the word "appear". This would tighten up the statute.

As it currently reads, it is a violation of any criminal law. This would mean that those people who would be terrorists by this definition could easily have been the Kent State University students. And they did engage in an activity that was dangerous to life, particularly theirs. This would involve those picketing outside of abortion clinics. This would make them potentially terrorists, because by their very nature they are interfering with actions that may be dangerous to human life, by their own definition.

So I suggest that these two sections be amended, and in reviewing the sunset provisions to this Act that we look at the report from the 9/11 Commission and then act with the light of day shining upon this Act. Thank you.

[The prepared statement of Mr. Cohne appears as a submission for the record.]

Chairman HATCH. Appreciate your statements. Mr. Collins, you are going to wrap up. You may want to talk about your viewpoints of all of the suggestions and criticisms that have been made. And we would be happy to hear whatever you want to say.

STATEMENT OF DANIEL P. COLLINS, MUNGER, TOLLES & OLSON, LLP, LOS ANGELES, CALIFORNIA

Mr. COLLINS. Sure.

Chairman Hatch, I thank you for the opportunity to testify here today. The Congress has few responsibilities that are more weighty than ensuring that the men and women who work day in and day out to detect and prevent terrorism have the tools that they need to get the job done and to get it done in a way that enhances both security and liberty.

My perspective on these matters has been formed by my prior service in the Department of Justice. Though this isn't my first time to Salt Lake City, I am not from Utah, but I'm glad to be back here again today.

Most recently I served as an Associate Deputy Attorney General in the office of Deputy Attorney General Larry Thompson and I also, during my time there, served as the Chief Privacy Officer of the Justice Department responsible for coordinating issues concerning privacy policy. I have also served as a Federal prosecutor in Los Angeles and also in the Department's Office of Legal Counsel. I caution that the views that I offer today are solely my own.

The PATRIOT Act was passed in October, 2001, by an overwhelming bipartisan majority and yet since that point, it has become the subject of, what is to me, somewhat surprising controversy. One of the speakers said that it has become a symbol. I think it may be a little bit more accurate to say it has become a cartoon. A lot of comments that are made either attribute things to the Act that are not there, misdescribe provisions that are in

there, or misunderstand the provisions and the protections that are in there.

In my view, the criticisms that have been made of the Act do not withstand analysis. On the contrary, I think that the Act represents a measured, responsible, and constitutional approach to the threat of terrorist activities conducted in the United States and against American citizens.

Before I turn to specific provisions, I'd like to make a couple of points about general issues, policy principles that, in my experience in the Department, were important in looking at issues of privacy policy. First is absolute unwavering fidelity to the Constitution. The challenge of terrorism today, as many have said, requires us to think outside the box, but not outside the Constitution. We all start with that assumption. No one is questioning that.

Second, I think it is important to keep in mind that we are not talking about a zero sum game. I think too many of the comments that are made reflect the view that anything, any enhanced authority or any enhanced power that is given to law enforcement is necessarily a reduction in civil liberties.

I think it is plain that things needed to be done differently. Things needed to be changed after 9/11. And the question is how to change those in a way that allows the job that needs to be done to get done in a way that is respectful of civil liberties.

Third, I think it's important we keep in mind that not all privacy interests are of the same magnitude and weight. You need to consider the context and the nature of what is at stake.

Fourth, privacy is an important value but it's not the only value, and that's part of the challenge of the task here.

Fifth—and I think this is a core point, and it's a core point that underlies a lot of the provisions of the PATRIOT Act—if it is good enough for fighting the mob, it's good enough for fighting terrorism. For me is that a categorical principle. It is irresponsible to allow a law enforcement or intelligence tool to be used for other purposes and not allow it to be used for fighting terrorism. There is no justification, I think, for such disparities. And much of the provisions of the PATRIOT Act can be explained by that simple principle.

And then six is the importance of technological neutrality. We live in an age of emerging technology and those who are seeking to do harm to us take advantage of it and try and use it to their benefit. We need to try and ensure that the law keeps up with technology so that there isn't a technological gap, so that the criminals will have a leg up, or the terrorists will have a leg up. And that, I think, explains a lot of the provisions in the PATRIOT Act.

I'd like to focus specifically, and I know a lot has been said on it, on Section 215, because I think it illustrates an important point about the PATRIOT Act. We have two primary sets of laws that give us tools for fighting terrorism. One is the traditional criminal law regime. Most terrorist acts are crimes, and therefore that whole regime is there. But there's also intelligence tools that are available, and those are critical. And one of the key lessons that has come out of 9/11 is that those worlds need to speak to one another.

But there also needs to be parallelism. Tools that exist on the law enforcement side should have analogs on the intelligence side,

so that when a law enforcement predicate may not be available, the tool can nonetheless be used. That's why there are provisions about searches in both of those regimes. There's search provisions under FISA and there are on the criminal side. There are provisions for electronic surveillance on both sides.

Where there was a real gap was in access to business records. On the criminal side there is fairly broad access to criminal records, but there was not on the intelligence side. And Section 215 simply adds, in a much more restricted fashion than exists on the criminal side, an ability to get records, business records that may be necessary in the course of conducting an intelligence investigation.

So in summary, I think that the PATRIOT Act reflects, as I said, a measured and constitutional approach to try and improve the tools so that we can fight terrorism, and I wholeheartedly endorse that all of the provisions be made permanent. Thank you.

[The prepared statement of Mr. Collins appears as a submission for the record.]

Chairman HATCH. Thank you. I personally appreciate each and every one of you for the efforts you have put forward in appearing here today, and expressing your particular points of view. We have had a lot of hearings on this and we have had a lot of discussions. We have had a lot of various people come in. And we have analyzed an awful lot of differences among various groups in trying to come up with what the PATRIOT Act ought ultimately to become.

Mr. Collins, let me start with you. You mention, in your written testimony, the importance of laws that are, if I recall your testimony correctly, quote technologically neutral, unquote. Could you elaborate for us what you mean by the concept of what the PATRIOT Act does to implement that.

Mr. COLLINS. I think, let me talk about a provision that—

Chairman HATCH. One of the questions, I want to get it off my chest while I'm thinking about it, could you address the concerns we hear from many that the PATRIOT Act lowers the standard of the supervision of the courts in granting various search warrants that are permitted.

Mr. COLLINS. Yes, Senator.

Chairman HATCH. If you could answer those two questions, that would be helpful.

Mr. COLLINS. With respect to technological neutrality, I think it's best addressed by discussing a section which has not been mentioned today, which is Section 216. 216 is what amended the pen register provisions that exist in current law, so that they more clearly apply to other technologies.

A pen register is a device that records the numbers dialed on a telephone. The Supreme Court has made clear that there is not the same expectation of privacy in who you are calling or the number you are calling on a telephone as there is in the contents of the communication, in the same way that an address on an envelope is not protected by privacy in the way that the contents of the envelope are.

Well now so many people communicate by e-mail or other forms of electronic communication, and there's a need to have an ability to make the same kind of connection—again technological neu-

trality—do exactly what you can in terms of postal letters and in terms of telephones with e-mail, so you can follow address information without looking at content. And that's what 216 does.

Several courts, prior to the enactment of Section 216, had granted pen register orders in the context of electronic communications, reasoning that the statute or authorities that were already available applied to that. But Section 216 removes any question or legal cloud that may have existed there and makes clear that the pen register provisions apply to all of the technologies. And again, it strengthens, actually, 216 actually has pro-privacy provisions in it, making very clear that content may not be collected. And I worked on a directive that was issued by Deputy Attorney General Thompson to provide concrete guidance enforcing that specific directive.

It also puts in special provisions to deal with the use of government installed technology, the so-called Carnivore debate. There were specific provisions drafted by Representative Armey who was concerned about that issue that imposed very stringent court supervision on those types of methods.

I was disheartened to see that that is one of the provisions that would be sunsetted in the SAFE Act. And I am incredulous at that suggestion. The Internet has shown no danger of going away. There will be a need to be able to do on the Internet what is done with telephones and letters. And that is what I mean by technological neutrality.

Chairman HATCH. We live in a technological world and we can't ignore it. These are important provisions. But what about the concern I mentioned that many believe the PATRIOT Act lowers the standards in the supervision of the courts in granting various search warrants that are permitted?

Mr. COLLINS. The PATRIOT Act does not alter the standards for search warrants or for electronic surveillance under the wiretap statute at all. It adds certain predicates to the wiretap statute. Those are subject to sunset. I think there should be no question that they should be made permanent.

I also had the privilege, while I was in the Department, of working on the Protect Act where quite a few statutes were added permanently to the wiretap list on child pornography. And again, this principle of equivalence; if it is good enough to fight child pornographers, it is good enough to fight terrorism. There should be no question that that should be permanent. But the substantive standards are unaffected.

Chairman HATCH. As you know, I'm one of the authors of the Protect Act, and that has been called by some the most important criminal law in the last year. It gives us the modern tools that we need to go after these people.

Well, let me ask everybody here, I will start with you, Ms. Eyer, and go across the board a minute. Current President Bush last night emphasized the importance of removing the pre–9/11 legal barrier that effectively prevented sharing of criminal investigation between the FBI and CIA. I think Attorney General Comey made that same point here today.

Now, does anyone in this panel believe that the provision—and I would just kind of like to have yes and no and if you want to extend we will give you some time. Does anybody on this panel be-

lieve that the provision of the PATRIOT Act Section 203, that removes the wall that exists, is an unjustified threat to civil liberties and should be repealed?

Ms. EYER. The "yes" and "no" part is problematic. Listening to the hearings, as well, I believe that there is a reason for that wall to be a little less substantial between intelligence and criminal investigations.

Chairman HATCH. That's the problem. How less substantial?

Ms. EYER. The devil is in the details. I did hear as recently as this morning the staff report from the CIA testimony did mention that they thought the barriers that were even larger were the cultural and bureaucratic barriers, rather than the smaller legal barriers.

Chairman HATCH. They are both barriers, though.

Ms. Benowitz.

Ms. BENOWITZ. I don't have the legal mind that most members of this panel do.

Chairman HATCH. You're doing all right.

Ms. BENOWITZ. But as a layman, I would wish that communication would always be open and there would be no barrier between the investigation of the CIA and the FBI. I did hear, I thought yesterday, that the law had been misinterpreted for twenty years. I don't know whether that is relevant or not. But I would hope that there would not be a wall.

Chairman HATCH. Thank you. Frank?

Mr. MYLAR. Again, I feel a little bit of a yes/no, I agree that that had a huge impact on our ability to try and counter what happened on 9/11. There's no question about it.

Chairman HATCH. As a member of the Intelligence Committee, I see all the time certain very restricted materials. And I have to say had we been able to match them between the agencies, we would have had a better chance to deal with these people. I tell you. So that's what is behind this.

Mr. MYLAR. And I completely agree with that. My concern is there's been a traditional aversion to the concept of having the CIA investigate U.S. citizens on U.S. soil. I think that we do need to be careful and look at what kind of protections we can have to prevent also what I alluded to a minute ago, and Mr. Cohne did a good job of specifying that a little bit more, as to how this can be misapplied by future administrations in targeting groups that are not politically in line with the current administration.

There has to be something to be able to very much define what is a terrorist act and what is an appearance of a terrorist act and these types of situations. I think we need to be very careful and may need to keep scrutinizing that to see where those potential pitfalls are.

Chairman HATCH. Well, you are talking about scrutinization, we all have to do our duty to oversee whatever criminal laws there are. And that's a good point. No question. And this law has to be overseen, as well. One of the reasons why we are all in these hearings, we had some suggestions here today. We will look at all of them and consider it.

Mr. Flowers.

Mr. FLOWERS. As a user of the information and as a state representative, everything we do, every plan we make is based on the accuracy of information that we receive. I'm disturbed by the wall that was put up. I keep asking myself why? Why a wall? Is it to protect abuses? What is that all about? But when it is all said and done at the end of the day, it is about the citizens we are trying to protect.

Chairman HATCH. The wall was put up because some people in administrations didn't trust law enforcement.

Mr. FLOWERS. The term "trust" is an interesting one on me. You have to break it down into what trust is. I have been doing research about the cultural barriers in Utah that have been keeping us from that sharing today. I'm finding that the cultural issues should be receiving as much attention as the laws because I think you can bring two people together who want to work together, but you can throw a million dollars at something and if the groups are not willing to come together you are wasting your resources. So it is an interesting thing for me.

But I have seen the improvement firsthand. I am one of the ones that are actually on the ground floor doing this sort of thing. And I can't tell you the benefit of being able to have this kind of marriage of law enforcement and intelligence information. And I think it's the way we must go. I'm not sure we have much choice in the matter.

Chairman HATCH. Thank you.

Mr. Bradley.

Mr. BRADLEY. I have grave concerns about the reduction of that barrier. And much of it goes back to the historical perspective of—I usually try and take it in regards to the American perspective. Free societies don't build dossiers on their citizens. And historically Americans have been loath to consider the fact that their government may not leave them alone to perform what freedom allows them to perform.

I'm concerned that as we blur the lines between the international intelligence gathering community and law enforcement, that the potential exists for future abuses. It would be very difficult to document those abuses at this point because the act itself precludes the making public of those kinds of things that have occurred, or may have occurred.

Chairman HATCH. The Act actually makes law enforcement have to report every year on various aspects of the Act at certain times.

Mr. BRADLEY. The Congress is supposed to get reports. I'm not sure if they have. I'm not present there. But what I'm referring to is the fact that—

Chairman HATCH. I have been informed by counsel that so far we have received all the reports that the PATRIOT Act says we should receive.

Mr. BRADLEY. Okay. That is positive.

Chairman HATCH. I don't mean to keep interrupting you, but I want to clarify. I agree with you: Our government should not be making dossiers on the American citizens. And that is not what the PATRIOT Act does. Nor does it permit that.

Mr. BRADLEY. But it does encourage a diminishment, in spite of what the attorney at the end was saying, is it Mr. Collins, would

have us believe. In particular, when he turned to Section 216, he indicated that there was the same protections on search warrants and so forth. But having read 216, and of course I have read the whole document from end to end, in all of its glory, there are numerous locations where it says, "Shall issue upon certification by the law enforcement officers before a judge." It is a "shall issue" circumstance, wherein the judge shall issue if they certify to him that it is part of an ongoing investigation. There's no probable cause required in so many instances. There are in some, I admit. I admit.

But those instances where the circumstance of allowing police agencies to have access to things based on a rubber stamp, for lack of a better term. I know that's been thoroughly debunked by the individuals that spoke previously, that they thought all judges were pretty hard to get things through. But when they have a law before them wherein the Congress has mandated that they shall issue authorization upon certification, that this act that they are going to do is necessary for an ongoing investigation, that has some concerns.

And I have strayed far from what you said. This section 203, I do have concerns about. I am concerned that it may at some point be abused. I don't know if that has ever been abused at this point and I guess we need to be careful with how we go forward with that.

Chairman HATCH. We have to make sure the provisions aren't abused, and that is the job of government and people like myself, and we take it seriously. But that is true of every criminal aspect.

Mr. Turpen?

Mr. TURPEN. I would agree with Mr. Bradley. I believe he summed it up pretty well. What I would add to that is, I have a pretty healthy suspicion of government on the whole, and in my view I believe that there should be more people in government watching government than there are watching anything else.

Chairman HATCH. Don't worry, there are a lot. I'll tell you. And I'm one of them.

Mr. TURPEN. My biggest problem with the idea of lowering the barrier as was covered by Mr. Bradley; that eventually CIA operatives or NSA or any intelligence group may begin to watch United States people. And that, to me, it's Orwellian and it shouldn't happen.

But I do trust that we have elected people to office and their job, or part of their job, is to watch what these agencies are doing. And I believe that as long as that is continuing to happen, and as long as it is done honestly and fairly, that our butts are covered.

I do want to ask, though, if I may, I have read some of the reports that were given from the Department of Justice—those that were publicized. Specifically under the PATRIOT Act, and I couldn't tell you the title of it right off the top of my head, but it was a report I believe on warrants issued from the FISA court. And the report itself was less than half a page. In fact, as I recall, the letterhead took up more space than the actual report.

According to that report, the FISA corporation had issued one hundred percent of the requested warrants of the court. And I just wonder if we have heard several times today that it is not a rubber

stamp. And that tells me different. And I wonder if you have a perspective on that.

Chairman HATCH. The reason that is so is because it goes through a series of layers by the time it gets there. And keep in mind the Moussaoui case. A terrible mistake was made because law enforcement people just were afraid it was a borderline case that they couldn't really make the case and they would get chewed up for it. And I have seen cases where some of our people have been banned from the FISA court because they made over-representations.

It is a tough process. By the time you get to the FISA court, you have gone through a lot of hoops. And you have gone through a lot of explanation. That doesn't mean they can't reject it. But it does mean that in most cases they are going to accept it. And frankly in the one case and in almost every case, they accepted it. But you go through a lot of hoops to get there.

Mr. Cohne.

Mr. COHNE. I would say there's no absolutes. Conceptually, the exchange of information is healthy as it goes to fighting terrorism. As the Israelis have learned, you can't stop terrorists who are determined to strike.

Chairman HATCH. That's right.

Mr. COHNE. And this law is not going to stop terrorists who are determined to strike. It will help, but it will not stop anybody who is really determined to come forward.

Chairman HATCH. It's not a full guarantee.

Mr. COHNE. But what it can do in the sharing, it will permit information to go across a jurisdictional line that was not available before.

Chairman HATCH. Right.

Mr. COHNE. I would feel more comfortable if it was up to the United States District Court judges and not a FISA court. The FISA court, in all due deference to the people enforcing it, smacks of Star Chamber proceedings in many of its proceedings.

Chairman HATCH. Thank you.

Mr. Collins, to sum up?

Mr. COLLINS. I believe that it was critical. The most important feature of the PATRIOT Act was the removal of the "wall." You cannot connect the dots when some of the dots are on one side of the wall and some of them are on the other.

Some of the people who have spoken I think have confused the issue of information sharing and operational responsibility. Operational responsibility for gathering intelligence under FISA and other authorities within the United States continues to reside with the FBI. There's been a debate over whether or not that should be moved, but that's where it stays. The PATRIOT Act doesn't change that.

The FISA process, as Senator Hatch, you described, involves a tremendous amount of internal screening. It goes to a very high level within the Bureau itself, often to the Director personally. It then goes through a review from the Office of Intelligence and Policy Review in the Department of Justice. Ultimately, it must be personally reviewed and approved by either the Deputy Attorney General or the Attorney General before it goes to the FISA court.

Chairman HATCH. And they take that seriously because they know they are going to get chewed up like you can't believe if they make a mistake.

Mr. COLLINS. That's the process for physical searches and electronic surveillances. It's a little different under the 215 process. But I did want to clarify that.

I'd also like to respond to—and I should also note that the FISA court is composed of sitting Article III district judges who are chosen by the Chief Justice. So they are ordinary district judges who are tough as ordinary district judges are.

I would like to also respond to one comment that misunderstood my prior response to you. It confused my answers to the two questions. I did not say that Section 216 had the same standards as search warrants. Pen registers have never been subject to the probable cause requirements of search warrants. The Supreme Court made that clear in the 1970s. I think it would be remarkable to say that for terrorism we will have a higher standard than the Supreme Court has stated for thirty years shall apply to this investigatory tool. I don't fathom that.

Chairman HATCH. In the case of pen register and trap and trace.

Mr. COLLINS. Exactly.

Chairman HATCH. This has really been good. I have to say I have enjoyed this whole panel.

Let me just ask one other question. We have heard from the Department of Justice on the first panel, you have heard them describe the delayed notification, why the delayed notification, what some call "sneak and peek" search warrants, and the roving wiretap are important in preventing terrorists. Does anybody on this panel think that we should allow these provisions to expire with regard to terrorism?

Mr. Bradley.

Mr. BRADLEY. I appreciate the necessity—

Chairman HATCH. Let me just finish the question so I can get all my thoughts out. If you can specifically comment on Mr. Comey's comments on the inadvisability, I heard him say, about the seven day limit on delayed notification warrants. Why not simply leave that as a matter for the judge's discretion, as Mr. Comey suggested?

Okay. Mr. Bradley.

Mr. BRADLEY. I'm sensitive to the rationale behind "sneak and peeks" that have been expounded upon here today. I must return, however, to a couple of basic principles, one of which is found in the Fourth Amendment. And if I may just simply quote the Amendment. And I'm not certain that this is always completely adhered to in the approach that's been suggested within this document, the PATRIOT Act.

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

I mentioned, in my opening remarks, the concerns about the Writs of Assistance and how this Fourth Amendment was an outgrowth of that.

Chairman HATCH. Keep in mind the key word there is "unreasonable".

Mr. BRADLEY. I agree. Unreasonable. Sometimes that is in a perspective, too.

Chairman HATCH. Not so much in law enforcement.

Mr. BRADLEY. We have an experience that the Founding Fathers lived through where the British government felt it was very reasonable to be able to enter and basically go on fishing trips whenever they thought they may have something to catch. The Founding Fathers were very, very careful in saying that they must be very specific, oath or affirmation describing the place to be searched, persons or things to be seized. And it is very difficult to have all of those things perhaps met. And if they are, I think that "sneak and peek" is not nearly as dangerous as other people may think.

However, there is one thing that can't be done away with and that is that there are errors oftentimes where police agencies, there's record of them going to the wrong address and going to the wrong location. And if there were those kinds of things occurring, I'm just wondering would the person be available to defend themselves in terms of how their privacy was violated, how their home was searched, how things may have been destroyed. There's a whole bunch of things. But the fact of the matter is I think it's important for individuals to be able to recognize that they have the right to face those who accuse them, and to correct if there's wrong address.

Chairman HATCH. They will. Anybody would.

Ms. EYER. Senator Hatch, if I may?

Chairman HATCH. Yes, Ms. Eyer.

Ms. EYER. On the "sneak and peek" warrants, it's my understanding that there's a criteria that deviates from the original criteria of "flight from prosecution," "destruction of evidence," and "physical safety" of a person in danger; that there's another provision in the PATRIOT Act that says we can get these sort of indefinite warrants, not indefinite, but delayed notification warrants, also if it may "jeopardize prosecution." It's that terminology that we are a little concerned about. Because—

Chairman HATCH. But you're not for doing away with it.

Ms. EYER. Well, it does seem like a more lenient standard—

Chairman HATCH. Like I say, that's one thing I appreciate about the ACLU; that they are not doing away with it. They want to make sure it works right.

Ms. EYER. In fact, it's that provision of "jeopardizing the prosecution." And our suggestion of renewable seven day warrants, I think, is based upon the concept that a "reasonable amount of time" is such a squishy term that, for example, in the recent detainee matters, you can hold for the INS originally 24 hours and then 48 hours and then 7 days.

Chairman HATCH. That has nothing to do with "sneak and peek."

Ms. EYER. I understand. But the terminology "a reasonable amount of time" was used there and it ended up being a year. So that's my only response to that.

And then I have a response to the roving wiretaps, as well. We are not in favor of doing away with those, which I was misquoted today in the paper.

Chairman HATCH. Right.

Ms. EYER. But have some specific suggestions to safeguards, that the target is specified and they ascertain that the target is using the facility which was previously used for criminal investigations. Thank you.

Chairman HATCH. Appreciate that. Let's make it clear, and you haven't, but some people have interpreted the detainees at Guantanamo as being detained because of the PATRIOT Act. It has nothing to do with the PATRIOT Act. It does have a lot to do with "enemy combatants" and how that is interpreted, and that's going to have to be sifted through. And we will have to figure that out. I'm going to go down there within the next while and personally review the whole matter and really look it over.

But that's the request of the Justice Department and the Department of Defense. But a lot of people have misconstrued the PATRIOT Act thinking that the people are being detained because of the PATRIOT Act, and it's just not so. You didn't indicate that, but I wanted to clarify that.

The PATRIOT Act has been condemned by some people who have no idea what's in it and who have made very unjust and irresponsible accusations. As you can see, this has been a substantive hearing where we are trying to figure out if there are things that need to be changed and need to be modified or need to be strengthened or need, you know, need to be deleted. And frankly, through most of my hearings I haven't heard one abuse other than the court in this one provision, that it was vague. And that wasn't an abuse. But it's a criticism that may be valid. We will see about that and see what we can do.

Anybody else care to comment?

Mr. MYLAR. Mr. Chairman?

Chairman HATCH. Frank.

Mr. MYLAR. When I look at the wording of this Section 213, it doesn't give any time periods whatsoever. What might be reasonable to one judge could be totally unreasonable to another judge. It says it can be extended for good cause, but again there's no definite time period. Of particular concern is that this idea that the judge is going to be exercising supervision or oversight. I think that is a little bit illusory, especially given the heavy schedules of judges. They don't necessarily look through all the investigative files.

Chairman HATCH. They take it pretty seriously, and by the time it gets there it has been really scrutinized forwards and backwards.

Mr. MYLAR. But it may never came back to that judge's attention unless something else is done on that case. For instance, if a criminal case is—

Chairman HATCH. I don't think your argument is that we shouldn't give them a reasonable period of time—

Mr. MYLAR. No.

Chairman HATCH. —so that the enemy or criminal is informed on the thing and then can flee or trigger some terrorist act. So that's basically what I'm asking about.

Mr. MYLAR. But there should be some kind of uniform period of time where they have to make that second application so that we know that the judge actually will see it.

Chairman HATCH. I think Mr. Collins would agree there hasn't been an extensive period of time in any of these cases.

Mr. COLLINS. In pre-existing case law, there was not a statutory provision prior to the PATRIOT Act that specifically provided for this, but the courts had allowed it. And the case law, there were a number—

Chairman HATCH. Allowed it with regard to general criminal activities, organized crime, and a whole raft of other related criminal activities before we ever put it in the PATRIOT Act.

Mr. COLLINS. That's correct, Senator. And many had adopted sort of—

Chairman HATCH. And they didn't have that right with regard to terrorists. That's why we put it in there.

Mr. COLLINS. The provision is an across-the-board codification and that makes sense because it's a general issue. Some of the courts had used a seven day benchmark. But even those that did so by case law acknowledged that in some cases 7 days might not be adequate. There shouldn't be a one-size-fits-all. It leaves it to the discretion of an independent Article III district judge to say, "I think what is reasonable in this circumstance is 7 days," or, "I think it may be 20 days based upon the showing that you made."

Chairman HATCH. And an Article III district judge, of course, is a trial judge in the courts.

Well, let me just end this hearing on this comment—

Mr. TURPEN. Could I make a quick comment?

Chairman HATCH. I'm sorry. You did want to comment.

Mr. TURPEN. I believe as far as "sneak and peek" warrants, as they are called, I believe that Mr. Bradley did the right thing. He went straight to the core. He jumped right to the Fourth Amendment. And what I would like to point out, and I don't mean to apologize for criminals or justify what they are doing, but in the example that was used by the Deputy Attorney General, I believe that that judge was incorrect in giving that warrant. And specifically the reason I believe that is because the Fourth Amendment says specifically, "Upon oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." And I don't disagree that there should be or that this is not a great tool for law enforcement. But I think it is something that should be very, very, very carefully scrutinized. And I think that it should be scrutinized according to the supreme law of the land.

Chairman HATCH. I understand. You and I do disagree. And I agree with Mr. Comey on that, that that was a reasonable and frankly a very important and necessary approach to resolve that crime.

But we have appreciated your honest impressions, your honest suggestions here. We listened carefully and will continue to analyze and think about what you had to say.

I'd like to thank U.S. Attorney Paul Warner for sitting through the whole hearing and remaining to hear all of your concerns.

I want to thank Dean Matheson for making this facility availability to us. And actually I hope he remains the dean here for a long time.

We will allow for those who have witnessed or those who have appeared and made comments, we will allow a seven day period in which the record can be supplemented, because you have all sat through and listened to each other and the two law enforcement people, and you may have some additional thoughts that may be helpful to us. So we will be happy to keep this record open for 7 days and take your written suggestions.

With that, I just want to express my gratitude for everybody who has participated in this hearing. It's been a very good hearing. And I appreciate the extra time and all.

And I particularly appreciate Mr. Comey coming all the way from Washington, as busy as he is, and right in the middle of the 9/11 Commission and everything else to come here. But it shows the importance that they put on this particular Act and how important it is.

I have had something to do with almost every law enforcement, every anti-crime matter in the last 28 years. You mentioned the Protect Act. You mentioned that. That's protecting our children like never before. And let me tell you, we had all kinds of opposition to provisions in that Act. But we have also had people on both sides say that that's one of the most important crime bills for children ever. It's the most important crime bill for children ever enacted.

And I will just say this to you: Listen carefully to what Mr. Comey was saying, and Paul Warner. Without the PATRIOT Act, we would not have apprehended—and I will just give a ballpark figure, and it's actually probably more—but at least 200 terrorists in this country since 9/11. Without the PATRIOT Act, we would not have had the tools to have been able to protect you as much as we have. And I, for one, don't want to see those provisions sunsetted. I'm not against trying to perfect them even more or improve them even more. I think it would be crazy to sunset provisions that are helping us to apprehend terrorists in this country that we wouldn't be able to do without them.

So this is an important hearing and I personally am very appreciative of everybody who has participated. And with that, we will just recess it until further notice. Thank you.

[Whereupon, at 12:15 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

League of Women Voters of Utah
3804 Highland Drive, Suite 8-D Salt Lake City, UT 84106
(801) 272-8683 www.lwvutah.org

May 18th, 2004

Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C., 20510

Attention: Barr Huefner

RE: Senator Hatch April 14th, 2004 Utah Field Hearing on
"Preventing and Responding to Acts of Terrorism: A Review of Current Law"
Questions to Nanette Benowitz

Dear Judiciary Committee:

I would again like to thank you for your clear commitment to addressing concerns about the USA PATRIOT Act and for giving me the opportunity to share with you the views of some of your constituents.

It is with grave concern that I answer your questions concerning "unsubstantiated hype and speculation" and "specific examples of . . . abuse" under the PATRIOT Act. It is my hope that in considering the appropriateness of the PATRIOT Act, that your committee will not disregard the well-established constitutional doctrine that a statute can be unconstitutional due to the "chilling effect" it has on our First Amendment rights. There need not be specific examples of abuse for the PATRIOT Act to be unconstitutional on its face. My concern, for example, is not with how many library records have been collected pursuant to the PATRIOT Act so much as how many people have chosen *not to go to the library at all* for fear that what they may be singled out for what they choose to read.

It is possible that some fear the PATRIOT Act for unsubstantiated reasons. However, it is not only possible, but in fact evident from my meetings with members of the League, that many of our members have substantiated fears concerning the PATRIOT Act. The Washington Post recently reported that the number of FISA warrants this year exceeded, for the first time, the number of regular electronic surveillance warrants. Due to the USA PATRIOT Act it is now easier than ever for federal agents to obtain a FISA warrant, with its truncated Fourth Amendment protections, even if the primary purpose of the investigation is not to gather foreign intelligence. When the FISA was originally enacted,

federal agents were given enhanced power to conduct surveillance outside the ambit of the Fourth Amendment in order to collect foreign intelligence. This important safeguard has been removed by the PATRIOT Act and has been further undermined by calls for "lone wolf" amendments. In short, due to a person's alleged association with a foreign terrorist organization, a designation not subject to judicial review, federal agents can secure a warrant against him without showing probable cause that he has any connection to criminal activity.

The prevalent use of FISA warrants has troubling implications on freedom of association. The mere number of FISA warrants could have a profound chilling effect on this fundamental right. Nor do I doubt that cases will be brought to challenge the legality of the statute, though the public may never learn the outcome of these secret judicial processes.

The members of my League read such articles with great concern. They are aware that our country has an unfortunate history with infringing upon the freedom of association and share the hope that these abuses will not be repeated.

As Chief Justice Warren so eloquently stated in the case of *US v. Robel*, "[i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties--the freedom of association--which makes the defense of the Nation worthwhile." 389 U.S. 258, 265 U.S.Wash. 1967 (striking down provisions of the Subversive Activities Control Act for unconstitutionally infringing on freedom of association).

Your constituents have read with concern about the manner in which the PATRIOT Act was enacted. We have read, for example, that thousand of pages of legislative material were enacted into law within a few weeks time and that many Congress members did not have the time to review all of these materials. Here, is a specific example of an infringement upon our right to representative government. Failure to address the public's substantiated concerns will undoubtedly have a harmful effect on the legitimacy of our law enforcement activities. For these reasons, I urge you to take the public's concerns seriously and not dismiss them as "mere hype."

With regard to your question about how to "educate and encourage a civil debate on some of the challenges between national security and our civil liberties," I would respectfully suggest that you task the Inspector General of the Department of Justice to do a follow-up on his report released last summer. He was not asked to do an investigation of the impact of the PATRIOT Act. Such an investigation is urgently needed given the revelations of profound abuse of detention power immediately following September 11th. The public has serious concerns about these abuses and the singling out of minorities. Their concerns are quite substantiated.

See, e.g., J. Elijah, *The Reality of Political Prisoners in the United States*, 18 HARV. BLACKLETTER L.J. 129 (2002) ("after September 11 hundreds of immigrants, mostly of Middle Eastern descent were rounded up and interned in a manner reminiscent of

American treatment of Japanese people during World War II."). NSYEERS part of PATRIOT Act?

> National security is no excuse, as Justice Jackson wrote during World War II, " . . . freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *West Virginia State Bd. Of Educ. V. Barnette,* 319 U.S. 624, 642 (1943).

I would also suggest that you hold public congressional hearings in which members of the administration would report on specific examples of how the PATRIOT Act has undermined terrorist plots. Such extravagant powers as those granted to the administration by the PATRIOT Act should not be renewed or allowed to continue absent concrete evidence that they are effective means of combating terrorism. The burden to justify the PATRIOT Act, given its high propensity to chill freedom of association and expression, rests not on the public but on our public servants.

Of course, I do not believe that the "struggle of balancing civil liberties with national security" is a "zero-sum game." It is for this reason that I am concerned that so much has happened to change our fundamental liberties while so little has happened to reform antiquated and inefficient law enforcement. As so many experts have recently testified on the Hill, our law enforcement need more resources and they need to be better coordinated. Because of the overemphasis on new legal powers, I do have concerns that we are no safer from terrorism today, than we were in 2001.

Ineffective law enforcement is the real problem. It can be fixed without the PATRIOT Act and without infringing on civil rights. As the Reverend Martin Luther King, Jr. so eloquently stated from his jail cell in Alabama, "there are two types of laws: There are *just* laws and there are *unjust* laws. I would agree with Saint Augustine that 'An unjust law is no law at all.'" M.L. King, LETTER FROM A BIRMINGHAM JAIL (April 16, 1963).

Respectfully submitted,

Nanette Benowitz,
President League of Women Voters of Utah

Bruce G. Cohne
525 East First South, Suite 500
P. O. Box 11008
Salt Lake City, UT 84147-0008
Telephone: (801) 532-2666
Facsimile: (801) 355-1813
E-Mail Address: crslaw.com

May 14, 2004

Honorable Orrin G. Hatch
United States Senator and
Chairman of the United States Senate
Committee on the Judiciary
Attention: Barr Huefner
224 Dirksen Senate Office Building
Washington, D.C. 20510
Electronic version has been sent pursuant to request under letter of May 7, 2004.

Dear Senator Hatch:

Pursuant to your request by letter dated May 7, 2004 my response is as follows:

1. The difficulty in reading and understanding the USA Patriot Act of 2001 (Act) is, in my opinion, the method of presentation and the incorporation of many statutory and code amendments into a single piece of complex legislation. If I were rewriting the bill and trying to make it reasonably understandable I would do the following: After the reference to Short Title Section 1 I would insert a new (b) entitled Federal Statutes and U.S. Code Provisions Amended or Modified by the USA Patriot Act of 2001. I would then list each of the various federal statutes and code provisions in alphabetical and numerical order, that are amended or modified by the Act making a reference to the section or sections of Act modifying the particular statute or code provision.

Then provide a (c) which would be entitled Definitions and entitle it: "Terms defined in the USA Patriot Act of 2001," and list alphabetically each of the various terms defined in the Act, cross referenced to Act sections where the

term is defined. These two changes enable a person to have before them at the beginning of the Act the various statutes and code provisions involved as well as the various terms defined therein. Under (d) would be the Table of Contents. By making changes suggested in (b), (c) and (d) above any reading the Act would be more organized and people would have an opportunity to sift through the various amendments to the various statutes without jumping from one statute to the other.

The next area I would address, would be to separate out Title III and make it either an addendum or separate Act and refer to it rather than as Section III, as it is stated in the Act, refer to it as the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001 making this Act stand on its own as separate and distinct from the USA Patriot Act rather than being incorporated within the terms of the Act. These appear to be two separate Acts and should be viewed as such. I would also treat the International Money Laundering Abatement and Anti-Terrorist Financing Act in the same manner I have approached the USA Patriot Act, i.e. setting out a section at the beginning indicating which federal statutes and code provisions have been amended, listing them in numerical and alphabetical order, and then providing a section on definition of terms.

You also asked for suggestions to amend the USA Patriot Act.

First (other than as set forth herein) and foremost prior to making any major amendment or modification of the Act or adopting proposed amendments, i.e. "The Safe Act." It is my suggestion to wait until after the 911 Commission has finished its hearings, take the report of those hearings together with Paul Bremmer's report on the National Commission on Terrorism entitled *Countering the Changing Threat of International Terrorism* of 2000, take a look at Bremmer's report prior to 911, and the 911 Commission's report, analyze the Act in light of both reports together with the Safe Act and then make changes deemed appropriate and necessary to the Act.

Specifically, in any event, I suggest an amendment to Section 215 of the Act entitled *Access to Records* and other items under the Foreign Intelligence Surveillance Act. This proposed amendment goes to Section 501 of the Foreign

Intelligence Surveillance Act of 1978 by amending subsection (c)(1) modifying the following language which currently reads as follows: "Upon an application made pursuant to this section, the Judge shall enter an ex parte order as requested, or as modified, approving the release of records if the Judge finds that the application meets the requirements of this section." I would amend the above language to read as follows: "**Upon an application made pursuant to this section, the Judge shall enter an ex parte order upon a showing of probable cause as requested and set forth in the application or as the application is modified either by the applicant or the Judge, approving the release of the records sought providing the Judge finds that otherwise the application meets all of the requirements of this section**." The reason for the above change, and I would urge throughout the Act to make the probable cause standard the standard by which all warrants and orders issued to be consistent with the Fourth Amendment of the United States Constitution which reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, *and no warrant shall issue, but upon probable cause, supported by oath or affirmation*, and particularly describing the place to be searched, and the persons or things to be seized." (emphasis added). I would also suggest that all applications for a warrant under the Act incorporate a full description of the place to be searched and the persons or things to be seized. Such a procedure would not prohibit "sneak-n-peek" warrants or "roving wiretaps" but would make the basis of the warrant to be founded upon a finding of probable cause and the setting forth of the specifics of the people targeted and the items targeted avoiding potential abuses under the Act.

The second amendment I propose addresses section 802 of the Act *Definition of Domestic Terrorism* and in particular (5) the term Domestic Terrorism which currently is written as follows: "The term domestic terrorism means activity that - (A) involves acts dangerous to human life that are a violation of the criminal laws of the United States or any state; (B) appear to be intended - (I) to intimidate or coerce a civilian population; (II) to influence the policy of a government by intimidation or coercions; or (III) to effect the conduct of a government by mass destruction, assassination, or kidnaping; and (C) occur primarily within the territorial jurisdiction of the United States." I suggest revised

language that reads as follows: "**The term domestic terrorism means planned or organized activities that - (A) involve acts inherently or designed to be dangerous to human life which actions are a violation of the criminal laws of the United States or the felony statutes of any state; (B) and are determined, intended or calculated through the use of force and violence - (I) to intimidate or coerce a civilian population; (II) to unlawfully influence the policy of a government by intimidation or coercion; . . .**"

The purpose of these changes are to more narrowly define what domestic terrorism is. The problem as I see it with the current definition is for example, a group protesting outside of a Planned Parenthood Clinic advocating or intimidating women not to enter the clinic in violation of current federal law or local ordinances could be deemed domestic terrorists, which is not he intent of the Act. The First Amendment to the United States Constitution provides in part ". . . or of the people peacefully to assemble, and to petition the government for redress of grievances." It is important that constraints on assemblages which may border on, or in fact may be an act of civil disobedience, even though volatile of some state law on gathering does not rise to the level of becoming an act of domestic terrorism. It is the use of the word appear and the violation of any criminal provision that gives rise to an overly broad definition of domestic terrorism if the purpose of the gathering is to influence or intimidate government through the method of striking or a large gathering. Such as the women's march on Washington, the civil rights protests of the 1960's for civil rights. Such gatherings while intended to be peaceful may become violent, but those people are not terrorists. Many of the changes in our society which have been for the good would never have occurred had the Act with its present definition of Domestic Terrorism been in effect.

You further requested that I address four specific questions. I will address them as follows:

1. Do you agree our country is better prepared to stop acts of terrorism today than we were two years ago? I would answer that questions as follows: Yes, but not necessarily due to the adoption of the USA Patriot Act. I would

further add that government was more prepared to deal with acts of domestic terrorism after Oklahoma City than before the Oklahoma City bombing.

2. Can anyone cite specific examples of what they would consider abuse under the provisions of the Patriot Act? Since most of the activities of government provided for in the Patriot Act are secret it is not possible for the public to be aware of abuses especially of the sneak-n-peek provisions or of the roving wiretap provisions. Actions ordered by FISA courts or condoned under FISA. Therefore I am unable to answer the question simply because I do not have access either under the Freedom of Information Act or through sources that can verify what has or has not been done as an abuse under the provisions of the Patriot Act of our fundamental rights and liberties. However, I would suggest that all FISA court proceedings be made public after five years from the date an investigation closes. Further, that the statute of limitations for an aggrieved citizen be two years from date of discovery of the abuse. I would also suggest that governmental immunity not be available where a showing is made that people have been abused by reason of a FISA court order.

3. What specific changes if any would you recommend to the Patriot Act to insure that liberties are preserved while enabling law enforcement to combat terrorism? I have previously, in this letter, indicated a number of general and two specific changes to the Act.

4. Do you believe that the struggle of balancing civil liberties with national security is a zero sum game? I do not believe the sacrificing of liberty is ever justified in the guise of obtaining greater national security. Our national security and the freedom we enjoy rests with the United States Constitution and the Bill of Sights. Once we sacrifice a freedom or right we the people almost never get those rights and freedoms returned. While government wants the people to trust it government must also trust the people. After all, are we not a government of the people, by the people, for the people?

5. Roving Wiretaps. I do have the technological expertise nor the legal background to make a suggestion as to modifications as to Section 206 and leave that to those who are better qualified.

I sincerely appreciate the opportunity to respond to your inquiry of May 7 and hope my suggestions have been balanced, candid and useful.

Very truly yours,

Bruce G. Cohne

MUNGER, TOLLES & OLSON LLP

355 SOUTH GRAND AVENUE
THIRTY-FIFTH FLOOR
LOS ANGELES, CALIFORNIA 90071-1560
TELEPHONE (213) 683-9100
FACSIMILE (213) 687-3702

33 NEW MONTGOMERY STREET
SAN FRANCISCO, CALIFORNIA 94105-9781
TELEPHONE (415) 512-4000
FACSIMILE (415) 512-4077

PETER R. TAFT[1]
ROBERT K. JOHNSON[1]
ALAN V. FRIEDMAN[1]
RONALD L. OLSON[1]
DENNIS E. KINNAIRD[1]
RICHARD S. VOLPERT
SIMON M. LORNE
DENNIS C. BROWN[1]
ROBERT E. DENHAM
JEFFREY I. WEINBERGER
ROBERT L. ADLER
CARY B. LERMAN
CHARLES D. SIEGAL
RONALD K. MEYER
GREGORY P. STONE
VILMA S. MARTINEZ
BRAD D. BRIAN
BRADLEY S. PHILLIPS
GEORGE M. GARVEY
WILLIAM D. TEMKO
STEVEN L. GUEST
ROBERT E. KHAUSS
H. GREGORY MORGAN
STEPHEN M. KRISTOVICH
JOHN W. SPIEGEL
TERRY E. SANCHEZ
STEVEN M. PERRY
RUTH E. FISHER
MARK B. HELM
JOSEPH D. LEE
MICHAEL R. DOYEN
MICHAEL E. SOLOFF
GREGORY D. PHILLIPS
LAWRENCE C. BARTH
KATHLEEN M. MCDOWELL
GLENN D. POMERANTZ
THOMAS B. WALPER
RONALD C. HAUSMANN
PATRICK J. CAFFERTY, JR.
JAY M. FUJITANI
O'MALLEY M. MILLER
SANDRA A. SEVILLE-JONES
MARK H. EPSTEIN
HENRY WEISSMANN
KEVIN S. ALLRED
MARC A. BECKER
CYNTHIA L. BURCH
BART H. WILLIAMS
JEFFREY A. HEINTZ
JUDITH T. KITANO
KRISTIN LINSLEY MYLES
MARC T.G. DWORSKY
JEROME C. ROTH
STEPHEN D. ROSE
JEFFREY L. BLEICH
GARTH T. VINCENT
TED DANE
MARK SHIKDERMAN
STUART N. SENATOR
MARTIN D. BERN
STEVEN B. WEISBURD
EDWARD C. HAGEROTT, JR.
RICHARD E. GRODYAN
ROBERT L. DELL ANGELO
BRUCE A. ABBOTT
JONATHAN E. ALTMAN
MARY ANN TODD
MICHAEL J. O'SULLIVAN
KELLY M. KLAUS
DAVID B. GOLDMAN
BURTON A. GROSS
KEVIN S. MASUDA
HOJOON HWANG
KRISTIN S. ESCALANTE
DAVID C. DINIELLI
ANDREA WEISS JEFFRIES
PETER A. DETRE
PAUL J. WATFORD
DANA S. TREISTER
CARL H. MOOR
ALLISON B. STEIN
MARSHA HYMANSON
MONICA WAHL SHAFFER
SUSAN R. SZABO
DAVID M. ROSENZWEIG
DAVID H. FRY
STEPHEN E. MORRISSEY
TAMERLIN J. GODLEY
LINDA S. GOLDMAN
TODD E. HOLZ
LINDA M. BURROW
LISA J. DEMSKY
ANDREW C. FINCH
MALCOLM A. HEINICKE
JAMES C. RUTTEN
SEAN P. GATES
JOHN P. HUNT
J. MARTIN WILHITE
PAUL A. DAVIS
NATALIE PAGES STONE
RICHARD ST. JOHN
BRETT J. RODDA
BRIAN T. DALY
TIMOTHY B. EVANS
C. DAVID LEE
CAROLYN HOECKER LUEDTKE
KIRSTIN M. AULT
JOSEPH S. KLAPACH
LISA VANCE CASTLETON
C. DABNEY O'RIORDAN
STEVE KIM
REDMG-SOO KIM
ROHIT K. SINGLA
RANDALL G. SOMMER
BROOKS E. ALLEN
EMILY M. STEPHENS
JEFFREY S. MANNING-CARTWRIGHT
AARON M. MAY
BRYONY J. GAGAN
SHONT E. MILLER
JASON L. HAAS
MANUEL F. CACHAN
ERIC J. LORENZINI
HAMA SEFERIAN
MEGAN M. LA BELLE
KATHERINE K. HUANG
SARAH KURTIN
KATHERINE M. FORSTER
MONINA S. WIENER
BAYRON T. GILCHRIST
ADAM R. WICHMAN
ROSALIND WANG
JOSEPH J. YBARRA
ROSEMARIE T. RING
ANNE M. VOIGTS
JEFF A. SCHWARTZ
AMANDA SCHREIBER
BLANCA FROMM YOUNG
ROBERT E. SATTERTHWAITE
JAY B. SHAPIRO
A. JOSHUA MALLAMUD
LINDSAY D. MCASKILL
MARK H. KIM
KATE K. ANDERSON
ALISON J. MARKOVITZ
ROHIT KHANNA
H. LOREN KESSLER

RICHARD D. ESBENSHADE[1]
OF COUNSEL

E. LEROY TOLLES
(RETIRED)

[1]A PROFESSIONAL CORPORATION

May 24, 2004

WRITER'S DIRECT LINE

(213) 683-9125
(213) 683-5125 FAX
collinsdp@mto.com

VIA ELECTRONIC MAIL AND U.S. MAIL

The Hon. Orrin G. Hatch, Chairman
Senate Judiciary Committee
Attn: Barr Heufner
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Hatch:

Thank you for the opportunity to testify before the Committee during its recent field hearing in Salt Lake City, Utah. Enclosed please find my answers to the written questions that I received from you after the hearing. Please do not hesitate to let me know if there is any way I can be of further assistance.

Sincerely,

Daniel P. Collins

DPC:let
encl.

1010380.1

Answers to Questions from Chairman Hatch to Dan Collins
April 14, 2004 Utah Field Hearing of the Senate Judiciary Committee
on "Preventing and Responding to Acts of Terrorism: A Review of Current Law"

Q.1: Mr. Collins, you mention in your written testimony the importance of laws that are "technologically neutral." Could you elaborate for us what you mean by this concept and what the PATRIOT Act does to implement it?

Answer:

The idea behind the notion of "technological neutrality" is that neither privacy nor legitimate law enforcement efforts should suffer as a result of advances in technology. Our Constitution and our laws have long provided an array of basic protections for communications and records, while at the same time permitting certain law enforcement actions with appropriate authorization. However, advances in communications and other technologies can in some cases have the practical effect of altering one side or the other of this balance. The principle of "technological neutrality" is that statutory law needs to take account of the potential for new technologies to alter the settled balance. In crafting standards that will apply to new technologies, Congress should endeavor, to the extent feasible, to ensure that the same balance that has traditionally applied in the context of older technologies is respected. As I stated in my testimony:

> "[J]ust because a transaction is conducted using a new technology, there should not have to be a loss of privacy when compared to similar transactions using older technologies. To use an example, the privacy protection for ordinary email should be roughly equivalent to that of an ordinary postal letter. Conversely, the emergence of new technologies should not provide criminals with new ways to thwart legitimate and legally authorized law enforcement action. Cyberspace must not be permitted to become a "safe haven" for criminal activity. The notion of technological neutrality takes into account both sides of the coin."

The PATRIOT Act faithfully implements this notion of technological neutrality in a wide variety of areas. A few examples will illustrate the point:

- Section 211 eliminates the irrational disparity in prior law under which (at least in the view of some courts) different levels of protection were afforded to Internet communications depending upon whether the person used a cable company, as opposed to a telephone company, to reach the Internet. *See* Pub. L. No. 107-56, § 211, 115 Stat. at 283-84.

- Section 216 enshrines the principle of technological neutrality in the statutes governing pen registers — devices to capture routing and signaling information, but

not content. The standards established in these laws now clearly apply, in an even-handed way, to both electronic communications and telephonic communications. Moreover, section 216 is a good illustration of the importance of taking into account *both* sides of the "technological neutrality" coin: while section 216 applies the same overall standards to both kinds of communications, it also contains specific provisions that are tailored to unique practical concerns that are presented *only* in the context of electronic communications. Much has been said about the specific privacy concerns raised about the use of government-installed programs to implement pen register orders in the context of electronic communications. To take account of these legitimate concerns, the Act provides for judicial oversight of such deployments by requiring detailed reporting to the court whenever such a government-installed program is used to implement a pen/trap order involving electronic communications. 18 U.S.C. § 3123(a)(3). Section 216 thus properly crafts standards that are designed, in their practical effect, to ensure that the same balance that exists for telephonic communications will exist for electronic communications.

- Section 209 eliminates the pre-existing disparity in prior law between the standards for obtaining stored email and those for obtaining stored voicemail. Under prior law, voicemail stored with a third party required a full-blown Title III order, but stored email (and voicemail on the criminal's home answering machine) could be obtained with a regular search warrant. Pub. L. No. 107-56, § 209, 115 Stat. at 283.

Q.2: Could you address the concern that we hear from many that the PATRIOT Act lowers the standard and the supervision of the courts in granting various search warrants that are permitted?

Answer:

The Patriot Act in numerous respects preserves, and sometimes enhances, pre-existing standards for judicial supervision. Again, a few examples will illustrate the point.

- Federal statutory law ("Title III") contains an appropriately stringent set of standards governing the interception of live communications by wiretapping. *The PATRIOT Act leaves unchanged the full panoply of substantive protections provided by Title III.* Instead, it merely extends this pre-existing set of strict standards so that wiretapping will be authorized in terrorism cases under the same standards that it was already authorized in organized crime cases. One of the requirements of Title III is that the investigation must involve an offense that is on Title III's list of offenses that are eligible for wiretapping. 18 U.S.C. § 2516. The Patriot Act simply adds to this list six terrorism offenses, unlawful possession of chemical weapons, and computer fraud and abuse. Pub. L. No. 107-56, §§ 201, 202, 115 Stat. at 278. But, as noted, it leaves unchanged the full range of substantive protections in Title III, including the extensive judicial oversight provided for in Title III.

- Section 213 of the Patriot Act codifies long-standing authority to delay notification of the execution of a warrant. *See, e.g., United States v. Villegas*, 899 F.2d 1324, 1337 (2d Cir. 1990). In doing so, however, *it does not alter the standards for granting the underlying warrant, and it preserves judicial oversight over the decision to delay notification*: the court must independently find "reasonable cause" to justify the delay; the court must set forth in the warrant the "reasonable period" for such delayed notice; and such a deadline may be extended only upon a subsequent finding by the court that "good cause" has been shown for the additional delay. 18 U.S.C. § 3103a(b).

- As noted above, section 216 actually *enhances* judicial oversight of pen register orders involving electronic communications. Section 216 applies, in the context of electronic communications, the same standards that have long governed pen registers involving telephonic communications. However, because of unique concerns involving government-installed devices used to implement electronic pen-register orders, the act creates a new, special requirement providing for judicial oversight of whatever information is collected by such devices.

- In enhancing the Government's ability to obtain records that may be relevant to a foreign intelligence investigation, section 215 (unlike a grand jury subpoena) provides for judicial review and oversight by the FISA Court *before* any such records may be obtained. Contrary to what some critics have suggested, this review is *not* merely a rubber-stamp, because the statute explicitly recognizes the court's authority both to deny and to "modif[y]" the requested order. 50 U.S.C. § 1861(c)(1).

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 7, 2005

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Enclosed please find responses to questions posed to Deputy Attorney General, Mr. James B. Comey, Jr., following Mr. Comey's appearance before the Committee on April 14, 2004. The subject of the Committee's hearing was "Preventing and Responding to Acts of Terrorism: A Review of Current Law."

We hope that this information is helpful to you. If we may be of additional assistance, we trust that you will not hesitate to call upon us.

Sincerely,

William E. Moschella
Assistant Attorney General

Enclosures

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

April 14, 2004 Utah Field Hearing on "Preventing and Responding to Acts of Terrorism: A Review of Current Law"

James B. Comey, Jr.
Deputy Attorney General

Committee on the Judiciary
United States Senate

Questions of Senator Hatch

1. First, do you agree that our country is better prepared to stop acts of terrorism today than we were two years ago?

Response: Yes, we are better prepared to stop acts of terrorism today than we were two years ago, due in large part to the tools contained in the USA PATRIOT Act, as well as the additional resources provided by Congress to fight terrorism.

2. Can anyone cite specific examples of what they would consider abuse under the provisions of the PATRIOT Act?

Response: The Department's Office of the Inspector General (OIG) is required under section 1001 of the USA PATRIOT Act to report to Congress every six months on allegations received by the OIG alleging abuses of civil rights or civil liberties by employees of the Department of Justice. The OIG issued its fifth report under section 1001 in September 2004.

The OIG has advised that, with the possible exception of one matter, none of the complaints submitted to the OIG alleging misconduct by employees of the Department has related to the use of a provision of the USA PATRIOT Act. We understand that Senator Feinstein reported last year that, when her staff e-mailed the ACLU and asked them of instances where the USA PATRIOT Act had been abused, they responded that they had none.

3. What specific changes, if any, would you recommend to change the PATRIOT Act to ensure that liberties are preserved while still enabling law enforcement to combat terrorism?

Response: We believe that the substantive provisions of the USA PATRIOT Act have provided valuable tools to intelligence and law enforcement personnel in the war against terrorism while at the same time preserving the civil rights and civil liberties of the American people. For this

reason, we do not believe that any changes need to be made to the substantive provisions of the USA PATRIOT Act. Rather, we support repealing section 224 of the Act, so that those provisions of the Act that are scheduled to sunset will not expire at the end of 2005. If those provisions were allowed to expire, law enforcement's ability to combat terrorism and other crime would be seriously diminished.

4. Do you believe that the struggle of balancing civil liberties with national security is a zero-sum game?

Response: No, we emphatically reject the notion that liberty and security are inherently conflicting goals. Rather, we believe that we can and must protect fundamental liberties and safeguard national security at the same time. Liberty and security are interrelated and mutually reinforcing values. Without liberty, the American people cannot truly be secure. And without security, the American people will not have the capacity to exercise and enjoy their liberty to the fullest extent possible.

Roving Wiretaps

5. Would you suggest any changes to the PATRIOT Act's Section 206, the so-called "roving wiretaps" provision? If so, please let me ask you for alternative suggestions. I feel we need to equip law enforcement and other agencies that fight terrorism with the tools to deal with 21st Century terrorists and not organized crime of fifty years ago. Search warrants were always meant to go beyond the mere tapping of a telephone wire. We know that terrorists regularly communicate by various means including land lines, cell phones, email, and are the first to exploit the newest technology for their own means. How can we effectively trace terrorists unless we allow a wiretap warrant to follow the suspect instead of being limited to one of the many means the suspect will use to coordinate an attack?

Response: We do not believe that section 206 of the USA PATRIOT Act needs to be changed or amended. Since 1986, law enforcement has been able to use multi-point or "roving," wiretaps, in which a wiretap authorization attaches to a particular suspect, rather than a particular communications device, to investigate ordinary crimes, such as drug offenses and racketeering. As with any other search warrant, roving wiretaps currently require – and required prior to the USA PATRIOT Act – judicial authorization, based upon a showing of probable cause that the information or property to be searched for or seized constitutes evidence of a criminal offense. *See generally* U.S. Department of Justice, *Delayed Notice Search Warrants: A Vital and Time-Honored Tool for Fighting Crime* (Sept. 2004) (available at www.lifeandliberty.gov). Section 206 simply authorized the use of this same technique in national-security investigations. This provision has enhanced the government's authority to monitor sophisticated international terrorists, who are trained to thwart surveillance, such as by rapidly changing cell phones, just

before important meetings or communications. Were section 206 of the USA PATRIOT Act allowed to expire at the end of 2005, our ability to track terrorists effectively would be severely diminished.

Questions of Senator Leahy

1. **Chairman Hatch stated during the second panel of the Utah field hearing that all of the reports to Congress required of the Department of Justice by the PATRIOT Act have been submitted. For the benefit of interested members of the public, please list for the hearing record all such reports, including the following:**

   (a) the section of the PATRIOT Act requiring the report;

   (b) the date the report(s) are due to Congress, the date(s) such reports were actually transmitted, and to what Committee or member(s) of Congress the reports were submitted; and

   (c) the location where such reports may be viewed by members of the general public, such as via a link to the relevant page on the Department's website. If such report(s) are classified or otherwise unavailable to the general public, please note such classification.

Response: Section 205(c) of the Act required the Attorney General to provide a report to Congress on the employment of translators by the FBI and other components of the Department. The Act did not specify a due date for the report; however, the report was provided to the Chairman and Ranking Member of this Committee by letter dated December 22, 2004.

Section 215 of the Act requires a semiannual report regarding requests for the production of certain documents. A report was transmitted on January 5, 2004. The Attorney General's Report on Access to Certain Business Records for Foreign Intelligence Purposes was delivered to the Permanent Select Committee on Intelligence of the House of Representatives, the Select Committee on Intelligence of the Senate, and the Committees on the Judiciary of House of Representatives and the Senate. These reports generally are classified as "Secret" and are not posted on the DOJ website. A second report on the Department's use of section 215 is classified and was delivered to the House and Senate Intelligence and Judiciary Committees on September 24, 2004.

Section 403(b) of the Act requires a report regarding the implementation of procedures to determine the existence of criminal history records for visa applicants. This is a joint Department of Justice and Department of State report. Although the report was due on October 26, 2003, Justice and State remain in the process of implementing and improving methods of identifying aliens with criminal histories and have not completed the report.

Section 403(c) of the Act requires a report on the implementation of a technology standard that can be used to verify the identity of persons applying for a visa or seeking to enter the United States pursuant to a visa. This is a joint Department of Justice and Department of State biannual report. Due to the creation of the Department of Homeland Security, and the transfer of immigration authorities to that Department, future reports are the responsibility of the Departments of Homeland and State, in consultation with the Attorney General. The first report was transmitted on February 4, 2003. The report was sent to the Honorable F. James Sensenbrenner, Jr., Chairman Committee on the Judiciary; The Honorable Orrin G. Hatch, Chairman, Committee on the Judiciary; The Honorable Henry J. Hyde, Chairman, Committee on International Relations; The Honorable Richard D. Lugar, Chairman, Committee on Foreign Relations, The Honorable John McCain, Chairman, Committee on Commerce, Science, and Transportation; the Honorable W.J. Tauzin, Chairman, Committee on Energy and Commerce; the Honorable C.W. Bill Young, Chairman, Committee on Appropriations; and the Honorable Ted Stevens, Chairman, Committee on Appropriations. The report is not currently posted on the Department of Justice website.

Section 405 of the Act requests a report on the feasibility of enhancing the Integrated Automated Fingerprint Identification System (IAFIS) to be better identify a person who holds a foreign passport or visa and may be wanted in connection with a criminal investigation in the U.S. or abroad before the issuance of a visa or the entry or exit from the U.S. The Act does not specify a deadline for submission of this information. In compliance with Section 405, the FBI Criminal Justice Information Services (CJIS) Division is conducting a technical study to assess the feasibility of upgrading IAFIS to provide real-time, electronic access to IAFIS data from consulates overseas and U.S. ports-of-entry. In July 2004, the Department notified Congress of the FBI's proposal to reprogram funds to support this study. When complete, the report submitted to Congress will recommend the most feasible AFIS solution to identify and detain individuals who may be wanted in connection with a criminal investigation or who may pose a threat to the national security. As an interim measure, FBI/CJIS continues to provide the DHS with a daily "wants and warrants" extract from the IAFIS database.

Section 412 of the Act requires a report to the Committees on the Judiciary of the House of Representatives and the Senate regarding the detention of alien terrorists. This is a semiannual reporting requirement and the first report was transmitted on April 23, 2003. This reporting requirement now is the responsibility of the Department of Homeland Security.

Section 906 of the Act requires the Central Intelligence Agency (CIA), the Department of the Treasury, and the Department of Justice to report on the feasibility of reconfiguring Treasury's Foreign Terrorist Asset Tracking Center. The report was transmitted by the CIA on July 23, 2002. The report is classified as "Secret" and was sent to the Honorable Bob Graham and the Honorable Richard C. Shelby, Select Committee on Intelligence, United States Senate.

Section 1001 of the Act requires a semiannual report to Committees on the Judiciary of the House of Representatives and the Senate on certain civil rights complaints against the Department of Justice. The first report was transmitted in June 2002, and the most recent report

was transmitted in September 2004. These reports are posted on the Department of Justice website at: http://www.usdoj.gov/oig/igspecr1.htm.

Section 1008 of the Act requires a report to the Committee on International Relations and the Committee on the Judiciary of the House of Representatives, and the Committee on Foreign Relations and the Committee on the Judiciary of the Senate, on the feasibility of the use of Biometric Identifiers. The report was due on January 24, 2002, and was transmitted to Congress on September 12, 2002. This report is not currently posted on the Department of Justice website.

Section 1009 of the Act required a report from the FBI to Congress by February 23, 2003, on the feasibility of providing airlines via computer the names of passengers who are suspected of terrorist activity. The Transportation Security Administration (TSA) subsequently was created in order to address transportation security, including security for commercial airports and air carriers. TSA currently provides the airlines with the names of known or suspected terrorists for comparisons against their manifests. On September 24, 2004, TSA announced its intention to implement a next generation aviation passenger prescreening program called "Secure Flight." Testing of the Secure Flight program began on November 30, 2004.

2. Referring to the PATRIOT Act, you stated in your testimony that, "[T]here is always a risk when you put a new tool in someone's hands. But that risk is minimized significantly when the tool is put in the hands of professionals who are closely monitored, not only by the Department of Justice, but also by the courts and by Congress." I agree that such oversight is critically important, and that is why I have become so frustrated with the Department's lack of cooperation when it comes to responding in a timely and comprehensive manner to congressional inquiries. By my count, approximately 30 letters remain outstanding, some more than two years old. These numbers represent only correspondence from me, not those sent by other members of the Committee. As the second-highest ranking official at the Department of Justice, what steps are you taking to ensure that the Department fully cooperates with Congress on oversight issues?

Response: We believe it is very important to be responsive to appropriate congressional oversight. Everyone at the Department takes the congressional oversight function seriously. And while there is always room for improvement, we think our record is very good. The Department, when invited, has been available at every opportunity to appear before your Committee, as well as other Committees in both the Senate and the House of Representatives.

During the last four years, the Department has sent more than 590 witnesses to more than 450 congressional hearings. We have responded to approximately 6,200 written questions for the record ("QFRs"), approximately 3,200 of which were related to the Department's efforts in combating terrorism. We continue to work on more than 400 pending QFRs relating to various hearings during the 108th Congress. The Department and its components have briefed Members

of Congress and their staffs more than 1,400 times during the past four years, and we have answered more than 14,500 letters from Members of Congress. The Department has submitted to Congress 57 legislative proposals and has commented through views letters on legislation over 180 times.

We accomplished these tasks with diminishing resources. For example, the Fiscal Year 2004 budget approved by Congress appropriated $350,000.00 less to the Office of Legislative Affairs than it did the year before. Congress also reduced the number of positions allotted to OLA. Although these reductions may seem small, they represent a 10 percent reduction from the prior year's funding level, which is dramatic for such a small office.

Finally, in 2003, you sent the Department forty-five letters. In 2004 alone, not including your extensive Questions for the Record that numbered well into the hundreds, you sent over fifty letters to the Department. As you mention in your question, in the spring of 2004 your staff provided us a list of approximately 30 letters, which you believed were outstanding. However, upon further research we determined that we had already responded to nearly half of those letters, and we are pleased to report that we have responded to every outstanding letter on that list.

The Department will make every effort to continue to improve our timeliness in responding to Congressional inquiries.

3. You said in your testimony that "we had built a wall, both by law and culture and practice, that made FBI agents working on either side of the wall afraid that if they talked to somebody on the other side it would be a career ender." Despite the Attorney General's recent suggestion that "the wall" between criminal and foreign intelligence investigations was created by one of your predecessors in a prior administration, this separation was actually established in the 1980s and evolved over time. In fact, the interpretation of "the wall" that was recently criticized by the Attorney General was actually reaffirmed by your immediate predecessor in 2001. I do not suggest that you played any role with regard to the Attorney General's recent statements, I simply want to make the hearing record clear on this point. I have several questions to ask regarding these issues:

(a) In its opinion reversing some of the FISA court's findings in the only published case to date, the FISA Review Court noted that a key argument made to the Review Court had never previously been advanced by the government before a court or Congress, despite the fact that the briefings in the lower court decision were filed after September 11, 2001, and the enactment of the PATRIOT Act. The argument advanced that was eventually adopted by the FISA Review Court was that the pre-PATRIOT Act restrictions on the government's intention to use foreign intelligence information in criminal prosecutions found no support in either the language of FISA or its legislative history. Can you provide insight into what factors resulted in advancement of this particular argument and why it was not made before by the

government when the case was pending in the lower court?

Response: From at least the 1970s onward, all three branches of government have shared a common understanding that foreign intelligence collection and law enforcement were distinct executive functions. What we now refer to as the "wall" originated in constitutional principles, legislative enactments and reports, judicial rulings, and in executive branch understandings and interpretations of those authorities. Although the Foreign Intelligence Surveillance Act, or FISA, was designed to collect foreign intelligence information, it was understood that such information could be used as evidence in a criminal prosecution so long as intelligence - and not law enforcement - was the "primary purpose" of the collection. Following the investigation of Aldrich Ames a confluence of legal, bureaucratic and cultural factors led to the development in the mid-1990s of written internal Department of Justice procedures that directly regulated the interaction between law enforcement and intelligence officials in terrorism and espionage cases.

These procedures were set forth in broad policy decision documents, such as a July 1995 Attorney General memorandum regarding FBI contacts with criminal prosecutors, as well as other more case-specific decisions that were taken, such as the March 1995 Deputy Attorney General memorandum setting forth procedures for conducting a particular set of related criminal and intelligence investigations. These procedures were intended to permit a significant degree of interaction and information sharing among prosecutors and FBI agents in intelligence cases (so long as prosecutors did not direct or control the investigation toward law enforcement objectives) while at the same time ensuring that the FBI would be able to obtain or continue FISA coverage and, later, use the fruits of that coverage in a criminal prosecution. The manner in which the written procedures were interpreted and implemented, however, resulted in far more limited information sharing and coordination between the two sides in practice than was allowed in theory under the Department's procedures. Due to unwarranted concerns (or confusion) about when sharing was permitted and a perception that improper information sharing could end a career - combined with inadequate information technology and cultural issues that further impeded proper information sharing and coordination - the exchange of information between intelligence and law enforcement officials was not as robust as it could have been.

In March 2002, following passage of the USA PATRIOT Act (the Act), the Department issued field guidance for the implementation of Sections 218 and 504(a) of the Act, which sought to eliminate the barriers that prevented effective communication between DOJ personnel assigned to foreign intelligence matters and those engaged in criminal law enforcement. In November of 2002, the Foreign Intelligence Surveillance Court of Review upheld in full section 218, as well as the Department's March 2002 procedures to implement it. The Court of Review expressly held "that FISA as amended is constitutional because the surveillances it authorizes are reasonable." *In re* Sealed Case, 310 F.3d 717, 746 (FISCR 2002). The old legal rules discouraged coordination, and created what the Court of Review calls "perverse organizational initiatives." *In re* Sealed Case, 310 F.3d at 743. In addition to upholding the Department's revised procedures, the Court of Review also noted that the old "wall" standards were not required even *prior to* the USA PATRIOT Act. *In re* Sealed Case, 310 F.3d at 723-27, 735.

We do not believe that it would be proper for the Department to disclose the internal legal discussions that took place regarding the development of the legal theory that the Department advocated before the FISA Court of Review. It is our understanding that the arguments advanced were simply the product of the efforts of many lawyers within the Department to take a fresh look at the entire issue after the attacks of September 11, 2001. The legal briefs were reviewed by interested components within the Department, and a decision was made to advance them before the FISA Court of Review.

In December 2002, the Department issued field guidance with respect to the March 2002 procedures and the Court of Review's decision.

(b) I, for one, have benefitted from the analysis of the FISA Review Court in the published opinion dated November 18, 2002, particularly regarding its historical discussion of the so-called "wall." Do you agree that court precedent is invaluable in helping to shape legal principles and initiate change when necessary? In this regard, I have been trying without success to enact S. 436, the Domestic Surveillance Oversight Act. What is your position regarding each of the following provisions of S. 436 that require certain public reporting with respect to FISA when done "in a manner consistent with the protection of the national security of the United States":

(i) the portions of the documents and applications filed with the courts established under section 103 that include significant construction or interpretation of the provisions of this Act or any provision of the United States Constitution, not including the facts of any particular matter, which may be redacted;

(ii) the portions of the opinions and orders of the courts established under section 103 that include significant construction or interpretation of the provisions of this Act or any provision of the United States Constitution, not including the facts of any particular matter, which may be redacted; and

(iii) in the first report submitted under this section, the matters specified in subparagraphs (i) and (ii) for all documents and applications filed with the courts established under section 103, and all otherwise unpublished opinions and orders of that court, for the 4 years before the preceding calendar year in addition to that year.

Response: As we noted in our letter of January 15, 2004, to Chairman Hatch regarding S. 436 (108th Congress) (copy enclosed), the Administration opposed a proposed requirement to disclose portions of FISA opinions and orders that deal with significant questions of law, because to do so would be inherently in conflict with the protection of the national security of the United States. On December 17, 2004, the President approved the "Intelligence Reform and Terrorism

Prevention Act of 2004," which requires, among other things, that the Attorney General submit to the Senate Select and the House Permanent Select Committees on Intelligence and the Senate and House Committees on the Judiciary semiannual reports containing information similar to that called for by S. 436. The Department remains concerned about possible harm to national security that may arise from this requirement but looks forward to working with Congress in providing the information Congress needs to exercise its oversight responsibilities.

4. There seemed to be some confusion in the discussion at the Utah field hearing over which provisions of the PATRIOT Act require federal law enforcement to obtain a court order before conducting surveillance and which do not. The President has muddled this argument in recent appearances by making unclear statements that imply that court orders are always required in terrorism investigations. For example, at a recent rally in Buffalo, New York, the President said, "[W]hen we're talking about chasing down terrorists, we're talking about getting a court order before we do so. It's important for our fellow citizens to understand, when you think PATRIOT Act, constitutional guarantees are in place when it comes to doing what is necessary to protect our homeland[.]"

(a) For the benefit of the interested public, and to clarify the hearing record, please confirm that Section 505 of the PATRIOT Act does not require a court order.

Response: The quote restated above is taken from the President's appearance on April 20, 2004, in Buffalo, New York, where the President was discussing two specific provisions of the USA PATRIOT Act: section 206 relating to roving wiretaps and section 213 relating to delayed notice search warrants. In his remarks, he accurately explained that in order for the government to employ either a roving wiretap or a delayed notice search warrant, the government must first obtain a valid court order. In this regard, and when the quote is taken in context, we think the President's statements regarding the USA PATRIOT Act and established constitutional guarantees are both clear and correct. We have enclosed a copy of the complete transcript of the April 20, 2004, remarks for your convenience.

With respect to section 505 of the USA PATRIOT Act, we note that this provision did not create authority to conduct surveillance; it merely amended the scope of existing National Security Letter authorities. Among the authorities amended by section 505 was 18 U.S.C. § 2709, which you introduced as part of the Electronic Communications Privacy Act of 1986 ("ECPA"). Section 2709 permits the FBI to request a wire or electronic communication service provider to furnish to the FBI subscriber information and toll billing records information or electronic communication transactional records in its custody or possession when this information is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that an investigation of a United States person is not conducted solely on the basis of activities protected by the First Amendment of the U.S. Constitution. The FBI obtains this information through the service of a National Security Letter, rather than through court order. Section 505 of the USA PATRIOT Act amended section 2709

merely to permit issuance of NSLs for information "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities."

A Federal district court in New York recently held that certain procedural aspects of section 2709 predating the USA PATRIOT Act were unconstitutional. *See Doe v. Ashcroft,* 2004 WL 2185571, 04 Civ. 2614 (VM) (S.D.N.Y. Sept. 28, 2004). Noting that "[s]ection 2709 has been available to the FBI since 1986," slip op. at 63, the court held that the provision violated the Fourth Amendment because, as applied, it effectively barred or substantially deterred any judicial challenge to an NSL request. It further opined that the nondisclosure provision within the 1986 provision operated as a prior restraint on speech, in violation of the First Amendment. As is also noted in our response to question 6(d), the Government has filed a notice of appeal in this case.

(b) Please summarize for the hearing record the other sections of the PATRIOT Act that allow for much less than a probable cause finding before a court issues an order authorizing a specific law enforcement technique.

Response: We disagree with the premise of this question and, in particular, do not agree that any of the provisions of the PATRIOT Act allow for "much less than a probable cause finding before a court issues an order authorizing a specific law enforcement technique." Rather, they provide for a different standard, not necessarily a lesser standard.

5. In your written testimony you stated, "A critical element in our battle against terrorism is to prevent the flow of money and other material resources to terrorists and terrorist organizations. By using the statutes Congress provided against material support of terrorism, the Department has successfully disrupted terrorist planning at the earliest possible stages, well before such violent plans can become reality. Utilizing the terrorist financing and material support provisions created by Congress, the Department has charged more than 50 individuals and obtained 28 convictions."

(a) Please detail how many of the 50 individuals charged and 28 convictions were under 18 U.S.C § 2339A?

Response: In implementing our proactive strategy of prevention, we have put the material support statutes to good use. Only a handful of material support prosecutions were initiated before September 11, 2001, but since then, the Department has charged more than 50 defendants with such offenses in 17 different judicial districts. Nineteen of these defendants were charged with offenses under 18 U.S.C. § 2339A, nine of whom were also charged with other material support or related offenses. Ten defendants charged under 18 U.S.C. § 2339A since September 11, 2001, have been convicted of or have pleaded guilty to this or another criminal charge.

(b) How many of the 50 individuals charged and 28 convictions were under 18

U.S.C § 2339B?

Response: Since September 11, 2001, 49 defendants have been charged with offenses under 18 U.S.C. § 2339B, 16 of whom were also charged with other material support or related offenses. Twenty-six defendants charged under 18 U.S.C. § 2339B since September 11, 2001, have been convicted of or have pleaded guilty to this or another criminal charge.

We also note that, since September 11, 2001, 29 defendants have been charged with offenses under the International Emergency Economic Powers Act (IEEPA), 16 of whom were also charged separately with material support offenses. Sixteen defendants charged under IEEPA since September 11, 2001, have been convicted of or have pleaded guilty to this or another criminal charge.

(c) Regarding those charged with terrorist financing, please list the relevant statutes and the numbers charged and convicted, respectively, under each statute.

Response: Since September 11, 2001, 51 defendants have been charged under the material support statutes and IEEPA with providing, or attempting or conspiring to provide, terrorists with such forms of support as funds, weapons, lodging, and expert advice. Three of these 51 defendants were charged under more than one of the above statutes.

- 18 U.S.C. § 2339A: 12 of these defendants were charged under 18 U.S.C. § 2339A, and 5 of these defendants have been convicted of or have pleaded guilty to this or another criminal charge.
- 18 U.S.C. § 2339B: 27 were charged under 18 U.S.C. § 2339B, and 9 of these defendants have been convicted of or have pleaded guilty to this or another criminal charge.
- IEEPA: 15 were charged under IEEPA, and 5 of these defendants have been convicted of or have pleaded guilty to this or another criminal charge.

6. Responding to concerns raised about the increased potential for government surveillance of libraries under the PATRIOT Act, the Attorney General has said that the Department has not used section 215 of the PATRIOT Act to obtain records from libraries -- or from anyone else, for that matter. You echoed this statement in your presentation at the Utah field hearing. But that is not the whole story. In a letter to my office dated September 9, 2003, the FBI stated that "an NSL [National Security Letter] can be used ... to obtain transactional records of Internet use within the library if the library serves as its own Internet Service Provider."

(a) Has the FBI served any NSLs on libraries since September 11, 2001 - - yes or no - - and if yes, on how many occasions?

Response: Information about the use of National Security Letters (NSLs) is classified. The Department will provide information about the use of NSLs in response to a Committee request.

(b) At an October 21, 2003, oversight hearing before the Judiciary Committee, Assistant Attorney General Christopher Wray confirmed that the FBI can compel the production of "certain library records" using NSLs, but said he was "not aware of" its having done so. Given his testimony on October 21 regarding NSLs, can we assume that information regarding requests made under 18 U.S.C. 2709(b) are no longer classified? If not, given the Department's recent declassification of information regarding section 215 of the PATRIOT Act, would the Department now consider declassifying information on all requests made under 18 U.S.C. 2709(b) to institutions operating as public libraries or serving as libraries of secondary schools or institutions of higher learning?

Response: Information regarding the use of NSLs remains classified. We do not believe that the declassification of the information to which you have referred is being considered at the Department.

(c) The FBI's letter of September 9, 2003, also states that the FBI has asked the Department to "clarify" a reference made in a Justice Department letter to Congress regarding obtaining "certain library records" with NSLs. Since September 11, 2001, what guidance has the Department provided to the FBI about the use of NSLs to obtain records from libraries and/or bookstores? Please provide any Department memorandum or document that discusses the circumstances under which an NSL may be issued to a library and/or bookstore.

Response: The Department has issued no guidance specific to this point. As the Attorney General has made clear, terrorism investigators have no interest in ordinary Americans' library habits and are committed to preserving the freedoms guaranteed by the First Amendment. Also, as noted previously (in the response to question 4(a)), section 505 of the USA PATRIOT Act did not create new authority to conduct surveillance. Rather, it merely amended the scope of existing National Security Letter authorities.

(d) I understand from press reports that the American Civil Liberties Union and New York Civil Liberties Union recently disclosed documents in an extraordinary sealed case in federal court involving the PATRIOT Act's expanded "National Security Letter" power. The ACLU lawsuit challenges the constitutionality of a provision that allows the Federal Bureau of Investigation to demand sensitive customer records from businesses without judicial oversight. Does the government intend to unseal its response regarding the issues raised by the ACLU with respect to the expanded definition of "internet service provider?" What is the government's position on this legal issue? Is there support in law for this interpretation of the statute? If so, please explain in full.

Response: Neither the Electronic Communications Privacy Act (of which 18 U.S.C. § 2709 is a part) nor the USA PATRIOT Act defines the term "internet service provider." This question's reference to an "expanded definition of 'internet service provider'" is therefore in error.

As noted in the answer to question 4(a), the Government has filed a notice of appeal in a case in which a district court held that certain procedural aspects of section 2709 of the Electronic Communications Privacy Act (ECPA) that predate the USA PATRIOT Act are unconstitutional. In its September 24, 2004, decision, the court disclosed (with the consent of the Government) that "John Doe" had been served with an NSL and had brought an "as applied" challenge to section 2709 of ECPA. Following the issuance of that decision, the ACLU moved for an order to permit unsealing of limited portions of the sealed pleadings and other filings. The Government consented to the unsealing of certain portions and opposed the unsealing of others. On December 22, 2004, the court entered an order requesting supplemental briefings on the issue of whether the Government's filing of its notice of appeal had divested the court of jurisdiction to further unseal the pleadings and other filings.

7. Both the President and Attorney General Ashcroft have called on Congress to further expand on the powers we granted in the PATRIOT Act by authorizing the use of so-called "administrative subpoenas" in terrorism investigations. Unlike grand jury subpoenas and orders issued under FISA, administrative subpoenas can be issued without any involvement by a court or even an Assistant U.S. Attorney. An FBI agent can simply pull a form out of his desk, fill it out, sign his name, and serve it.

(a) In a letter from the Attorney General to members of this Committee dated September 30, 2003, he stated that "judicial approval requirements," such as court orders, constitute a "critical check" on certain powers. As noted above, if court approval is so important, why does the Administration now seek to broaden the use of administrative subpoenas?

Response: As the Attorney General indicated in his letter of September 30, 2003, the judicial approval requirements set forth in the Foreign Intelligence Surveillance Act and Title III of the Omnibus Crime Control and Safe Streets Act of 1968 "represents a critical check that guarantees compliance with all applicable statutes and with the Constitution." There is no inconsistency, however, between this view of judicial approval requirements and the Department's support for extending existing administrative subpoena authorities into terrorism investigations.

First, administrative subpoenas are a time-tested investigative tool, used by numerous federal agencies in a wide variety of contexts. Currently, there are approximately 335 separate administrative subpoena authorities in the U.S. Code, granting subpoena authority in investigations of crimes including health-care fraud, false claims against the United States, and

threats against the President and others under Secret Service protection. However, although administrative subpoenas are used in a wide range of criminal investigative contexts, there is currently no statutory authority to use administrative subpoenas in terrorism investigations. The Department believes that this anomaly in the law should be corrected as there is no reason why the FBI should be able to use an administrative subpoena to catch a corrupt doctor in a health-care fraud case, but not to catch a terrorist.

Second, Administrative subpoenas are often the quickest way for investigators to obtain information critical to an investigation. And in terrorism investigations, where prevention is the most important objective, every minute counts. As you point out in your question, it is true that administrative subpoenas may be issued without prior judicial involvement. Grand-jury subpoenas, however, are also regularly issued in the absence of judicial involvement. With respect to both administrative subpoenas and grand-jury subpoenas, critical judicial oversight is provided after a subpoena is issued, rather than in advance, as recipients may challenge a subpoena by filing a motion to quash in federal district court. In addition, if the recipient of an administrative subpoena does not comply with the subpoena, the FBI cannot unilaterally enforce it. Instead, the government is required to ask a federal district court to order the subpoenaed individual to comply.

(b) If it is still true that the Department has never once used section 215 of the PATRIOT Act, which made it easier for the FBI to compel the production of documents under FISA, please explain why the Department needs additional authority of a similar nature, that is, administrative subpoena power?

Response: Section 215 is not an adequate substitute for administrative subpoena authority. In cases where immediate action is needed and time is of the essence, obtaining judicial approval, as required by section 215, may not be feasible. In such cases, the issuance of an administrative subpoena may be the only practical alternative for effective law enforcement.

(c) If the Government is not using Section 215 to get business records, what tool is the government currently using to get business records in foreign intelligence and terrorism investigations?

Response: In criminal terrorism investigations, investigators currently use grand jury subpoenas to obtain business records. In foreign intelligence investigations, investigators have authority to use section 215 or to obtain certain types of records, such as communications transaction records, financial reports, and credit information through the use of NSLs.

8. Section 218 of the PATRIOT Act amended FISA to require a certification that a "significant" purpose rather than "the" purpose of a surveillance or search under FISA is to obtain foreign intelligence information.

(a) Please estimate how many FISA surveillance orders have been obtained under the "significant purpose" standard that could not have been obtained prior to the PATRIOT Act.

Response: Because we immediately began using the new "significant purpose" standard after passage of the PATRIOT Act, we had no occasion to make contemporaneous assessments on whether our FISA applications would also satisfy a "primary purpose" standard. Therefore, we cannot respond to the question with specificity.

(b) What policy directives or guidance have been issued regarding the use of section 218 by the FBI?

Response: In order to implement section 218 of the USA PATRIOT Act, as well as other amendments made by the Act to FISA, the Attorney General issued intelligence sharing procedures on March 6, 2002. These procedures were set forth in a memorandum from the Attorney General entitled "Intelligence Sharing Procedures for Foreign Intelligence and Foreign Counterintelligence Investigations Conducted by the FBI," and were upheld by the Foreign Intelligence Surveillance Court of Review on November 18, 2002. In December 2002, the Department issued field guidance with respect to the March 2002 procedures and the Court of Review's decision.

9. Section 802 of the PATRIOT Act defines "domestic terrorism" as any activities that "involve acts dangerous to human life that are a violation of the criminal laws of the United States," if the actor's intent is to "influence the policy of a government by intimidation or coercion."

(a) How has this section been used?

Response: Section 802 of the USA PATRIOT Act, codified at 18 U.S.C. § 2331(5), provides the definition of "domestic terrorism," yet this term is not used in any substantive offense in current Federal law of which we are aware.

(b) What policy directives, memorandums, or directives have been issued or training provided regarding the scope of this section?

Response: The Department has not issued any formal policy directives, memorandums, or directives regarding the scope of section 802 of the PATRIOT Act. Informal guidance, however, has been provided to prosecutors in the field by attorneys in the Counterterrorism Section of the Criminal Division, and the FBI's Office of General Counsel has conducted training for agents that covers section 802 of the PATRIOT Act.

10. The press recently reported on the number of Foreign Intelligence Surveillance Act Orders for 2003 and that number (1,727) is drastically up from the 1,228 orders issued in 2002. Press reports also reflect that 4 applications were rejected by the FISA court. Please provide the basis upon which the court rejected the 4 affidavits.

Response: The classified semiannual report that is provided to the Senate and House Intelligence Committees pursuant to FISA would contain detailed information concerning any application denied by the Foreign Intelligence Surveillance Court during the reporting period at issue. We understand that, under applicable Senate rules and procedures, all Senators may review this report.

11. I am very interested in understanding exactly how the Department monitors, categorizes, and reports upon terrorism investigations and prosecutions. This type of data is important not only as a method of tracking the distribution of resources, but also in understanding how effectively the laws are being implemented in the field.

(a) Please detail the methods by which the Department captures and records terrorism prosecution data, particularly with reference to arrests, charges and convictions both before and after September 11, 2001. Please explain in detail what standard or definition the Department follows in determining whether to categorize a particular arrest, charge or conviction as a "terrorism" arrest, charge or conviction.

Response: The Criminal Division has tracked charges brought and convictions obtained in terrorism and anti-terrorism cases since September 11, 2001. The charges and convictions tracked by the Criminal Division reflect not only "terrorism" charges such as violations of the material support statutes, 18 U.S.C. § 2339A and 2339B, but also non-terrorism charges such as immigration, firearms, and document fraud violations that have some nexus to international terrorism.

The USAO's case management system reflects that, during FY 2003, 661 terrorism and anti-terrorism defendants were convicted. For purposes of this system, "Terrorism" cases include International Terrorism, Domestic Terrorism, Terrorist Financing, and Terrorism-Related Hoaxes; and "Anti-Terrorism" cases include Immigration, Identity Theft, OCDETF, Environmental, and Violent Crime – all cases where the defendant is reasonably linked to terrorist activity.

Of the matters tracked by the Criminal Division, since September 11, 2001, and as of November 2004, 361 individuals had been charged with criminal offenses as a result of international terrorism investigations. Of these defendants, 192 had been convicted or had pleaded guilty.

(b) Please summarize and provide a current copy of all Justice Department memoranda, reports or documents that record arrest, charge and conviction data for the Department in terrorism cases.

Response: A chart listing the charges and convictions tracked by the Criminal Division is attached. The chart does not include material that remains under seal.

(c) Do you believe that the systems currently in place to track such data produce an accurate portrayal of the Department's role in terrorism prosecutions? If not, are efforts underway to ensure that the data received by Congress and the public about terrorism prosecutions after September 11, 2001, are as accurate and reliable as possible? If you are making changes or improvements to data collection and dissemination, please describe them.

Response: Yes. We believe that the case management system that is currently in place is the best way to track terrorism cases, because it relies on information supplied by the United States Attorneys Offices. These Offices are prosecuting terorrism-related cases and are therefore in the best position to categorize such cases.

(d) AAG Christopher Wray told this Committee last October (almost 7 months ago) that 284 defendants have been charged as a result of terrorism investigations, of which 152 were convicted or pled guilty. I am still awaiting more detailed information about those specific cases. Presumably, prosecutions continue and I am deeply concerned that when I receive AAG Wray's answers, the data will be outdated and/or moot. Can you ensure that the data we receive in this area will be current to at least within a 30-day time period from the date we receive it?

Response: We regret any delays in responding to your inquiry and, like all of us in the Department, we appreciate your interest in these matters. As stated above in our response to Part (b) of this question, since September 11, 2001, and as of November 2004, 361 individuals had been charged with criminal offenses as a result of international terrorism investigations. Of these defendants, 192 had been convicted or had pleaded guilty.

Hearing Before the Senate Judiciary Committee

"Preventing and Responding to Acts of Terrorism: A Review of Current Law"
April 14th, 2004
Dani Eyer
Executive Director, Utah Civil Liberties Union

Answers to Written Questions

Questions for Dani Eyer

1. I think the greatest single reason for any confusion in the general public concerning the PATRIOT Act is the unwillingness of the Justice Department to be forthcoming about the law and how it has been used. While the Attorney General has engaged in public relations events, he has not answered direct questions about the PATRIOT Act from either the general public or even members of Congress. People's legitimate concerns about provisions of the PATRIOT Act that infringe on civil liberties are only exacerbated when the Department of Justice tries to shroud the entire act in secrecy.

Part of the 'myth versus reality' dichotomy you speak of comes from the Department defending sections of the PATRIOT Act that are not being assailed, while not directly addressing the specific changes being proposed. It is also confusing to the public when government representatives appear at town hall forums and make misleading statements to the public about the Act, as recently happened when the City of Dallas, Texas was debating a city council resolution expressing concern over parts of the PATRIOT Act. U.S. Attorney Matthew Orwig of Texas' Eastern Judicial District said "There's a lot of misinformation about this act. It cannot be used to investigate ordinary crimes or or domestic crimes." 1 This example is just one of many that are chronicled. The ACLU has documented some of these misleading statements made by the Department of Justice, and reports are available on our national website. Private citizens may occasionally get confused, and mistakenly think a separate government action that infringes on civil liberties is contained in the Act, but that is understandable when there is such a disregard for engaging critics, or any questioners, by the Administration. However, it is far more troubling when completely false statements like the one in Dallas are made by government officials whose job is to understand the law.

The best way to move forward would be first to recognize that many critics of the law aren't asking for repeal, but instead are asking for changes in a few key areas to protect the civil liberties of ordinary Americans. Passage of modest legislation like the SAFE Act would go a long way to assuage the concerns of American citizens without taking away any powers the Department of Justice needs to fight the war on terror.

---

[1] '*Dallas council debates Patriot Act*', **The Dallas Morning News**, Dec. 18, 2003.

2. What we are advocating is a return to individualized suspicion in FISA records searches, not abolishing the power altogether. The PATRIOT Act removed the requirement that the government show "specific and articulable facts that the person to whom the records they seek pertain is an agent of a foreign power." The government now needs merely to state that the records sought are relevant to an ongoing terror investigation. Even assuming that this standard is not so loose as to allow indiscriminate fishing expeditions, the removal of individualized suspicion means that the records of those not even the target of the investigation will be caught up in the information grab. This change would not "prevent the FBI from contacting a flight-training school to find out if Mohammed Atta is taking flight lessons, or the local library to see if Jose Padilla has been checking out the *Anarchist's Cookbook*", as you posit. The FBI would get a FISA court order for the records of Mr. Atta or Mr. Padilla, and then obtain the specific records. What the FBI wouldn't be able to do is go to the library Mr. Padilla was using and demand all of the library records, including those of people for whom the government has no suspicion of wrongdoing.

Importantly, in the two examples you present, even though the government would not be prevented from obtaining those records under the individualized suspicion standards, there are a number of other ways in which the government could obtain them not involving FISA at all. For example, a federal prosecutor could use a grand jury for a subpoena in connection with a criminal inquiry. The records could also be obtained with a search warrant based on probable cause, either pursuant to FISA or to general criminal law. Finally, the government could simply ask for records on a voluntary basis, after explaining why they were needed.

3. Let me address your suggestion that "Section 215 gives the FBI the same power that federal grand juries have long had in ordinary criminal cases." Section 215 differs in critical respects from grand jury subpoenas. Section 215 does not require the approval of a federal prosecutor, and the information that is sought by a section 215 order need not relate to any investigation of criminal activity. A target of a section 215 order – unlike the target of a grand jury subpoena – may not inform anyone that an order has issued. The secrecy of section 215 would prevent targets of government surveillance from raising alarms about the use of the power with members of the press or civil liberties organizations, while such alarms are often raised about overbroad or intrusive criminal subpoenas. Finally, section 215 provides no mechanism for a recipient of an order to seek to quash the order before a judge, while a grand jury subpoena does provide such a mechanism.

The Department of Justice said that it had not used Section 215 as of September 2003. The Department has not responded to inquiries from some U.S. Senators as to whether the power has been used since then. This raises the question of the necessity of Section 215, as the United States government has been conducting the largest terrorism investigation in our nation's history and has yet to need this contentious provision.

As you know, Section 215 court orders subject the recipient of the order to a gag order as well. This provision makes it nearly impossible to know how exactly the power is being used, and whether it is being used improperly. However, regardless of its specific use or non-use, the mere existence of such a sweeping authority to obtain personal records – including library, bookstore, medical and other personal records – in intelligence investigations, without the ordinary safeguards associated with the criminal process, itself has a chilling effect on First Amendment and other constitutionally protected activity.

Questions for All Witnesses

1. It is hard to tell. Undoubtedly, a greater sense of vigilance among ordinary Americans has helped, as has new funding for counter-terrorism efforts. However, in terms of hard statistics, the number of credible terrorist arrests and prosecutions has been low. In the Portland and Buffalo prosecutions, the charges dealt not with conspiracy to commit any impending attack, but stemmed from the defendants' travels to training camps in Afghanistan or charitable donations. Certainly, any support for al-Qaeda is inexcusable, but our prosecutions to date have not caught any "ticking time-bombs."

While the Department of Justice continues to tout its efforts to counter terrorism with impressive-sounding statistics in public forums, those numbers are very misleading. Raw prosecutorial data also shows that, as of December 2003, only five defendants in the close to 900 cases classified as domestic or international terrorism had received sentences of 20 years or more. Only 23 have received sentences of five years or more. Either the DOJ is inflating statistics, and overclassifying cases as terrorism prosecutions, or we need to work on increasing the effectiveness of our federal prosecutors.

We also do not believe that the controversial new surveillance and investigative powers, including the dozen or so provisions to which we object in the Patriot Act, have benefited our safety as much as they have eroded our freedoms. Arguably the most controversial provision of the Patriot Act, Section 215, has by the Justice Department's own admission not been used yet, so it cannot have paid any dividends in added security.

In another example of new post-9/11 security policies of dubious value, the General Accounting Office found recently that the CAPPS II airline security data-mining program had failed to demonstrate any inherent boon to security. For instance, the GAO found that the program's designers had failed to deal with the possibility of false positives, which would both hamper the program's effectiveness and threaten civil liberties.

At base, the ACLU continues to believe that rational, reasonable, properly considered security measures can and should be in place. These programs, however, need not infringe on our values and our laws. They should be implemented with appropriate safeguards to ensure individualized suspicion and to mitigate against abuses. In short, the fight to protect American security is not a zero-sum game. It is one where we can guard our safety while respecting basic American freedoms. We do not believe, however, that those provisions in the Patriot Act to which we object strike that crucial balance.

2. First, our objections to certain provisions in the Patriot Act were prompted not by their rampant abuse, but by the *potential* for abuse inherent in new investigative and surveillance that encourage fishing expeditions which treat whole groups of Americans as potential suspects. In the 1950s, 1960s and 1970s, the FBI, the CIA and the U.S. military -- because of a lack of basic checks and balances -- were able to do exactly that: use highly invasive surveillance and investigative tools to spy and harass groups of people, the vast majority of whom were peaceful, law-abiding and patriotic.

During the bad old days of J. Edgar Hoover and COINTELPRO, however, FBI and CIA agents snooped on civil rights and anti-war activists in an extra-legal fashion. There were no laws mediating their conduct. In the late 1970s, the U.S. Congress acted to provide checks against future abuse. Many of these checks have been substantially weakened by the Patriot Act and other White House and Justice Department policy changes (most notably, the revision of the Attorney General Guidelines limiting when and how FBI agents can initiate full-bore domestic and foreign policy investigations).

By removing these reforms of the late 1970s -- for instance, by easing FBI access to court orders under the Foreign Intelligence Surveillance Act of 1978 -- the problematic provisions of the USA Patriot Act act like legal landmines. Once the furor over the bill has died down, many will remain permanent fixtures of the American legal landscape, waiting for exploitation by the unscrupulous.

As for specific abuses, we believe that the overuse of administrative measures like National Security Letters, which are issued without any oversight role for the courts, poses serious problems. Already, the Las Vegas Review-Journal has reported that over last year's holiday season the FBI likely used NSLs to seize the travel and hotel records of close to 300,000 visitors. The FBI took this action even though, by their own admission, there had been no specific terrorist threat.

When talking about Patriot Act abuses, it is important to realize that American civil liberties are not something that can be endangered so long as government officials assure us they will not step out of line. Rather, we keep in place procedural and legal checks and balances that act to stop abuse before it occurs. The Patriot Act's troubling provisions, however, proceed from the opposite assumption: that government agents should be given the power to abuse our rights, under the assumption that they will simply not do so.

We need to implement modest revisions of the Patriot Act to restore these checks and balances against abuse.

3. The Justice Department has, from the beginning of this debate, sought to obscure, rather than illuminate, the legitimate civil liberties concerns raised by parts of the USA PATRIOT Act. The Department's statements in defense of the USA PATRIOT Act have been largely non-responsive to the complaints of civil liberties organizations. The example of the nationwide search warrants provision, at section 219 of the Act, are a case in point. Civil liberties groups do not object in principle to a nationwide search warrant power; rather, our concern is that the existence of such a power could provide a temptation for the government to engage in judge-shopping, i.e., choosing to apply for a warrant in a particular jurisdiction only because a judge is known to easily approve warrant applications. These concerns could be addressed by a sensible amendment to section 219 to ensure that a nexus exists between the investigation and the particular judge who is chosen to review nationwide search warrant applications.

The debate over the government's actions, and their impact on civil liberties, would be greatly aided by a more targeted discussion that focuses on the specific areas in which civil liberties are threatened.

In that vein, we strongly support the Security and Freedom Ensured (SAFE) Act introduced by Sen. Larry Craig. The SAFE Act addresses a number of the troublesome provisions laid out above, specifically:

- The expanded power to obtain business records under FISA (section 215) and to issue "national security letters" (section 505) – all without any evidence linking the records to a foreign agent,
- The "sneak and peek" provision (section 213) which threatens to turn an exception to the Fourth Amendment's "knock and announce" rule into a routine, rather than extraordinary, method of law enforcement,
- The poorly drafted "roving wiretap" provision, which manages to allow an intelligence wiretap where neither the name of the target nor the facility the target is using is specified, and which omits the sensible "ascertainment" requirement for intelligence roving wiretaps that is already required for criminal roving wiretaps, and

Other general concerns that we have which are not addressed by the SAFE Act include:

(1) Section 214, relating to the use of pen registers for foreign intelligence purposes.

(2) Section 216, relating to the use of pen registers in criminal cases.

(3) Section 218, relating to the Foreign Intelligence Surveillance Act .

(4) Section 411, relating to new grounds for deportation.

(5) Section 412, relating to mandatory detention of certain aliens.

(6) Section 507, relating to educational records.

(7) Section 508, relating to collection and disclosure of individually identifiable information under the National Education Statistics Act of 1994.

(8) Section 802, relating to the definition of domestic terrorism.

The ACLU certainly agrees that many of the administration's most troubling actions are not authorized by the USA PATRIOT Act. Some of these actions are also rescinded or limited by the Benjamin Franklin True Patriot Act (H.R. 3171).

Other USA PATRIOT Act provisions, such as those regarding money laundering, may also pose dangers for civil liberties. These provisions have not been the focus of the ACLU's advocacy and warrant further study.

4. As mentioned, we do not believe the fight to balance civil liberties is a zero sum game. Moreover, we also worry that the implementation of poorly considered measures that are suppressive of our liberties are actually not very effective. For instance, a civilian advisory committee to the Pentagon on its "Total Information Awareness" data-mining system urged new protections for use of these technologies not just for the sake of protecting liberty, but in order to ensure efficacy. "Good privacy protection in the context of data-mining is often consistent with more efficient investigation," the advisory commission said, as reported in the New York Times on May 17, 2004.

The same thing applies with the USA Patriot Act. For instance, many sections of the Patriot Act promise to reduce or remove individualized suspicion from the collection of intelligence in our counter-terrorism efforts. However, as the 9/11 commission proceedings demonstrated on several occasions, intelligence failures prior to the attacks occurred not because of a lack of collection capability, but because of insufficient analytical capacity. In other words, there was too much hay on the stack while we were looking for the needle. The problem parts of the Patriot Act, however, fail to ameliorate this problem, but threaten to throw far more hay on the stack.

As Americans, we pride ourselves on our innovative spirit. The fight against terrorism is no exception. We can find ways in our counter-terrorism efforts to give law enforcement and the military the tools they need to interdict and punish terrorists without compromising our values as a free nation.

5. The amendments to section 206 of the PATRIOT Act contained in the SAFE Act accomplish precisely what you have asked for. Under 50 U.S.C. *1805(c)(1),* an order approving an electronic surveillance shall specify (A) the identity, <u>if known</u>, or a description of the target of the electronic surveillance; and (B) the nature and location of each of the facilities or place at which the electronic surveillance will be directed, <u>if known</u>. Under these guidelines, it is possible for an order for electronic surveillance to be issued without identifying a specific target or facility.

The SAFE Act would eliminate this ambiguity by requiring either the target or the facility be identified, making it an either-or requirement. It would still permit roving wiretaps, however. Additionally, the SAFE Act would add a requirement identical to the requirement for roving surveillance under the criminal law, that if the location or facility was unknown when the court order was issued, surveillance may only be conducted at a facility when the target's presence is ascertained.

May 21, 204

The Honorable Senator Orin G. Hatch
United States Senate
Committee on the Judiciary
Washington, D.C. 20510-6275

Re: Response to Committee Questions

Dear Senator Hatch and Members of the Senate Judiciary Committee:

This letter is a response to your inquiry which I received last week. Please excuse the tardy reply in that I was out of town on depositions most of this week. My answers first to Senator Hatch's questions are as follows:

1. **QUESTION ONE**: Which "essential liberties" do you believe are "given up" by the Patriot Act?

Respectfully, the Patriot Act was passed with proper motives, but can and will be used to deny our Fourth Amendment and other rights without some meaningful changes.

First, **Section 215** allows access to records even relating to persons who are not suspected of criminal acts. Being a "suspected terrorist" may or may not mean that the target of the investigation is suspected of criminal activity. Unless records or other items are considered public or are otherwise available to the public, at least some reasonable suspicion that the subject of the record has committed a crime should be required. Allowing unbridled discretion to obtain non-public records when a person is not the subject of criminal investigation erodes liberties guaranteed under the First and Fourth Amendments of the Constitution and possibly the Fifth Amendment's Due Process clause if the subjects of the records are deprived of property without proper procedures.

Second, **Section 213** authorizes searches without notice on persons who also may not be the target of a criminal investigation. The Justice Department continues to state that these tools are currently available to enforce drug laws. The fallacy of this statement, however, is that a "suspected terrorist" under the Patriot Act may not be suspected of actually committing a crime in that no crime may have even been committed. Instead, it is sufficient under the Patriot Act to show that a person is merely a "suspected terrorist" in that he or she may commit an act of terrorism. Such "suspicions" may or may not be connected with an actual crime as opposed to a potential crime of terrorism.

Third, **Section 213** must have some date certain where a prosecutor must bring the warrant back before the judge and justify why the notice cannot be given. I would propose a period of between 7 to 30 days. It is not a burdensome job to send an attorney to renew the delayed warrant. On the other hand, it is unlikely that a delayed warrant will be reviewed again by a judge in a timely manner unless a prosecutor is required to renew the warrant and, thus, bring the matter again to the attention of the Judge.

Finally, **the "wall" of separation between foreign intelligence activities and domestic law enforcement** was created to protect United States Citizens and their Constitutional rights. While this "wall" obstructed the President's ability to prevent an attack like what was witnessed on 9/11, we should not so quickly set aside several years of wisdom in the name of trying to prevent future attacks. While I am not arguing that the "wall" as previously lived out, should not have been breached to some degree, I am concerned that the wall should not be summarily dispensed with in the name of providing greater safety.

The goals and methods of the F.B.I. and C.I.A. are not the same. The F.B.I. seeks to bring domestic criminals to justice and reduce violations of federal criminal laws. The C.I.A. and other foreign intelligence agencies, on the other hand, seek to gather foreign intelligence to preserve and protect United States governmental interests outside of the United States. Importantly, foreign intelligence agencies are often not dealing with American citizens on American soil. The Federal Constitution does not apply to many of their procedures and activities. They are not concerned with individual rights, but rather to protect United States interests as a whole and as directed by the President. Such power and discretion should not be turned with full force inwardly and used against United States citizens at home.

Unfortunately, I have not had time to come up with safeguards to prohibit the potential negative effects of breaking down the wall between domestic law enforcement and foreign intelligence activities. At this point I am merely raising the issue so that it can be discussed and debated and so Senators will begin thinking of the long-term ramifications of tearing down the wall.

The above powers and related sections of the Patriot Act most likely would not be abused by the Bush Administration. However, it is easy to see that a future President or Attorney General may use such powers against U.S. citizens on domestic soil to harass pro-life groups, those who believe a Biblical view of marriage, and those who oppose immoral acts and relationships as identified in the Bible. Such groups and individuals may be considered terrorists. Even in Canada at least two Appellate Provincial courts have found that a mere reference to immoral acts from the Bible and a peaceful brochure showing that Islam is incompatible with the God of the Bible were considered "hate crimes." It is not a far leap to go from "hate criminal" to "suspected terrorist." The thought that the Executive Branch may investigate U.S. citizens to squelch constitutionally-protected activities of conservative groups is not some mere Orwellian fantasy. To the contrary, it has been alleged that former Attorney General, Janet Reno, improperly investigated pro-life groups using RICO statutes even though the organizations were not connected to abortion clinic bombings or other unlawful activities.

2. **QUESTION TWO**: Do you believe that the tools given to the Department of Justice through the Patriot Act have been instrumental in thwarting terrorist attacks against this country?

   Answer: Yes.

3. **QUESTION THREE**: How can we change [the Patriot Act] to protect civil liberties while still giving the Department of Justice the tools it needs to effectively investigate and prosecute terrorists?

   Answer:

   A. Have a required showing of reasonable suspicion that the subject of subpoenaed records, seized property, or searched property has committed an actual crime under the laws of the United States.

   B. Require prosecutors to re-apply for delayed notice warrants in a definite time period such as 7 to 30 days. Mandate that notice must be given at some point and cannot be indefinitely delayed.

   C. Require more specific grounds to obtain a delayed notice warrant not merely that it may delay the trial.

   D. Create a task force to study the ramifications of breaching the wall between foreign intelligence activities and domestic law enforcement to recommend additional safeguards for U.S. citizens on domestic soil.

GENERAL QUESTIONS FROM THE COMMITTEE:

The following answers correspond to the numbered questions asked by the committee:

1. Yes. Our country was literally asleep in fighting terrorism for a decade prior to 9/11. The acts we witnessed on 9/11 were the logical result of a policy of indifference in the 1990s. We have been on the right track at home and in Iraq and Afghanistan. We must stay the course in Iraq and always expect opposition in this war as in any war.

2. I know of no examples of abuse, but lack of examples does not mean reform is not needed.

3. See above recommendations.

4. Liberties can be protected while fighting terrorism, although it may mean that less efficiency will be a consequence. Such is one of the prices of freedom. The Senate has a difficult job in protecting our Constitution while seeking to protect the American people. One distinction the Senate can make is between U.S. citizens verses legal or illegal aliens. Foreign nationals do not have the same rights as citizens and it is appropriate to make distinctions here.

I hope the above answers are helpful. Please contact me if you have further questions.

Very truly yours,

Frank D. Mylar

Aaron Turpen
Libertarian Party of Utah
April 14th, 2004 Utah Field Hearing of the Senate Judiciary
"Preventing and Responding to Acts of Terrorism: A Review of Current Law"
Answers to follow-up questions.

Several follow up questions were given by the Senate Judiciary Committee to myself and the other members of the April 14 panel. While the questions are astute, given the context of the testimony given and the subject at hand, they are, in my opinion, all-inclusive and can be answered together in one statement.

Referring back to my oral testimony before the Senate Judiciary on April 14, you will recall that I paraphrased Thoreau asking why we are striking branches instead of the root of the matter.

I asked whether the reaction to create more laws was the proper reaction. I stipulated that we should consider the basic problem at hand, rather than adding more to it.

Perhaps government has overstepped its bounds not just here on our own soil, but also abroad?

Looking at history, in a broad sense, I can see, at least partially, where we went awry.

Consider that for thousands of years, the "Arab World" has been content to make war with itself and has only turned its men of arms against western nations upon provocation from those nations. In this day and age, America is the most powerful military nation on the earth and exerts more influence internationally than any other nation. Most specifically, we exert a lot of influence in the Middle East. This, obviously, has lead to provocation.

Thomas Jefferson said "Peace, commerce, and honest friendship with all nations—entangling alliances with none."

In the aftermath of World War II, what is now called the "Cold War" began. During that time, the governments involved consolidated their powers and began a world-wide quest to consolidate alliances of power throughout the world. This "Us and Them" mentality has lead to many entangling alliances and enmity among many involved.

The Middle East, with its heavy oil reserves, was a hotbed for these intrigues as this Cold War commenced. In the process, many enemies were made. Nations, religious sects, and individuals were made to hate the United States because of our great influence (not always for the better) over them.

The people of the Middle East do not hate us for our freedom. Many of them have come here specifically to take part in the American experiment in liberty. Those who hate us hate us because, to them, we embody all that they cannot have and they see us as taking

what little they might have now. Through our entangling alliances, we have created this hatred.

So creating more police powers in this nation, giving more powers to "federal law enforcement," and making war abroad to "stem the tide of terrorism" are not the answer. If anything, these steps are only more fuel for the fire.

The answer is to make peace with these nations, to remove ourselves from these entangling alliances and become a prosperous nation of trade and commerce, not a nation of police and military might. Show the world that, while we will defend what is ours, we would rather be peaceful and give trade instead. Show those who hate us that we are no longer going to meddle in their affairs and will no longer entangle ourselves in complicated agreements as we have in the recent past.

One of the greatest strengths of the United States as a nation is our ability to admit to our own mistakes, show them to ourselves and the world, and then seek justice in making amends for those mistakes.

Perhaps this is what we should be doing now, sirs. Perhaps what we should be doing is reconsidering our actions and making amends for those mistakes we have made. Continuing down the path of increased legislation, increased police powers, and decreased freedoms is, perhaps, not the only solution, Senators.

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 26, 2004

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate

Dear Mr. Chairman:

Enclosed please find responses to questions posed to Mr. Paul Warner, United States Attorney for the District of Utah, following Mr. Warner's appearance before the Committee on April 14, 2004. The subject of the Committee's hearing was "Preventing and Responding to Acts of Terrorism: A Review of Current Law."

We hope that this information is useful to you. If we may be of additional assistance, we trust that you will not hesitate to call upon us.

Sincerely,

William E. Moschella
Assistant Attorney General

Enclosure

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

Responses of U.S. Attorney Paul Warner
to Follow-Up Questions from Senator Hatch
Hearing of the Senate Committee on the Judiciary
on "Preventing and Responding to Acts of Terrorism: A Review of Current Law"
Wednesday, April 14, 2004
Salt Lake City, Utah

1. First, do you agree that our country is better prepared to stop acts of terrorism today that we were two years ago?

Yes, I agree that our country is better prepared to stop acts of terrorism today than we were two years ago. Due in large part to the tools contained in the USA PATRIOT Act ("the Act"), as well as the additional resources provided by Congress to fight terrorism, we are in a far better position today than we were two years ago to detect and disrupt terrorist plots.

2. Can anyone cite specific examples of what they would consider abuse under the provisions of the PATRIOT Act?

I am unaware of any instance where any provision of the Act has been abused. I would note that Senator Feinstein reported last year that when her staff e-mailed the ACLU and asked them of instances where the Act had been abused, "They e-mailed back and said they had none."

3. What specific changes, if any, would you recommend to change the USA PATRIOT Act to ensure that liberties are preserved while still enabling law enforcement to combat terrorism?

I believe that the substantive provisions of the Act have provided valuable tools to intelligence and law enforcement personnel in the war against terrorism while at the same time preserving the civil rights and civil liberties of the American people. For this reason, I do not believe that any changes need to be made to the substantive provisions of the Act to ensure that liberties are preserved. Rather, I support repealing Section 224 of the Act so that those provisions of the Act that are sunsetted will not expire at the end of 2005. If those provisions were allowed to expire, law enforcement's ability to combat terrorism would be seriously diminished.

4. Do you believe that the struggle of balancing civil liberties with national security is a zero-sum game?

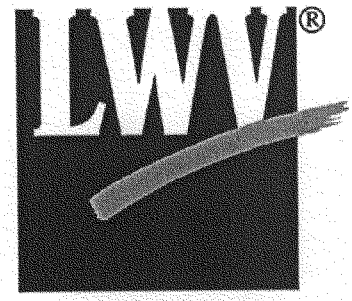
No, I emphatically reject the notion that liberty and security are inherently conflicting goals. Rather, I believe that we can and must protect fundamental liberties and safeguard national security at the same time. Liberty and security are interrelated and mutually reinforcing values. Without liberty, the American people cannot truly be

secure. And without security, the American people will not have the capacity to exercise and enjoy their freedoms to fullest extent possible.

5. Would you suggest any changes to the PATRIOT Act's Section 206, the so-called "roving wiretaps" provision? If so, please let me ask you for alternative suggestions. I feel we need to equip law enforcement and other agencies to fight terrorism with the tools to deal with 21st Century terrorists and not organized crime of fifty years ago. Search warrants were always meant to go beyond the mere tapping of a telephone wire. We know that terrorists regularly communicate by various means including land line, cell phones, e-mail, and are the first to exploit the newest technology for their own means. How can we effectively trace terrorists unless we allow a wiretap warrant to follow the suspect instead of being limited to one of the many means the suspect will use to coordinate an attack?

I do not believe that Section 206 of the Act needs to be changed or amended. For years, law enforcement has been able to use multi-point or "roving," wiretaps, in which a wiretap authorization attaches to a particular suspect, rather than a particular communications device, to investigate ordinary crimes, such as drug offenses and racketeering. Section 206 simply authorized the use of this same technique in national-security investigations. This provision has enhanced the government's authority to monitor sophisticated international terrorists, who are trained to thwart surveillance, such as by rapidly changing cell phones, just before important meetings or communications. Were Section 206 of the Act allowed to expire at the end of 2005, our ability to track terrorists effectively would be severely diminished.

SUBMISSIONS FOR THE RECORD



League of Women Voters of Utah
3804 Highland Drive, Suite 8-D, Salt Lake City, Utah 84106 (801) 272-8683
lwvut@xmission.com • www.lwvutah.org

League of Women Voters of Utah

Testimony at a Field Hearing On

**"Preventing and Responding to Acts of Terrorism:
A Review of Current Law"**

Before the

**United States Senate
Committee on the Judiciary**

**Submitted by
Nanette Benowitz
President**

April 14, 2004

Written Statement of Nanette Benowitz
President of the League of Women Voters of Utah
Submitted to the Committee on the Judiciary
United States Senate
April 14, 2004

"Preventing and Responding to Acts of Terrorism: A Review of Current Law."

Chairman Hatch and Members of the Committee, thank you for the opportunity to testify at this hearing on '*Preventing and Responding to Acts of Terrorism: A Review of Current Law."*

I share the views of many Americans that it is vital to take new measures to protect against terrorism, while maintaining fundamental protections of democratic society. As president of the League of Women Voters of Utah, I welcome the opportunity to share our organization's thoughts with you because our membership expressed concerns about the USA PATRIOT Act at our State Convention last May. Many also have chosen to study this issue either in general meetings open to the public or at smaller more intimate gatherings.

Our members, along with members of the League of Women Voters all over the United States, have been steadfast in their conviction that the need to protect against threats to America must be balanced with the need to preserve the liberties that are the very foundation of this country. Fundamental principles of checks and balances and open government, including independent judicial review of law enforcement actions and limits on secret indiscriminate searches, are essential to guarding our liberty.

Introduction

With that introduction, let me start by saying that we support the overall intent of the USA PATRIOT Act because we recognize the need for law enforcement to be able to address new forms of terrorism. However, we urge the Congress to perform the review and oversight they did not have the luxury of performing in September and October of 2001. We urge you to review exactly what the PATRIOT Act has accomplished and to revise some of the provisions that have unnecessarily infringed upon our civil liberties.

1. Citizens fear that by supporting laws that were designed to protect them they have given up many of their basic civil liberties.

Senator Hatch, your constituents are concerned that in stunned shock the country went too far too quickly. Our country has survived the Cold War and other serious dangers to our national security. Throughout those difficult times, all three branches of our government have examined and refined the protections afforded to all under the Fourth Amendment. This careful constitutional balance should not be set aside without concrete evidence that new powers have prevented or would have prevented attacks.

Revelations about abuses of surveillance and detention powers have created a climate of distrust between the citizenry and law enforcement that we simply cannot afford at this time. We have heard a wide variety of commentary on secret searches with delayed notification; even gag orders on third parties who hold information that should by right remain private. We also have read with concern the report of the Inspector General of the Department of Justice, released last summer, which included revelations about significant and lengthy wrongful detentions.

As an example of my concern about the growing sense of distrust that is developing even among league members, I would like to paraphrase a Salt Lake League unit discussion scribe's report from a league discussion following the viewing of video of a League-sponsored public meeting on the PATRIOT Act.

- **Old Farm Unit 3/29/04 Subject: Patriot Act**
  9 Members Present 2 Guests
  Member reporting: Bonnie Fernandez

  #1 What are the tradeoffs between security and civil liberties?
  - *There is a general sense of skepticism in the country.*
  - *Our liberties are so precious; they need to be protected.*
  - *The Patriot Act wouldn't necessarily have prevented 9/11.*
  - *We fear the return to "witch-hunts.*

  #3 Do you think we can trust the government?
  - *"If you've done nothing wrong, you have nothing to fear".*
  - *"You can't have your activities, memberships, associations be targeted and your name can end up on a list - therefore stifling what you do".*
  - *Trust is hard because of abuses. There were split opinions about trusting government. We are wary because they've proven untrustworthy.*
  - *Media plays an important role in this regard.*

I would also like to include some of the comments that have been made to me by league members since they became aware of our testifying at this hearing.

- **Bonnie Fernandez, member of the Salt Lake League**: *There is no valid reason to abrogate the constitutional protections of civil liberties, even in the name of national security. When national security supersedes the Constitution, we are in greater danger than any danger terrorists might present.*

- **Joyce Davis,** *President of LWV Cache County. [O]ur greatest objection to the Act is the FEAR that becomes part of our lives and the way that it tends to separate us from people who might look a little different or even worse some who look just like us.*

- **Marilyn Odell,** the President of Weber League. *Personally, I have neighbors who have had a very sad experience. According to them, their son-in-law who is a Kuwaiti citizen but lives with his family in Ogden and has applied for U.S. citizenship was arrested and held from Friday to*

Monday by the INS because they claimed there was an error in his papers. When his lawyer, who had been out of town, showed up, the INS said it was all a mistake and he was released. However, when he went back to his job at AOL and explained his absence he was immediately laid off in spite of the fact that he had previously had awards for his good work. It took him several months to find a new job.

We know this young man and his family so we believe his version. He fought against the Iraquis in Kuwait during the first Gulf War and was educated at Weber State. I don't know if his detention was under the provision of the Patriot Act allowing extended detention of aliens pending a determination of whether a person is connected to terrorist activities or not but I think detention of aliens without due process should be a concern as well as the privacy of U.S. citizens' records which seems to be the overriding concern of the League position.

2. The League supports the SAFE Act, S. 1709, because it addresses some of the problematic provisions of the PATRIOT Act[1]

The League supports the provision in the new legislation that would limit so-called "sneak and peek" searches, which now allow secret warrants without notifying the subject of the search for an unspecified length of time. Under SAFE, delayed notification would be allowed only when the government could show that secrecy was needed to prevent flight, destruction of evidence or danger to life or physical safety. Delays would be limited to renewable seven-day periods. This more meaningful judicial oversight would reassure citizens who value their Fourth Amendment protection against unreasonable searches and seizures.

In addition, S. 1709 would limit law enforcement requests for business records by requiring evidence that the records relate to a spy, terrorist or other foreign agent, and are not merely part of a "fishing expedition." Businesses include banks, doctors, employers, universities, libraries and bookstores, which hold sensitive information about our private lives, and most importantly our private thoughts including political thoughts. This information should not be available to the government without cause.

Finally, we support SAFE Act provisions that would extend the sunset provisions of the PATRIOT Act to include the sections on "sneak and peek" warrants and national security letters.

These are challenging times for all Americans. We recognize that there are real and serious terrorist threats. The League believes that the SAFE Act would preserve broad authority for law enforcement officials to combat terrorism. At the same time, it would protect innocent Americans from unrestricted government surveillance.

3. As the League has studied this issue, it seems clear that what is needed is not more powers but better use of existing powers.

---

[1] Letter to the members of the Senate from Kay Maxwell, President of the League of Women Voters of the United States, on February 26, 2004

The PATRIOT Act and subsequent bills have called for revisions to the Foreign Intelligence Surveillance Act ("FISA"). As we have studied these issues, we have become increasingly concerned about the risk of FISA warrants issued by a court that sits in secret becoming the warrant of choice for law enforcement officials because it is simply easier to secure a FISA warrant than a traditional warrant. It is not clear to us why FISA standards should be becoming more and more lax when it was not FISA restrictions that kept law enforcement from learning more about the 9/11 hijackers, including Moussaoui, but the failure of officials to seek a warrant at all. [2] Simply put, relaxed warrant requirements make it easier to add hay to the pile, but not any easier to find the needle.

We ask that you give law enforcement the resources they need to communicate with each other and do their job better, not undermine laws that hold those officers to higher standards. FISA was enacted to curb government abuses in the 50's and the 60's, specifically to restrict the use of these powers for domestic criminal investigations and

---

- [2] FBI Agent Colleen Rowley submitted a request for a FISA warrant to examine the laptop of alleged terrorist Zacarias Moussaoui several weeks before the September 11 attacks (that laptop is now known to have contained information that *might* have helped expose the hijacking plot, but that also included substantial information on crop dusting that just as likely might have led agents on a wild goose chase.) The bureaucratic response is known by this committee: FBI headquarters denied Rowley's request, believing the application was insufficiently supported by evidence that would pass FISA court scrutiny - with no indication that any analysis or connection was made with the other evidence, indicated below, that might have met the FISA court's requirements.
- For example, prior even to Rowley's request, FBI Agent Kenneth Williams submitted a memo to the FBI's Radical Fundamentalist Unit citing concerns about the number of Islamic fundamentalists receiving training at Arizona flight schools. This memo was neither acted upon by FBI headquarters nor combined with Rowley's later request for a FISA warrant. In testimony to this committee, Williams also indicated that he had communicated his concerns to the CIA, with similar results.
- President Bush was briefed by the CIA in August about increasing reports that fundamentalist groups, including al'Qaeda, might attempt to hijack airliners in the United States. The intelligence was not connected with either the Rowley or Williams reports.
- The French intelligence community had also been in contact with American agents, informing them of Moussaoui's connections to the Islamic fundamentalist movement. This information was not combined with any of the other data already collected.
- A serious question exists about why the FBI did not try to put in an application - at least try. Some observers have assessed such timidity as stemming from the FISA court's rebuke of the Department of Justice for filing false affidavits in another case. Others have attributed it to unwillingness to make terrorism a priority. Others have attributed it to the DOJ's reluctance to risk its record of success before the FISA court - only one warrant request has ever been denied. In any case, we believe that the Justice Department could have been more aggressive within existing standards to investigate Moussaoui, rather than calling for a wholesale weakening of FISA.

Amending FISA: The National Security and Privacy Concerns Raised by S.2659 and S.2586; Testimony of Jerry Berman, Executive Director, Center for Democracy and Technology[1]
Senate Select Committee on Intelligence, July 31, 2002

prosecutions.[3] The potential chilling effect of excessive surveillance and detention powers on both healthy political debate and effective cooperation between citizens and law enforcement is simply too great.

Conclusion

In conclusion, I would ask this committee to address all of the provisions of the PATRIOT Act, not just the sunset provisions. We feel strongly that this Act is too important not to be given the attention it deserves. We ask you to support the SAFE Act that adds oversight and review to the PATRIOT Act to provide the appropriate protection for innocent Americans from unrestricted government surveillance. And finally we encourage law-enforcement to more effectively coordinate and implement the use of the information they already have.

I would like to thank Senator Hatch and this committee for holding this hearing and giving all of us the opportunity to express our thoughts on this Act. The League was eager to participate in the diverse coalition that was formed to encourage open dialogue on the PATRIOT Act. This hearing has been a very educational process and an important step in educating Utahans about the steps our government is taking to review the USA PATRIOT ACT.

Thank you,

Nanette Benowitz
President, League of Women Voters of Utah

[3] "...mid-1970s investigation, led by Sen. Frank Church (D- Idaho), into the government's sordid history of domestic spying. Throughout hundreds of interviews and the examination of tens of thousands of documents, the Church committee found that the FBI, CIA and other government agencies had engaged in pervasive surveillance of politicians, religious organizations, women's rights advocates, antiwar groups and civil liberties activists." *Six Weeks in Autumn*, Robert O'Harrow Jr., The Washington Post. Washington, D.C. Oct 27, 2002. pg. W 06

USA PATRIOT Act of 2001 Concerns

Presented
to
The Senate Judiciary Committee
by
Scott N. Bradley
on behalf of
Utah Eagle Forum
14 April 2004

At the beginning of the American Revolution, the great patriot, Patrick Henry stated: "I have but one lamp by which my feet are guided; and that is the lamp of experience. I know of no way of judging the future but by the past." [Patrick Henry, speech to the Virginia Convention, Richmond, Virginia, March 23, 1775.—William Wirt, *Sketches of the Life and Character of Patrick Henry*, 9th ed., pp. 138-39 (1836, reprinted 1970). Language altered to first person.]

In *The Tempest*, William Shakespeare observed "...what's past is prologue," meaning the experience of the past is but an introduction to that which is to come. [Shakespeare, *The Tempest*, Act 2, Scene 1]

And in volume one of *The Life of Reason* we read: "Those who cannot remember the past are condemned to repeat it.... This is the condition of children and barbarians, in whom instinct has learned nothing from experience." [George Santayana, *The Life of Reason*, vol. 1, chapter 12, p. 284 (1905).]

It is from this perspective, and that of the original foundation principles upon which this great Nation was established, that I express concerns about the so-called USA PATRIOT Act.

The Founding Fathers of this Nation were painfully aware that government which exceeds the proper bounds can be an onerous burden upon those who are called to bear its yoke. They eloquently captured in the *Declaration of Independence* the purpose of government—

> "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness—that to secure these Rights, Governments are instituted among Men,..."

Their bloody revolution was fought upon that premise, and the Constitution they created in 1787 sought to assure that the scope and power of the national government was so defined as to assure that they and their posterity would enjoy the blessings of liberty for at least a thousand generations.

The *United States Constitution* and the marvelous *Bill of Rights* were designed to define the role of government to its specific purpose, and to keep government from encroaching into forbidden areas, thereby preventing the destruction of the liberty of the people of the Nation.

In contrast, history is filled with gross examples of how the temptation of power which is inherent in government has led to widespread oppression, death, and tyranny. Lenin, Stalin, Hitler, Mao Zedong, Pol Pot, and Saddam Hussein are vile archetypes of government power run amuck. They painfully demonstrated that by wielding unbridled government power, they could turn the state into an instrument of terror, death, and devastation.

Due to their first-hand personal experiences, the Founders of this Nation sought to forestall the tendency of government to overreach its proper bounds. By studying their words, we are able to understand that the Founders of this Nation were careful to craft a government which had a clearly defined scope and bounds.

For example, the Fourth Amendment was a direct outgrowth of search and seizure abuses experienced under the British rule in the 1760's and 70's. During that period of time, *Writs of Assistance* were general warrants carried by officials of the British government which allowed them to enter a premise, to search for anything they felt might be against the law, to seize any unlawful material they discovered, and to arrest anyone they suspected might have some connection to the matter. To counter and protect against this form of tyranny, the Fourth Amendment states:

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

The Founders wished to prevent any future violation such as that to which they had been subject, so they required extreme specificity in such warrants as might be issued by government officials. Unfortunately, it would seem that there are parallels between the *Writs* of the 1700's and the powers inherent in the PATRIOT Act of today. In both spirit and letter it may be argued that the PATRIOT Act has stepped away from the exact requirements and specificity called for in the Fourth Amendment, and seems to retrace the path which could lead America back to a circumstance in which modern-day *Writs of Assistance* become common instruments of investigation, and potentially lead to the destruction of the God-given rights which were won and defended so painfully.

While it may be argued that during times of great risk and trial it is necessary to set aside long held values in favor of expediency, the danger is that encroachments such as this generally lead to permanent reductions in individual liberty.

By their first-hand experience with the life-and-death risks which they encountered in their day, the Nation's founders were aware of the foolish natural tendency of frightened populations to jettison freedom for security when threatened. They warned of the risks associated with this response. Most have heard Benjamin Franklin's well-known perspective: "They who can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety." [Smyth 6:382. (1775.)] That perspective must be considered as we strike the proper balance between safety and the individual liberties vouched safe in the Nation's "enabling documents."

Again, if we examine the historical record, we discover that the world's history is filled with examples of peoples who have foolishly followed the path of security over liberty, and have suffered the consequences. In fact, this natural tendency of mankind is so widely known that it appears that Osama bin Laden anticipated that this would be the American response to his organization's dastardly attacks on 11 September 2001. In a BBC taped video interview several weeks after the attacks, bin Laden reportedly expressed his hope that the United States would enter the liberty-destroying path in response to his cowardly attacks on the Nation. In that translated interview bin Laden said:

> "[T]he battle has moved to inside America.... I tell you, freedom and human rights in America are doomed. The U.S. Government will lead the American people—and the West in general—into an unbearable hell and a choking life."

I firmly believe that the United States is stronger and braver than that, but we need the help of our elected leadership in the effort to assure our continued liberty. We must make absolutely certain that the rush for security does not extinguish the great purpose of the Nation, nor destroy the beacon of hope offered by our foundation principles and our Nation's charter to freedom-loving peoples throughout the world. We must make absolutely certain that by usurpation and encroachment we do not, in any means, destroy what we really cherish about this great Nation.

James Madison's warning in this matter bears repeating. In 1788 he said: "Since the general civilization of mankind, I believe there are more instances of the abridgement of the freedom of the people by gradual and silent encroachment of those in power than by violent and sudden usurpations."

In his monumental *Farewell Address*, George Washington pled with the Nation to avoid seductive reasons for straying from the path of freedom which had been outlined in the *Constitution* and *Bill of Rights*, regardless of the perceived need or immediate value of the variance:

> "Toward the preservation of your Government and the permanency of your present happy state, it is requisite not only that you steadily discountenance irregular oppositions to its acknowledged authority, but also that you resist with care the spirit of innovation upon its principles, however specious the pretexts. One method of assault may be to effect in the forms of the Constitution alterations which will impair the energy of the system, and thus

> to undermine what can not be directly overthrown....
>
> "If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield."

Changes were to come only through the deliberative process outlined in Article 5 of the *United States Constitution*, not by legislative enactment which subverts the spirit of the Nation's charter.

I have read the PATRIOT Act in its entirety which, unfortunately, is more than can be said of the vast majority of the members of both houses of Congress when it came before them and they voted in favor of it. The act is of substantial size and complexity. Its complexity is magnified by the almost countless instances in which it modifies other current law.

We are told that Congress is a deliberative body which carefully weighs and measures decisions before acting. In this case, it seems that passing a bill took precedence over the deliberative process. It has been reported that haste and precipitancy characterized the procedure throughout the entire legislative process. The passage of the act was reminiscent of the heady days of FDR when he virtually ordered Congress to pass bills which had not yet been written, but which would later be composed under the whim of bureaucrats who rarely recognized the constraints under which the national government was designed to operate.

I do not know which should be of greater concern: the fact that the USA PATRIOT bill was passed without it even being available for wide review and debate, or that rumors persist that the substantive elements of the document were already well on their way to inclusion in other legislation prior to the attacks of 11 September 2001, and that the attacks were simply the excuse for quick passage of provisions which under other circumstances would have elicited strong debate and resistance. It would be enlightening to hear a full review of these concerns.

At any rate, the PATRIOT Act is laden with clauses which are apt to be abused at some point by over-zealous government.

It may be argued that, to date, the abuses that *could have been* have not been rampant. It is difficult to ascertain the validity of this argument since many of the areas which could be abused are kept secret by the provisions of the act. However, given the examples found in history, perhaps they are simply not yet fulfilled. It may be remembered that Hitler "lawfully" became Germany's Chancellor in 1933, but he found many of the repressive enactments of the Weimar Republic to be sufficient for his needs for several years as he consolidated power and wove his web of destruction. In fact, he did not find it necessary to create additional restraints on ownership of firearms until 1938—when his tyranny was nearly absolute. Is it wise to leave to

chance the possibility that at some future date an individual or individuals may come to power in this Nation who will take advantage of opportunities presented within the PATRIOT Act?

In regards to such risks, Thomas Jefferson wisely counseled:

> "In questions of power, then, let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution." [Kentucky Resolution of 1798]
>
> ...and...
>
> "When an instrument admits two constructions, the one safe, the other dangerous, the one precise, the other indefinite, I prefer that which is safe and precise. I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a construction which would make our powers boundless. Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction." [Bergh 10:418-419. (1803.)]

The previously quoted wisdom of Washington about altering sound principles for specious reasons should be adequate warning to us in regards to the risks we take when we modify our foundation principles for the sake of expediency.

A full review of concerns with the PATRIOT Act would require a document which would exceed the size of the act itself. Perhaps a few examples will suffice to demonstrate how it is at odds with the foundation principles of the Nation, and how the seeds of tyranny are perceived by many to be found within its pages.

A few general concerns about the PATRIOT Act would have to include the following broad statements:

- The Act dramatically expands federal government powers of surveillance, search, and arrest, and sets potentially harmful precedents for future encroachments on personal liberty. In spite of protestations to the contrary, some of these expanded powers may be unconstitutional, and would likely have been found so in a day and time when the foundation principles of the Nation were better understood, and a bold love of liberty was more widely held within America.

- The Act greatly expands the legal use of so-called "black-bag" searches—in that there are broad powers granted to police agencies to conduct secret searches without notifying the subject of the search until after the search has been conducted. This power appears to extend to all suspected criminal circumstances, not only to potential acts of terrorism or war.

- Roving wiretaps which allow investigators to tap multiple telephones used by a single "suspect" may now be carried out nationally on a single court order. Previously, such wiretap orders were generally only allowed within the jurisdiction of the judge issuing the

order, and were subject to constraints which reduced the potential that abuses would occur.

- As previously mentioned, the broad latitude granted for secret searches, and national search warrants that hold extra-jurisdictional force begin to look suspiciously like *Writs of Assistance*, and may be unconstitutional because the Fourth Amendment requires warrants to be issued "upon probable cause...particularly describing the place to be searched, and the persons or things to be seized."

- The Act also allows the CIA to access foreign intelligence information obtained by domestic grand juries, as well as other information obtained in investigations and by law enforcement agencies—effectively creating an environment in which the CIA could spy on American citizens—in violation of long-standing U.S. policy.

- Overall, the PATRIOT Act limits and reduces judicial oversight in the gathering of evidence, diminishes the distinction between the gathering of foreign intelligence and domestic law enforcement, and allows many of these provisions to be applied, not just against agents of foreign governments or against terrorists (which are defined under a very broad definition which may someday be abused), but against citizens of the Nation who may, under some construction of the law, be deemed a threat.

While the expanded powers inherent in the PATRIOT Act are ostensibly aimed at thwarting terrorist organizations bent on destroying all that we hold dear in this Nation, recent U.S. history demonstrates a willingness on the part of some who have held power to skew the original purposes of a law to attack those whom they deem as worthy targets. An example may be found in the application of RICO laws, which were supposedly created to give police agencies tools to fight organized crime. Numerous instances may be cited in which those who seek to protect the lives of unborn children were harassed under the umbrella of RICO—in clear violation of the legislative intent of these laws. Who is to say that some future official zealot may not someday turn the onerous powers bestowed by the PATRIOT Act upon individuals, or some class or group of Americans, who become targets because of some future political agenda? If history is as valuable as Patrick Henry, Shakespeare, and Santayana seemed to believe it is, then we may be virtually assured that such abuses will occur.

It would seem that other, better ways are available to the Nation to deal with the threats which face us in this dangerous world. Those ways would almost certainly include more diligent protection of our borders from potential threats, and those who would enter (or who have entered) illegally. It is tragic that the Nation's criminally lax immigration and visa policies gave the terrorists who attacked the Nation on 11 September free access to target our citizens. It appears that at least 15 of the 19 hijackers should never have been issued visas to the United States and would not have been given visas if consular officials had diligently followed the law. It is incomprehensible that a nation which is at war with terrorism, and has been victim to a vicious and brutal attack, has not taken the most simple and logical steps at our borders to preclude future potential attacks. And, it would appear that the argument could be made that we are taking steps to make our borders even less secure—even making overtures which will likely encourage the tide of illegal entry into the nation. The solution to terror as it has been thrust upon us is not to destroy the liberty of loyal Americans, but to interdict those who bring that

threat upon us. Perhaps this issue may be reviewed in greater detail in a future hearing of the Senate Judiciary Committee.

The patriotism of those of us who have concerns about the PATRIOT Act should not be automatically called into question. Many of us love this great Nation and are devoted to those immortal principles upon which it is founded. In his timeless *Farewell Address*, Washington warned of a time when devoted love of country may become unpopular, saying:

> "Real Patriots, who resist the intrigues of the favorite, are liable to become suspected and odious; while its tools and dupes usurp the applause and confidence of the people, to surrender their interests."

It is imperative that the Nation speedily return to the foundation principles upon which our great liberties lie, else those who hate the cause of freedom and seek to destroy it be successful—not by any overt act of violence, but by our own foolish actions.

Those who hold the reins of government, and those of us who love this Nation must forever be watchful and vigilant that corruption not overtake the soundness of our foundation. If we are wise, we will diligently apply this counsel:

> "You must remember, my fellow citizens, that eternal vigilance by the people is the price of liberty, and that you must pay the price if you wish to secure the blessing." (President Andrew Jackson, Farewell Address, 04 March 1837) {While Jackson did say this in his farewell address, the original phrase has been attributed to both Thomas Jefferson and Patrick Henry; but it appears to have been adapted from a statement by John Philpot Curran, Lord Mayor of Dublin, in a speech before the Privy Council, 10 July 1790: "The condition upon which God hath given liberty to man is eternal vigilance." (in Speeches of the Right Honorable John Philpot Curran, ed. Thomas Davis [1847], pp.94-95)}

Let us hope that wisdom will prevail as the USA PATRIOT Act is reconsidered.

U.S. Department of Justice

Federal Bureau of Investigation

In Reply, Please Refer to
File No.

P.O.Box 3235
Salt Lake City, Utah 84110-3235
(801)579-1400
April 20, 2004

Honorable Orrin G. Hatch
United States Senator
8402 Federal Building
125 South State Street
Salt Lake City, Utah 84138

RE: Field Hearing on the USA Patriot Act

Dear Senator Hatch:

Thank you for the invitation to attend the Senate Judiciary Committee's field hearing entitled "Preventing and Responding to Acts of Terrorism: A Review of Current Law." I was, in fact, able to attend the hearing and it was a pleasure to listen to your comments in support of the PATRIOT Act. It was quite interesting to hear the diverse points of view that were expressed by the members of the panels that provided oral testimony.

I would like to accept your offer to submit written testimony while the hearing record is still open. The comments I am submitting come from the perspective of the men and women of the FBI's Salt Lake City Division who are on the front lines of the domestic battle against terrorism. In the aftermath of the horrific events of September 11, 2001 the United States Congress passed the USA Patriot Act, the effect of which was to provide tools to the law enforcement and intelligence communities to protect the homeland from terrorist attacks. One of the most important of these tools is the ability to lower the "wall" between criminal investigators and intelligence agents. I would strongly urge the Congress to not let any intelligence sharing provisions "sunset" in December of 2005 but to make them a permanent part of our anti-terrorism legislation.

I see firsthand this intelligence sharing on a daily basis; not only among the FBI employees assigned to both criminal and intelligence matters, but also among numerous state, local, and other federal agencies assigned to the Joint Terrorism Task Force housed in FBI space in Salt Lake City. This has led directly to several very successful investigations, the end result of which is a greater degree of safety for the citizens of Utah.

Another provision of the PATRIOT act that is important to law enforcement is the "delayed notification" provisions for the service of search warrants. The Act allows this tool, which has long been used in traditional criminal investigations, to be used in terrorism investigations. The collective opinion of the agents I supervise, and one I personally share, is that it only makes common sense to be able to shield from disclosure to the very subjects of extremely sensitive terrorism investigations the fact that they are indeed subjects. It must be reiterated that this tool is only used in the most compelling investigations and then only with approval and supervision of a federal judicial officer. This tool is used very infrequently and I know of no instances of abuse.

Finally I would like to comment on the so-called "librarian" issue, Section 215 of the Act, more correctly described as the new standard for business records under FISA. While this section has never been used to obtain library records, the need for law enforcement and intelligence agencies to have access to a myriad of records through a judicially supervised process cannot be understated. Law enforcement already enjoys record obtaining authorities through both administrative subpoenas and the use of Grand Jury subpoenas in specific instances. I would note that neither of these avenues necessitate review by a judge. From a law enforcement perspective it only makes sense to have similar authorities in the context of terrorism investigations. I should note that Section 215 not only requires an order from a judge but also mandates Congressional oversight.

In conclusion, the Patriot Act provides the law enforcement and intelligence communities with new tools, and strengthens existing tools that can be effectively used in the domestic fight against terrorism. The Act, while passed quickly, was not passed hastily and has not only worked well in the real world defense of the homeland, but to date has been found constitutional in its application. I would ask, on behalf of the men and women of the Salt Lake City Division of the FBI, that the provisions of the USA Patriot Act subject to "Sunset" provisions be made a permanent part of the set of laws used to combat terrorism.

Sincerely,

James H. Burrus, Jr.
Special Agent in Charge

Bruce G. Cohne
525 East First South, Suite 500
P. O. Box 11008
Salt Lake City, UT 84147-0008
Telephone: (801) 532-2666
Facsimile: (801) 355-1813
E-Mail Address: crs law.com

April 12, 2004

Honorable Senator Orrin Hatch, Chairman
United States Senate Committee on the Judiciary
125 South State Street
Salt Lake City, Utah 84138

I want to thank Senator Hatch, and the Senate Committee on the Judiciary for this opportunity to discuss some of the positive and negative implications of the USA Patriot Act.(Act)

First, I must offer some disclaimers with respect to my testimony today. The views which I express are not the views of the Governor of the State of Utah, The Coalition for Utah's Future or Envision Utah and are not offered in my capacity as Chairperson of the Envision Utah Governor's Quality Growth Awards Committee. They are not the views of the Treasurer of the State of Utah or of the Utah State Money Management Council, of which I serve as Vice Chairperson. Further, what I say does not represent the views of KUED Television or the University of Utah, as I currently serve as the President of the Friends Board of KUED TV. Nor are they the views of The United States Commission on Civil Rights, which has not had hearing or taken a formal position on the USA Patriot Act as a whole or various provisions of the Act in particular. My views do express the sentiments and concerns of many of the members of The Utah Advisory Committee to the United States Commission on Civil Rights, which I chair.

We are all painfully aware that September 11, 2001 changed our nation and our individual lives in many ways. The acts of the terrorists brought death and destruction to our shores and fear to our hearts. The aftermath of that day effects us all and impacts each of us in many ways some known and many unknown.

The USA Patriot Act (ACT) was passed in haste, without much in the way of debate, it passed the US Senate by a vote of 99 to 1. The USA Patriot Act stands for "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act," becoming Public Law 107-56 on the 26th of October, 2001.

Did the terrorists win the war on September 11th? They did if we sacrifice our freedoms

to Governmental intrusion. They did if we are no longer free to go about our daily lives without the fear of Government intrusion into our homes our churches and our places of business. They did if we show we are afraid of them. They did if we retreat from our values in the face of their ongoing threat.

My purpose in being here today is raise a voice of caution.

We are a free people and we will remain so if we do not weaken. Remembering these words: "We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness..." and: "We the people of the United States, in Order to form a more perfect Union, establish justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

This nation was formed under the rule of law, not the rule of man. We are a nation of laws. We are a nation "of the people by the people for the people".

This Act was, if we are to believe our leaders, drafted and passed in 45 days from the attack on September 11th. For the purpose of providing for "Domestic Tranquility" and for the "Common Defense" The Act is very technical and precise. Therefore, it is not a stretch to assume that large portions of the Act were drafted in advance of September 11th 2001, and were waiting for some catalyst to get it before Congress. September 11th was that catalyst. Normally such a complex and important piece of legislation would take many months and much debate before being passed. Contrary to the speed with which the Act was passed, many of the rules and regulations implementing the Act have yet to be written, now more than two years from the date of its passage. I am currently working with the Utah Attorney General's office and the office of the State Treasurer to draft a single rule creating oversight of Investment Advisors, and this experience I find proper drafting takes a great deal of time to do it right.

When looking at any law, rule or regulation, we must ask ourselves is the restriction upon our Constitutionally-guaranteed rights deserving the protection that the law is intended to provide and is it worth the cost? We know in advance that those who seek to break the law will do so, law of no law. The words of Benjamin Franklin are as true to day as they were when first written, **"They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."**

There is much about the USA Patriot Act (ACT) to laud and applaud. There is also much

to fear. There are many aspects of the legislation that were both needed and appropriate. Those sections addressing. Money Laundering Sections 318 and 352 and others, Money transfers domestic and foreign, Sections 328 and 359, as will be others. Interagency cooperation and Interagency information sharing, Sections 106 and 504 and many others.

We are aware that the Immigration and Naturalization Service (INS) was empowered under prior law to keep track of and to intercept illegal aliens. Had that agency used the tools it had and had it the mind set to carry out its charge maybe history would be different, who knows. The same people who dropped the ball at INS before September 11th 2001 are still running the Agency, and they are still failing to enforce the law and do their job.

Once the report of the 911 Commission is released we will know much more of why and how September 11th took place. That report should form the framework for revisions to the Act and the implementation of new laws rules and regulations. The Act as it is was passed in a knee jerk reaction to the attack of September 11th. It was not properly vetted by the House or the Senate.

Is our liberty in danger from the Act? The Act permits, through various Governmental agencies, the use of so called "Sneak and Peak Searches". These searches may issue without the production of evidence that the person who is the subject of the search is the target of a criminal investigation, i.e. a demonstration of probable cause. What lawyers would call permission to conduct the ultimate fishing expedition. Average law abiding citizens have been assured they have nothing to fear from the Act. Many in government argue that our government acts only in our best national interest. Taking a look back we find, Nuclear Testing in Nevada, Impounding of Japanese Americans during World War Two, the Alien Sedition Act of 1798, and the treatment of our Native Americans, through numerous treaties made and broken, all actions by a trusted government.

The Act permits the use of modern technoloy to pry into any e-mail message, tapping cell phones along with wired phones (Sections 201 and 204), through the use of warrants issued by a new special court Section 208 of the Act. Further, under Section 212 of the Act, an internet provider can not alert a citizen that he or she is under the watchful eye of the Authorities.

E-mail is defined in the Act as the same form of communication as ordinary telephonic communication. The use of E-mail to facilitate commerce is growing very fast and affects us all. Much of our commercial E-mail not only contains a message like a phone call, but also contains attachments such as documents and pictures like the mail. E-mail should be as secure from the prying eye of the authorities as materials handled by the United States Post Office. We must feel

secure in our sanctity to communicate with each other. It is a First Amendment Right, not a privilege. Doctors and lawyers must be able to rely upon this medium of communication. That it will remain secure. These professionals must be able to be sure their privilege in communication with patients and clients have not been compromised. The Act, in Section 507, permits the Attorney General or his designee to obtain school records. Wile not intended to reach US citizens there are no protections. Do school administrators know who is and who is not a US Citizen?

Section 802 defines the term terrorism to mean, "any criminal act that in the view of the Government involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State..."

Once the all seeing eye of the Government is brought into our homes and businesses it will not withdraw. The power set out in the Act that allows the government to define what is an enemy of the State can change with the times that we live in. Today terrorists, tomorrow civil rights marchers.

The Act is very complex and hard to understand, take section 201 as just one example.

"Section 201. Authority to Intercept Wire, Oral, and Electronic Communications Relating to Terrorism.

Section 2516(1) of title 18, United States Code, is amended:

(1) by redesignating paragraph (p), as so redesignated by section 434(2) of the Antiterrorism and Effective Death Penalty Act of 1996 (Public Law 104-132:110 Stat. 1274, as paragraph (r) and

(2) by inserting after paragraph (p) as so redesignated by section 201(3) of the Illegal .Immigration Reform and Immigrant Responsibility Act of 1996 (division C of Public Law 104-208: 110 Stat. 3009-565, the following new paragraph:"

Before a person can understand what was stated above you would have to read and cross reference two other specific acts, and that is just portion of section 201. Section 212 reads in part as follows:

"Sec.212 Emergency Disclosure of Electronic Communications to Protect Life and Limb.
(A) Disclosure of Contents.

(1) In General-Section 2702 of title 18, United States Code, is amended.

(A) by striking the section heading and inserting the following:

Section 2702. Voluntary Disclosure of customer communications or records:"

Section 212 permits a Governmental agency to invade your private e-mail and review all your communications, The Network or ISP provider under penalty of law can not advise you that your e-mail is being reviewed, The Act makes no provision for privileged communication. As the use of electronic forms of communication increase, we must have more, not less, protection of our methods of communication. The Act provides for a hostile invasion into our lives beyond what is by definition either reasonable or proper. The right of free speech is for us to be secure in what we say in private. There is an expectation of privacy when we use e-mail in our communications with others including our Government.

For an intellectual exercise read and interpret Section 422 of the Act Extension of Filing for reentry deadlines. A seven word title for a section of the act is almost as long as the whole United States Constitution without amendments.

Freedom is gained and maintained only through constant vigilance and with hard work, but Freedom can be lost in a moment, when our leaders react out of fear. Franklin Roosevelt said it best "the only thing we have to fear is fear itself". Let us as a Nation go forward and preserve our freedoms not out of fear but with courage to meet our foes and dispatch them as we have from our founding as a Nation." This Act by and large was created out of fear of the future and in the smoke and ruins of "Ground Zero". The Act should be revised when the 911 Commission report is received, it should be openly and freely debated. The sun should be allowed to set on those portions of the Act that attack our freedom.. The conservative mantra that we should follow is "the best government is that government that governs least." Trust in the language "We the People."

Thank you for the opportunity to be heard today.

Bruce G. Cohne

As set forth in my oral testimony at the hearing I hereby submit proposed amendments to the USA Patriot Act . Specifically Sections 215 and 802 there of as follows:

SEC. 215 . ACCESS TO RECORDS AND OTHER ITEMS UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT.

SECTION 501. ACCESS TO CERTAIN BUSINESS RECORDS FOR FOREIGN INTELLIGENCE AND INTERNATIONAL TERRORISM INVESTIGATIONS.

SEC (c)(1) Shall be amended to read as follows: *"Upon an application made pursuant to this section, the Judge upon a <u>showing of probable</u> cause shall enter an ex parte order as requested, or as modified, approving release of records if the Judge finds that the application meets the <u>other</u> requirements of this section."*

Note underlining reflects changes from the present language of the affected statute.

It would be my recommendation that the standard for the issuance of any warrant for a search of property meet the standard of probable cause, before any court of competent jurisdiction can issue a search warrant, under the above section 215, or any other section of the act. The 4th Amendment standard of probable cause should be the standard guiding any all searches of property.

SECTION 802 of the USA Patriot Act should be amended as to the definition of domestic terrorism as follows: *"Activity that involves act <u>inherently</u>, dangerous to human life that violate the <u>criminal</u> laws of the United States or any state and are <u>calculated</u> to: ....."*

Underlining reflects changes to the present provisions of the act.

Striking from the present provision of the act the words *appear* and *be.*

The above proposed amendments to the Act are submitted as a supplement to my written and oral testimony of record.

Thank you Senator Hatch for taking the time to hear, read and review the comments and testimony of the panel.

Respectfully submitted this 14th day of April 2004

Bruce G. Cohne

Testimony of Daniel P. Collins
before the Senate Committee on the Judiciary
April 14, 2004

Chairman Hatch and Members of the Committee, I appreciate the opportunity to testify here today. There is no more important issue facing our Nation than the detection and prevention of terrorist attacks. And by the same token, the Congress has few responsibilities more weighty than ensuring that the men and women who work day in and day out to thwart terrorism have the tools that they need to get the job done — and to get it done in a way that enhances *both* security and liberty. So let me begin by thanking you for the opportunity to appear before you to offer my views on this vital issue.

My perspective on these matters is informed by my service over the years in various capacities in the Justice Department. Most recently, I served from June 2001 until September 2003 as an Associate Deputy Attorney General ("ADAG") in the office of Deputy Attorney General Larry Thompson. In that capacity, I worked most frequently with the Office of Legal Policy and the Office of Legal Counsel on a broad range of issues that confronted the Department During the same period, I also served as the Department's Chief Privacy Officer, and in that capacity, I had the responsibility for coordinating the Department's policies on privacy issues. I also served, from 1992 to 1996, as an Assistant United States Attorney in the Criminal Division of the U.S. Attorney's Office for the Central District of California in Los Angeles. And prior to that, I had served from 1989 to 1991 as an Attorney-Advisor in the Office of Legal Counsel in Washington, D.C. I am now back in private practice in Los Angeles, and I emphasize that the views I offer today are solely my own.

In evaluating whether current law provides appropriate tools for fighting terrorism, one

must begin with the USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001). This landmark piece of legislation was passed in October 2001 by overwhelming bipartisan majorities in both houses — indeed, the vote in the Senate was a remarkable 98-1. Despite this broad consensus, some commentators have denounced the legislation as a grave threat to privacy and civil liberties. Indeed, some of these criticisms have used rather sweeping language in denouncing the Act, claiming that it creates an "unprecedented freedom to eavesdrop" and "threatens America's foundational constitutional rights." In my view, these criticisms of the Act do not withstand analysis. On the contrary, the Act represents a measured, responsible, and constitutional approach to the threat of terrorist activities conducted in the United States and directed against American citizens.

To explain why I think the Patriot Act strikes the right balance, let me first outline some of the basic principles that I think should be kept in mind here. In fashioning appropriate tools to fight terrorism in a manner that preserves and enhances privacy, one should take account of several key principles:

- *Unwavering fidelity to the Constitution.* Privacy is a cherished American right. Among the various ways in which the Constitution protects that right, the Fourth Amendment specifically reaffirms the right of the people to be free from unreasonable searches of their "houses, papers, and effects." Our laws must scrupulously respect the limits established by the Constitution. As many have said, we have to think outside the box, but not outside the Constitution. But while the Constitution sets the minimum, our laws have long properly reflected the judgment that, from a policy perspective, there should be additional statutory protections for privacy. The remaining principles that I will describe address some of the key

common-sense elements that characterize a sensible privacy policy.

- *Privacy protection is not a zero-sum game.* Too often, the debate over the Patriot Act, as well as over other measures, has wrongly viewed the matter as some sort of zero-sum game. Some critics seem to operate from the implicit premise that *anything* that helps law enforcement is *necessarily* a reduction in civil liberties and a loss of freedom. This sort of thinking does not make much sense either from a law enforcement perspective or from a civil liberties perspective.

- *Not all privacy interests are the same.* Not all privacy interests are of the same magnitude, and it makes no policy sense to act as if they were. For example, some categories of information are more important and more sensitive than others. The fact that the supermarket club could maintain a computerized stockpile of information about my personal buying habits may raise a privacy concern, but it is not on the same level as someone eavesdropping on my phone conversations or reading my medical records. The nature and severity of the privacy intrusion at issue are certainly important factors to consider.

- *Privacy is not always the most important value.* It is essential to keep in mind that, while privacy is an important right, it is by no means the only important value. Human society, by its very nature, involves some loss of personal privacy. Competing concerns raised by new technology may also justify particular intrusions on privacy: no one can deny that airport inspections are essential to public safety, regardless of the cost to privacy.

- *If it's good enough for fighting the mob, it's good enough for fighting terrorism.* Any tool that is already available to fight any other type of crime — be it racketeering, drug trafficking, child pornography, or health care fraud — should be available for fighting terrorism.

If the judgment has already been made that the tool is appropriate for fighting these other crimes, and that any privacy interests at stake must yield to that effort, then surely the tool should also be available to fight terrorism.

- *The law of inertia must not be a principle of privacy policy.* It does not make much sense to perpetuate outmoded ways of doing things simply because it has always been done that way. As times and technologies change, the judgments that are reflected in existing statutory rules may need to be re-evaluated.

- *The importance of technological neutrality.* In applying privacy principles to new and emerging technologies, an important benchmark is the concept of "technological neutrality." The idea is that, just because a transaction is conducted using a new technology, there should not have to be a loss of privacy when compared to similar transactions using older technologies. To use an example, the privacy protection for ordinary email should be roughly equivalent to that of an ordinary postal letter. Conversely, the emergence of new technologies should not provide criminals with new ways to thwart legitimate and legally authorized law enforcement action. Cyberspace must not be permitted to become a "safe haven" for criminal activity. The notion of technological neutrality takes into account both sides of the coin.

With these basic principles in mind, let me explain why I think the Patriot Act properly enhances the abilities of law enforcement in a manner that respects and preserves our freedoms. Let me give just a few examples:

- Section 215 of the Patriot Act enacted much-needed reforms to the provisions of the Foreign Intelligence Surveillance Act ("FISA") that govern the ability to obtain business records in connection with FISA investigations. Despite the stridency of some of the criticisms

leveled at Section 215, the authority provided by this section is quite modest and quite reasonable. For a very long time, grand juries have had very broad authority to obtain, by subpoena, records and other tangible items that may be needed during the course of a criminal investigation. Section 215 provides a narrow analog to such subpoenas in the context of certain intelligence investigations under FISA. Indeed, in many respects, Section 215 contains more protections than the rules governing grand jury subpoenas:

- A court order is required. 50 U.S.C. § 1861(c).
- The court is *not* merely a rubber-stamp, because the statute explicitly recognizes the court's authority to "modif[y]" the requested order. *Id*, § 1861(c)(1).
- The section has a narrow scope, and can be used in an investigation of a U.S. person only "to protect against international terrorism or clandestine intelligence activities." *Id.*, § 1861(a)(1), (b)(2). It cannot be used to investigate domestic terrorism.
- The section provides explicit protection for First Amendment rights. *Id.*, § 1861(a)(1), (a)(2)(B).

Despite what some of its critics seem to imply, this narrowly drafted business records provision has no special focus on authorizing the obtaining of "library records." On the contrary, because the provision specifically forbids the use of its authority to investigate U.S. persons "solely upon the basis of activities protected by the first amendment to the Constitution," the provision does *not* authorize federal agents to rummage through the library records of ordinary citizens. Moreover, it would make no sense to create a carve-out for libraries from the otherwise

applicable scope of Section 215: that would simply establish libraries and library computers as a "safe harbor" for international terrorists. Indeed, over the years, grand juries have, on appropriate occasions, issued subpoenas for library records in connection with ordinary criminal investigations. In my view, a sensible privacy policy should allow an appropriately limited analog in the FISA context, and section 215 is just that.

In this regard, I would note that Section 4 of S. 1709 (the "SAFE Act") would amend the FISA so that the authority conferred by section 215 could only be exercised if "there are specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power." This is much too narrow a standard. Given the various safeguards already in place in Section 215, which adequately take account of the difference between investigations under FISA and ordinary criminal investigations, there is insufficient justification for a standard that is so much more demanding than the ordinary "relevance" standard that has long governed grand jury subpoenas in criminal investigations.

- Section 213 of the Patriot Act codifies long-standing authority to delay notification of the execution of a warrant. *See, e.g.*, *United States v. Villegas*, 899 F.2d 1324, 1337 (2d Cir. 1990). It does so with proper safeguards: the court must independently find "reasonable cause" to justify the delay; the court must set forth in the warrant the "reasonable period" for such delayed notice; and such a deadline may be extended only upon a subsequent finding by the court that "good cause" has been shown for the additional delay. 18 U.S.C. § 3103a(b). These stringent safeguards are entirely appropriate, but they are also entirely adequate. In particular, the revisions that would be made by Section 3 of S. 1709 would be a serious mistake. There is no reason why delayed notice should not be authorized when

notification could result in the intimidation of witnesses, the destruction of *other* evidence (i.e., evidence other than that described in the warrant), or the jeopardizing of an entire ongoing investigation. So long as the court has the ultimate ability, and the *independent* ability, to supervise and control the delay, immediate notification should not be required when such serious concerns are present. Indeed, section 3 of S. 1709 would leave the law *worse* than it was before the Patriot Act.

- The Patriot Act eliminates unwarranted and irrational disparities in prior law, which afforded different levels of protection to similar things. For example, prior law (at least in the view of some courts) afforded different levels of protection to Internet communications based upon whether the person used a cable company, as opposed to a telephone company, to reach the Internet. This sort of disparate treatment violates the principle of technological neutrality and is very hard to justify under any rational theory of appropriate law enforcement. The Patriot Act fixes this. *See* Pub. L. No. 107-56, § 211, 115 Stat. at 283-84.

- The Patriot Act allows a single federal district court to issue an order authorizing the installation of a pen register or trap and trace device "anywhere within the United States." Pub. L. No. 107-56, § 216(b)(1), 115 Stat. at 288-89. In light of the inherently interstate nature of electronic communications, and the number of entities that may be involved in transmitting them, a nationwide scope makes perfect sense. And there is little gain, if any, from a civil liberties perspective, in requiring the Government to incur the shoe leather costs of getting separate orders in multiple districts.[1]

---

[1] Some critics have complained that giving pen/trap orders nationwide scope confers too much discretion and opens up possibilities for serious abuse. These criticisms are unfounded. Businesses upon whom pen/trap orders are served, if they are not already "specifically named" in

- Similarly, the Patriot Act properly recognizes the inherently interstate nature of electronic communications by allowing nationwide service of search warrants for electronic evidence. *Id.*, § 220.

- The Patriot Act makes more technologically neutral the statutes governing pen registers — devices to capture routing and signaling information, but not content. These laws now clearly apply to both electronic communications and telephonic communications. And to take account of the specific privacy concerns raised about the use of government-installed programs to implement such orders — I am referring to the "Carnivore" debate — the Act provides for judicial oversight by requiring detailed reporting to the court whenever such a government-installed program is used to implement a pen/trap order involving electronic communications. 18 U.S.C. § 3123(a)(3).

- Title III — the wiretap statute — sets forth a number of stringent requirements that must be met before a court may issue an order authorizing a wiretap. One of the requirements is that the investigation must involve an offense that is on Title III's list of offenses that are eligible for wiretapping. 18 U.S.C. § 2516. The Patriot Act modestly expands this list — which already includes a variety of serious offenses such as money laundering and bank fraud — to include six terrorism offenses, unlawful possession of chemical weapons, and computer fraud and abuse. Pub. L. No. 107-56, §§ 201, 202, 115 Stat. at 278. In adding these offenses to the list of those eligible to be investigated by wiretapping, the Act leaves unchanged the full

---

the order, are entitled to request that the government "provide written or electronic certification that the order applies" to them. 18 U.S.C. § 3123(a)(1). Additionally, the Act states that providers or other persons who "furnish[] facilities or technical assistance" in the execution of such orders "shall be reasonably compensated for such reasonable expenditures incurred in providing such facilities or assistance." Pub. L. No. 107-56, § 222, 115 Stat. at 292-93.

panoply of substantive protections provided by Title III. Moreover, the notion that there is a rational and defensible privacy interest in precluding wiretapping to investigate *terrorism* — while permitting it to be used to investigate, say, bribery in sports contests — is very difficult to defend. Law enforcement should have at least the same tools to fight terrorism that it has to fight organized crime.

- The Patriot Act eliminates the anomalous disparity in prior law between the standards for obtaining stored email and those for obtaining stored voicemail. Under prior law, voicemail stored with a third party required a full-blown Title III order, but stored email (and voicemail on the criminal's home answering machine) could be obtained with a regular search warrant. Again, from a technological-neutrality perspective, this didn't make a lot of sense. The USA Patriot Act amends the law so that a search warrant will do in such cases. Pub. L. No. 107-56, § 209, 115 Stat. at 283.

- The Patriot Act further eliminates the loophole in prior law under which *hackers* were arguably protected by the wiretap law from law-enforcement monitoring authorized by the operators of the computers they invade. *Id.*, § 217.

These provisions of the Patriot Act — a statute passed by overwhelming bipartisan majorities in both houses — are just a few illustrations of how the Act properly updates the law while respecting and preserving our freedoms.

I would like to make one final point. Some have criticized that many of the Patriot Act's reforms are not specifically limited so as to apply only in terrorism cases. Once again, I think this criticism reflects a failure to appreciate what sensible policy in this area entails. For example, if the principle of technological neutrality makes general sense, there is no reason why

it should be limited to terrorism cases. Is it a rational privacy policy to say that persons committing *bank fraud* should have a leg up over law enforcement if they use one communications technology rather than another? The fact that terrorism concerns motivated the effort to fix the problem in this area does not mean that the problem should not be fixed in a comprehensive and rational manner.

In closing, the Patriot Act is an invaluable and landmark piece of legislation that has worked to protect American lives while preserving American liberties.

I would be pleased to answer any questions the Committee might have on this subject.

Department of Justice

STATEMENT

OF

JAMES B. COMEY
DEPUTY ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

PREVENTING AND RESPONDING TO ACTS OF TERRORISM:
A REVIEW OF CURRENT LAW

PRESENTED ON

APRIL 14, 2004

STATEMENT OF JAMES B. COMEY
DEPUTY ATTORNEY GENERAL
OF THE UNITED STATES
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

April 14, 2004

Good morning Chairman Hatch and Members of the Committee. Thank you for giving me the opportunity to appear before you today and discuss the vital tools of the USA PATRIOT Act and the efforts of the Department of Justice in the war on terror. I am grateful to you and to this Committee for your strong support of the Department of Justice. The Department has had many successes in the war on terror, in battling corporate fraud, in stemming violent gang and drug crime, and in preserving the civil rights and liberties of Americans. That success has come from the commitment of the people of the Department, from strong leadership and from your dedication to our cause.

Since assuming my current post, I've met with hundreds of the Department's employees to talk about their work and their efforts to help safeguard the lives and liberties of Americans. It's been said by many wiser than I that we live in challenging times. Fortunately, at the Department of Justice, our people are up to the challenge. They are simply the best of the best. These are people who chose public service and they are committed to serving the cause of justice.

As I stated, the Department of Justice's number one priority continues to be the

prevention, investigation, and prosecution of terrorist activities against U.S. citizens and U.S. interests. Following the tragedy of September 11, 2001, Congress overwhelmingly passed, and on October 26, 2001, the President signed the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act" ("USA PATRIOT Act" or "Act"). This legislation provided our nation's law enforcement, national defense, and intelligence personnel with enhanced and vital new tools to prevent future terrorist attacks and bring terrorists and other dangerous criminals to justice. Over two and one-half years have passed since the catastrophic attacks of September 11, 2001, but the danger is still clear. Survival and success in this very real war on terrorism demands that the Department of Justice continuously improve its capabilities to protect Americans. The United States of America is winning this war on terrorism with unrelenting focus and unprecedented cooperation. For example, the Department of Justice secured convictions of nine individuals in the Virginia jihad case on terrorism-related charges, including conspiracy to levy war against the United States and conspiracy to provide material support to the Taliban and Lashkar-e-Taiba. As the Attorney General stated, "[those] convictions are a stark reminder that terrorist organizations are active in the United States. We will not allow terrorist groups to exploit America's freedoms for their murderous goals."

As our work continues, a debate also continues. Much of that debate surrounds civil liberties after September 11th and particularly the USA PATRIOT Act. Good people will always disagree about policy issues, particularly when they touch on the powers of government. All

citizens should question the power of government and demand explanations. But because I believe the USA PATRIOT Act is wholly constitutional and just plain smart, I feel strongly those tools should remain on the books for our prosecutors and agents to use. Having served as a prosecutor, I've used many of those tools and know how valuable they are. I firmly believe that if the American people understood how we use these important provisions, their reaction would be the reaction I've gotten all across the country, "I certainly would not want to take that out of your toolbox."

What the USA PATRIOT Act did was to equip federal law enforcement and intelligence officials with the tools they needed to mount a seamless, coordinated campaign against our nation's terrorist enemies. The USA PATRIOT Act eased legal restraints that impaired law enforcement's ability to gather, analyze, and share critical terrorism-related intelligence information. The Act also enhanced America's criminal laws against terrorism, and clarified that existing laws against terrorism apply to the new types of attacks planned by al Qaida and other international terrorist organizations.

As I've discussed privately with a number of Senators and Members of Congress, the USA PATRIOT Act did something absolutely critical to our national security and that is breaking down the wall between the intelligence investigators responding to al Qaida and other terrorist threats and the criminal investigators responding to those same threats. That changed our world and has made us immeasurably safer. The USA PATRIOT Act authorized government

agencies to share intelligence so that a complete mosaic of information could be compiled to understand better what terrorists might be planning and to prevent attacks from happening. Prior law and policy sharply limited the ability of law enforcement and intelligence agents to share information, which severely hampered terrorism investigators' ability to "connect the dots." The USA PATRIOT Act, however, brought down this "wall" and greatly enhanced foreign intelligence information sharing among federal law enforcement and national security personnel, intelligence agencies, and other entities entrusted with protecting the nation from acts of terrorism. This increased ability to share information has been invaluable to the Department in terrorism investigations and has directly led to numerous arrests, prosecutions, and convictions in terrorism cases.

The removal of the "wall" separating intelligence and law enforcement personnel, for example, played a crucial role in the Department's successful dismantling of a Portland, Oregon terror cell, known as the "Portland Seven." Members of this terror cell had attempted to travel to Afghanistan in 2001 and 2002 to defend the Taliban and al Qaida by taking up arms against United States and coalition forces fighting there. Utilizing sections 218 and 504 of the USA PATRIOT Act, however, the FBI was able to conduct Foreign Intelligence Surveillance Act (FISA) surveillance of one of the suspects to detect whether he had received orders from an international terrorist group to reinstate a domestic attack plan on Jewish targets that the lead defendant had once discussed and in turn, keep prosecutors informed as to what they were learning. This gave prosecutors the confidence not to arrest the suspect prematurely while they

continued to gather evidence on the other members of the terrorist cell. Ultimately, prosecutors were able to collect sufficient evidence to charge seven defendants and then to secure prison sentences for the six defendants taken into custody ranging from three to eighteen years.

Section 213 of the USA PATRIOT Act codified and made nationally consistent an important tool by expressly authorizing courts to issue delayed notification search warrants. Court-authorized delayed-notice search warrants are a vital aspect of the Justice Department's strategy of prevention - - detecting and incapacitating terrorists before they are able to strike. In some cases, if criminals are tipped off too early to an investigation, they might flee, destroy evidence, intimidate or kill witnesses, cut off contact with associates, or take other action to evade arrest. Under the Act, courts can delay notice only when immediate notification may result in death or physical harm to an individual, flight from prosecution, evidence tampering, witness intimidation, or serious jeopardy to an investigation.

Section 215 of the USA PATRIOT Act allows the Foreign Intelligence Surveillance Court to order production of business records. Under long standing authority, grand juries have issued subpoenas to many varieties of businesses, including libraries and bookstores, for records relevant to criminal inquiries. The USA PATRIOT Act authorized the FISA Court (or a designated magistrate) to issue similar orders in national security investigations. And while these judicial orders could be issued to bookstores or libraries, section 215 does not single them out.

The USA PATRIOT Act has also strengthened the nation's criminal laws against terrorism, providing prosecutors with a solid foundation to pursue what has become the Department's highest priority. A critical element in our battle against terrorism is to prevent the flow of money and other material resources to terrorists and terrorist organizations. By using the statutes Congress provided against material support of terrorism, the Department has successfully disrupted terrorist planning at the earliest possible stages, well before such violent plans can become reality. Utilizing the terrorist financing and material support provisions created by Congress, the Department has charged more than 50 individuals and obtained 28 convictions. In addition, using the material support statutes, the Department has obtained convictions yielding lengthy prison sentences, as in the case of Mohammed Hammoud, the main defendant in the Charlotte Hizballah case, who was ultimately sentenced to 155 years in federal prison.

Lastly, prior to enactment of the USA PATRIOT Act, the federal prohibition on attacking transportation carriers was a patchwork of federal statutes with gaps that had the potential to hamper terrorism investigations. Section 801 of the Act filed in these gaps by creating a new crime of attacking a mass transportation system. Among other things, it now is illegal to destroy a mass transportation vehicle or place a biological toxin near a mass transportation vehicle. Since the passage of the Act, the Department has used section 801 in at least two cases.

The USA PATRIOT Act also removed a number of significant legal obstacles that prevented law enforcement from effectively investigating terrorism and related criminal activity.

It has greatly improved the Department's ability to disrupt, weaken, thwart, and eliminate the infrastructure of terrorist organizations, to prevent or thwart terrorist attacks, and to punish perpetrators of terrorist acts. In the past, investigators had to waste precious time petitioning multiple judges in multiple districts for search warrants. Section 219 of the USA PATRIOT Act, however, streamlined this process, making nationwide search warrants available to law enforcement in terrorism cases. Law enforcement already has used this authority on numerous occasions.

I would also like to discuss some of the critical protections for civil liberties encompassed within the USA PATRIOT Act and long-standing law. The Act provides for ample judicial, congressional and public oversight to ensure that the civil rights and civil liberties of all Americans are protected. First, the USA PATRIOT Act preserves the historic role of courts by ensuring that the vital role of judicial oversight is not diminished. For example, the provision for delayed notice for search warrants requires judicial approval. In addition, under the Act, investigators cannot obtain a FISA pen register unless they apply for and receive permission from federal court. The USA PATRIOT Act actually goes farther to protect privacy than that Constitution requires, as the Supreme Court has long held that law enforcement authorities are not constitutionally required to obtain court approval before installing a pen register. Furthermore, a court order is required to compel production of business records, in national security investigations.

Second, the USA PATRIOT Act respects important congressional oversight by placing new reporting requirements on the Department. Every six months, the Attorney General is required to report to Congress the number of times section 215 has been utilized, as well as to inform Congress concerning all electronic surveillance under the Foreign Intelligence Surveillance Act. Under section 1001 of the USA PATRIOT Act, Congress receives a semiannual report from the Department's Inspector General detailing any abuses of civil rights and civil liberties by employees or officials of the Department of Justice. It is important to point out that in the Inspector General's most recent report to Congress, he reported that his office has received no complaints alleging misconduct by Department employees related to the use of a substantive provision of the USA PATRIOT Act.

Finally, the USA PATRIOT Act fosters public oversight of the Department. In addition to the role of the Inspector General to review complaints alleging abuses of civil liberties and civil rights, the Act provides a cause of action for individuals aggrieved by any willful violation of Title III or certain sections of FISA. To date, no civil actions have been filed under this provision.

I believe that if people would take the time to have a reasoned discussion about the tools used by law enforcement in the war on terror, they would realize that the USA PATRIOT Act was not rushed, it actually came 10 years too late. As the Attorney General stated on November 8, 2001, the Department of Justice has been called to "the highest and most noble form of public

service—the preservation of American lives and liberty." Now, more than two years after the attacks of September 11, the Department continues to respond to this call with enthusiasm, and with a profound respect for this country's tradition of civil rights and liberties.

Mr. Chairman, thank you for holding this important hearing today. I hope that the work we do today, and the work that we will continue to do, will help the American people understand how vital the tools of the USA PATRIOT Act are in our efforts to root out terrorism and keep Americans safe.

I would be pleased to answer any questions you may have. Thank you.

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 15, 2004

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This presents the views of the Department of Justice on S. 436, the "Domestic Surveillance Oversight Act of 2003." The bill would require FISA (Foreign Intelligence Surveillance Act) courts to transmit their rules and procedures to relevant committees of Congress and to release to those committees the sections of opinions that contain legal interpretations of FISA and of the Constitution. It would also require the Attorney General to report annually to Congress on, inter alia: the "aggregate number of United States persons targeted for orders under" FISA; and, "in a manner consistent with the protection of the national security of the United States . . . the portions of the documents filed with" the FISA courts "that include significant construction or interpretation of" FISA or the United States Constitution.

The Administration does not support the public disclosure of the number of United States persons targeted under FISA for searches or electronic surveillance. Under current law, the Department publicly reports the annual aggregate number of FISA searches and surveillances, but does not disclose publicly how many of those searches and surveillances involve United States persons. See 50 U.S.C. §§ 1807, 1826. Of course, the Department does keep the Intelligence Committees of Congress "fully inform[ed]" about its use of FISA, including the use of FISA to target U.S. persons. See *ibid.* Congress has in the past considered, and rejected, proposals to require disclosure of this information to the general public rather than to the Intelligence Committees. In 1984, the Senate Select Committee on Intelligence was "asked by the American Civil Liberties Union to consider making public the number of U.S. persons who have been FISA surveillance targets." S. Rep. No. 98-660, 98th Cong., 2d Sess. 25 (1984). The Committee rejected that proposal because "the benefits of such disclosure for public understanding of FISA's impact would [not] outweigh the damage to FBI foreign counterintelligence capabilities that can reasonably be expected to result." *Ibid.* As the Committee explained, "[a]ny specific or approximate figure would provide significant information about the extent of the FBI's knowledge of the existence of hostile foreign intelligence agents in this country. As in other areas of intelligence oversight, the Committee

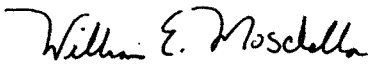
must attempt to strike a proper balance between the need for public accountability and the secrecy required for effective intelligence operations." *Ibid.* The Administration continues to support the balance that was struck in 1978 and reaffirmed in 1984.

The Administration takes no position on whether the Foreign Intelligence Surveillance Court (FISC) or Court of Review should be compelled by statute to release publicly the unclassified portions of their rules and procedures. That is a matter for resolution by those Courts and Congress. However, the Administration would oppose a statutory requirement to compel public disclosure of the Courts' classified orders, opinions, rules, or procedures, as the decision whether currently classified information may be declassified is a matter properly reserved to the executive branch.

Finally, the Administration opposes a requirement to disclose portions of FISA pleadings and orders that deal with significant questions of law, because it is inherently inconsistent with "the protection of the national security of the United States." Virtually the entirety of each decision of the FISC discusses the facts, techniques, or pleading of highly classified FISA operations. As we noted in our letter of August 6, 2002, on predecessor legislation in the 107th Congress, "[a]n interpretation by the FISC of the applicability of FISA to a technique or circumstance, no matter how conceptually drawn, could provide our adversaries with clues to relative safe harbors from the reach of FISA."

Thank you for your attention to this matter. If we may be of additional assistance, we trust that you will not hesitate to call upon us. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this report.

Sincerely,



William E. Moschella
Assistant Attorney General

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

WASHINGTON LEGISLATIVE OFFICE
Laura W. Murphy
Director

1333 H Street, NW Washington, D C 20005
(202) 544-1681 Fax (202) 546-0738

To: Interested Persons

From: Timothy H. Edgar, ACLU legislative counsel

Re: DOJ letter opposing SAFE Act

Date: February 6, 2004

The Attorney General's letter recommending a veto of the Security And Freedom Enhanced (SAFE) Act of 2003 is based on hyperbole and slanted legal analysis, not facts. Congress should still enact SAFE this year.

The bipartisan SAFE Act is a measured, informed response that adds safeguards to key provisions of the USA PATRIOT Act that threaten fundamental American civil liberties. To set the record straight, *the SAFE Act does not repeal any provision of the USA PATRIOT Act, much less take away any of the government's pre-9/11 anti-terror powers.*

Notably absent from the Attorney General's letter is any real-life terrorism case (or indeed any case) where the prudent limits of the SAFE Act on USA PATRIOT Act surveillance powers would actually have impeded an investigation. Instead, the letter mischaracterizes the provisions of the SAFE Act in an effort to frighten potential co-sponsors of the legislation.

Surveillance powers amended by the SAFE Act including roving wiretaps in intelligence investigations, searches of library and other personal records, and "sneak and peek" warrants. The SAFE Act preserves all these surveillance powers while amending them to restore meaningful judicial and Congressional oversight.

Roving wiretaps. Prior to the passage of the USA PATRIOT Act, the government could obtain an electronic surveillance order of a suspected international terrorist either by obtaining a criminal wiretap order based on probable cause of criminal activity,[1] or by obtaining an intelligence wiretap order under the Foreign Intelligence Surveillance Act (FISA).

[1] Criminal wiretaps are also called "Title III wiretaps" because they were authorized by Title III of Pub. L. No. 90-351, the Omnibus Crime Control and Safe Streets Act of 1968, now codified at chapter 119 of Title 18, United States Code.

"Roving wiretaps," which permit the government to conduct surveillance without obtaining a new court order when the suspect changes from one facility (usually a telephone) to another, *were available for suspected terrorists* in criminal terrorism investigations. To obtain a roving wiretap in a criminal investigation, the government has to specify a target and the person conducting the surveillance has to "ascertain" that the target is using the facility.[2]

Section 209 of the USA PATRIOT Act made roving wiretaps available in intelligence (FISA) investigations. However, the ascertainment requirement – which ensures the target is actually using the telephone the government is tapping – was not included. As a result, the government could easily listen into conversations of entirely innocent people simply because it supposed, wrongly, that a target might be using that telephone. The danger of intercepting innocent conversations is compounded in intelligence investigations, which are not limited to targets who are necessarily suspected of any criminal activity.

Section 314(a)(2) of the Intelligence Authorization Act for FY2002, passed shortly after the USA PATRIOT Act, compounded the problem by creating what was, until then, an entirely unknown surveillance power – the "John Doe" roving wiretap. A roving wiretap, in theory, follows a target rather than a particular facility or telephone. However, because of the Intelligence Act's amendment, the government may now, for the first time, obtain a wiretap order without specifying either the telephone *or* the target. As a result, the government can listen into any telephone if it believes an unknown suspect might be using it.

The Attorney General's letter attempts to defend this entirely novel type of wiretap – and escape the "John Doe" roving wiretap moniker – by noting that the order still requires the government to provide a physical description of the unknown suspect. The letter fails to acknowledge the obvious potential for invasion of privacy in a wiretap order that does not apply to a particular telephone, or even a particular person, but lets the government listen in to any telephone the government thinks might be used by a person that happens to meet the physical description of some unknown suspect.

Importantly, the government must specify the "identity" of the target – not necessarily the target's real name. Justice Department officials have long interpreted this requirement of the criminal roving wiretap statute not to require knowledge of the target's true name. For example, a roving wiretap order could be granted if the government knew of a suspect only by an alias.

In sum, the SAFE Act permits roving wiretaps in intelligence investigations, but imposes two safeguards for such wiretaps that are already required for criminal roving wiretaps –

---

[2] *See* 18 U.S.C. § 2518(11)(b)(ii) (providing that a roving wiretap must "identif[y] the person believed to be committing the offense and whose communications are likely to be intercepted,"); *id.* at (12) (providing that interception pursuant to a roving wiretap "shall not begin until the place where the communication is to be intercepted is ascertained by the person implementing the interception order.")

that the government specify the target and ascertain the target is actually using the facility.

Wiretaps are the most intrusive form of surveillance known to the law. It is not asking too much to require the government, when it seeks a surveillance order than can jump from telephone to telephone, that it at least specify whom the order is supposed to be following.

Finally, the Attorney General's letter does not even attempt to defend the lack of an ascertainment requirement for FISA roving wiretaps.

"Sneak and peek" warrants. The Attorney General's letter fails to acknowledge that, prior to passage of the USA PATRIOT Act, there was *no statutory authority* for the practice of issuing "sneak and peek" warrants – criminal search warrants where notice of the execution of the warrant was delayed. The Federal Rules of Criminal Procedure – which governs the procedure for issuing search warrants – provided no express exception to the rule requiring service of warrants at the time a search was conducted.

While some courts had approved the practice in limited circumstances, two federal circuit courts of appeals that ruled on sneak and peek warrants prior to 9/11 had done so only pursuant to limitations that were swept away by the USA PATRIOT Act. For example, these courts had imposed a presumptive seven-day time limit for the delay.[3] The Supreme Court had yet to decide whether sneak and peek warrants were authorized by statute or the Constitution (except in the specific context of electronic surveillance which is authorized by statute).[4] In its most recent pronouncement on the subject, the Supreme Court, in an opinion written by Justice Thomas, held that the principle requiring notice for the execution of a warrant (often called the "knock and announce" rule) is not merely a common law principle, but is a constitutional rule based on the Fourth Amendment. *Wilson* v. *Arkansas*, 514 U.S. 927 (1995).

The USA PATRIOT Act differs from prior law in that it does not include any specific time limit, allowing a delay of notice to be extended for any "reasonable" time period. The Act also authorizes such searches not only in specific instances, but whenever the government shows notice would "seriously jeopardize" a prosecution or "unduly delay" a trial.

The SAFE Act merely limits the reasons for "sneak and peek" warrants to three specific circumstances – that notice would cause (1) the life or physical safety of a person (such as a witness) to be put in danger, (2) flight from prosecution, or (3) destruction of evidence. The Attorney General's letter simply mischaracterizes the SAFE Act when it claims it would prohibit a judge from approving a delay if notice would allow a suspect's

---

[3] See U.S. v. Villegas, 899 F.2d 1324, 1337 (2nd Cir. 1990) (imposing a renewable seven-day notice requirement for "sneak and peek" searches); United States v. Freitas, 800 F.2d 1451, 1456 (9th Cir. 1986) (same).

[4] *See Dalia* v. *United States*, 441 U.S. 238 (1979) (approving a secret search for the purpose of installing bugging equipment).

"associates to go into hiding, flee, change their plans, or even accelerate their plots." Clearly, the SAFE Act standard would permit a delay if the government could show any of the things the Attorney General's letter mentions.

Finally, this letter continues to rely on hypothetical, rather than real-life, examples of a sneak and peek search involving a suspected terrorist. While the Justice Department has reported widespread use of "sneak and peek" search warrants in ordinary criminal cases, the Department still has not provided even one example of how such a warrant has been used in any terrorism case – much less an example of a "sneak and peek" warrant in a terrorism case that could not have been obtained under stricter standards.

The letter also fails to acknowledge that the government can obtain an intelligence search warrant under FISA – which is always secret – for a physical search involving a suspected international terrorist, even where the SAFE Act's standards for criminal "sneak and peek" searches could not be met.

Searches of Library and Other Personal Records.

Prior to passage of the USA PATRIOT Act, FISA records searches were limited to certain (generally travel-related) business records of a suspected foreign agent. Section 215 of the USA PATRIOT Act expanded this power to include any and all "tangible things," including library records, medical records, genetic information, membership lists of organizations, and other sensitive records and eliminated the requirement of individual suspicion.

The SAFE Act preserves the government's new power to obtain any and all records under FISA – including library records – but does put back into place the requirement of individual suspicion that protects the records of innocent people from being obtained by the government.

The Attorney General has publicly revealed – in a speech denouncing the American Library Association – that there have been no FISA records searches at all since September 11, 2001. Astonishingly, the Attorney General's letter still claims that restoring some requirement of individual suspicion for FISA records searches would harm anti-terrorism investigations. If the government is not using a power at all, amending the standards for the use of the power will have no effect on its investigations.

The Attorney General's letter also inappropriately compares the standards for production of records pursuant to a criminal grand jury subpoena with those for production of records under FISA. The government can and does use grand jury subpoenas on a regular basis to obtain records in terrorism investigations. Nothing in the SAFE Act would limit the power of any grand jury to issue a subpoena. Rather, the government could still use the grand jury to obtain records in terrorism investigations, just as it can in any other investigation of crime, such as drug trafficking or fraud.

While the grand jury's powers are extensive, grand juries are supposed to obtain records that have some relevance to criminal wrongdoing. There is no such requirement in intelligence investigations, which often implicate political activity protected by the First Amendment. As a result, the power to obtain records must be limited in some other way in order to prevent widespread fishing expeditions into the personal records and reading habits of ordinary Americans.

The SAFE Act does this by restoring the requirement of "specific and articulable facts" that the records pertain to a terrorist, spy or other foreign agent. This level of individual suspicion is more than mere relevance, but less than probable cause – the same level a police officer must show to stop and frisk a person on the street. *See Terry* v. *Ohio*, 392 U.S. 1, 30 (1968). This is not a high hurdle to pass – but it does require *some* individual suspicion – and so would greatly limit the danger that the FISA records search power could be misused to secretly obtain the private records of innocent people.

National Security Letters. The SAFE Act contains a simple clarification of the government's power to obtain records without a court order using national security letters. The power to obtain national security letters was amended by section 505 of the USA PATRIOT Act to eliminate the requirement that there be any individual suspicion the records pertain to a foreign agent. National security letters may be issued to obtain, among other things, transactional records about the customers of a telephone, Internet, or other "communications service provider." 18 U.S.C. § 2709(b).

The SAFE Act does not restore the individual suspicion requirement or otherwise amend the general standards for national security letters provided the USA PATRIOT Act, and now greatly expanded by the amended definition of "financial records" in the Intelligence Act for FY2004.[5] It does clarify the law to ensure that libraries are not treated as "communications service providers" subject to providing transactional records about their patrons simply because they provide public access to the Internet. This change is needed to ensure that the amendments to section 215 have the desired effect of safeguarding the privacy of library records.

Libraries occupy a unique and important role in our democratic society. It is not asking too much to require the government to obtain information about the reading habits or Internet usage of library patrons only by presenting a grand jury subpoena, FISA records order based on individual suspicion, or other court order. A national security letter is not a court order and is not reviewed by an impartial person, such as a judge or magistrate, before it is issued. The Attorney General's letter fails to acknowledge that the Justice Department could obtain the information it might need from a library with any number of authorities – it simply could not do so outside the supervision of a court.

The letter also mischaracterizes the effect of this provision by claiming that it treats use of the Internet in a library differently than use of the Internet in a home or business.

---

[5] The SAFE Act's expanded sunset provision includes section 505 of the USA PATRIOT Act. As a result, if the SAFE Act passed, Congress would have to consider whether to restore that requirement by allowing that provision to expire at the end of 2005.

Under the SAFE Act, a library would be treated precisely the same as any other *customer* of a communications service provider. Records held by the communications service provider about a library's account – or about the account of an individual who uses a library computer to access their own Internet account – could be obtained with a national security letter just as such records could be obtained about the account of any other home or business customer. The SAFE Act merely makes clear that the library itself cannot be regarded as a communications service provider.

Sunsets. Adding new provisions to the sunset clause makes common sense because it gives Congress much-needed leverage in its oversight of the Administration's anti-terrorism effort – a point the Attorney General's letter conveniently ignores.

The Administration is on record opposing the sunsetting of any provision of the USA PATRIOT Act. Congress has wisely rejected that position despite repeated calls by the Administration to eliminate the sunsets early, because it expected that the leverage of the sunset clause (section 224) would encourage Justice Department cooperation with oversight efforts.

The continued failure of the Justice Department to answer many of Congress's legitimate questions shows that Congress was right to be worried its oversight efforts would not be taken seriously. Questions have gone answered for lengthy periods of time, and some information requested by members in their oversight capacity has been provided on a fragmentary basis or not at all. Without the sunset provision, it seems likely that the Justice Department's cooperation with oversight efforts would be even more cursory.

Most of the USA PATRIOT Act 158 provisions are not subject to the sunset clause. Congress chose to limit the sunset clause to some 14 surveillance provisions that it believed could pose a serious risk to personal privacy. Unfortunately, Congress omitted a number of key provisions, including those broadening "sneak and peek" searches, nationwide search warrants, and national security letters. The inclusion of these four additional provisions within the sunset clause does not prejudice, one way or another, the decision Congress must make by December 31, 2005 about whether to reauthorize these or other provisions of the USA PATRIOT Act.

Conclusion. The Attorney General's letter on the SAFE Act is based on hyperbole and mischaracterization of the Act's provisions, not facts. The SAFE Act takes away none of the government's powers under the USA PATRIOT Act, and certainly does not take away any of its pre 9/11 terrorism powers. Instead, the Act merely restores some measure of judicial and Congressional oversight to particularly sensitive surveillance authorities. Congress should enact the SAFE Act this year.

SAFE Act: PATRIOT Surveillance Powers Compared

surveillance power	*before 9/11*	*now*	*SAFE Act*
Roving wiretaps under the Foreign Intelligence Surveillance Act (FISA).		✓	✓
	No roving wiretaps under FISA, but were available for criminal investigations (including for terrorism). Criminal roving taps require that target of search is specified and agents "ascertain" that target is using the facility.	Now there are FISA roving wiretaps, but unlike criminal roving wiretaps, FISA roving wiretaps do not need to specify target and agents need not ascertain target is using that telephone. **PATRIOT § 206; Intelligence Act for FY2002 § 314.**	Would keep FISA roving wiretaps, but they would have to observe same requirements as criminal roving wiretaps, i.e., they must (1) specify a target, and (2) would have to ascertain target is using that facility. **SAFE § 2**
"Sneak and peek" – criminal search warrants with delayed notice.	✓	✓	✓
	Some courts had approved in specific circumstances, despite lack of statutory authority. Two circuit courts of appeals imposed presumptive seven-day limit on delaying notice.	Now there is statutory authority for sneak and peek searches under wide-ranging circumstances, including whenever notice could "seriously jeopardize" a prosecution. No time limit for delaying notice **PATRIOT § 213**	Would limit statutory reasons for delaying notice to three specific harms – danger to persons, flight from prosecution, or. destruction of evidence – and imposes a seven-day limit, which court can renew **SAFE § 3**
Library and other personal records searches under FISA.		✓	✓
	FISA search orders were available only for certain travel-related "business" records (not library or personal records) where FBI has "specific and articulable facts" connecting records to foreign agent.	Now these orders are available for any and all records, including library records, without individual suspicion. **PATRIOT § 215**	Would still be available for any and all records – including library records – but only where FBI has "specific and articulable facts" connecting records to foreign agent. **SAFE § 4**

SAFE Act: PATRIOT Surveillance Powers Compared

surveillance power	*before 9/11*	*now*	*after SAFE*
National security letters (no court order required) for financial records, telephone and ISP bills, consumer credit reports.	✓ Were available only where FBI could show "specific and articulable facts" connecting records to foreign agent.	✓ Now available without individual suspicion; definition of "financial records" greatly expanded. **PATRIOT § 505; Intelligence Act for FY2004 § 334.**	✓ Would still be available without individual suspicion, but libraries with Internet terminals would not be subject to national security letters. **SAFE § 5**
Sunset clause.	not applicable	Now applies to 14 provisions (out of 158 total). **PATRIOT § 224**	Would be expanded to include four additional provisions, for a total of 18 (out of 158 total). **SAFE § 6**

American Civil Liberties Union of Utah
Testimony at a Field Hearing on
"Preventing and Responding to Acts of Terrorism: A Review of Current Law"
Before the United States Senate Committee on the Judiciary
Submitted by Dani Eyer, Executive Director
April 14, 2004

Chairman Hatch and Members of the Committee:

On behalf of the American Civil Liberties Union of Utah and its several thousand members, dedicated to preserving the Constitution and Bill of Rights especially in times of national crisis, I am pleased to be here today to explain our opposition to sections of the USA PATRIOT Act that infringe on basic freedoms and civil liberties.

Perhaps more important, I will outline some solutions to these civil liberties problems that are strongly supported by an array of civil libertarians of the right, left and center – some of whom I am privileged to share the witness table with today. These solutions will enhance judicial review, open government, and accountability while preserving the government's ability to use its anti-terrorism powers wisely in order to deter, disrupt and prevent terrorist activities.

Mr. Chairman, your decision to hold this field hearing, open to honest discussion about these issues, shows respect for your constituents and for our democracy. The issue of preserving and protecting American civil liberties while keeping America safe from terrorism is not only extremely important as a national discussion, but has become a focal point, across the political spectrum, among Utahns.

As a former high school civics teacher in Utah, political science graduate of BYU, graduate of J. Reuben Clark Law School, member of the Utah State Bar, and citizen of Utah, I have a deep and abiding sense of respect for our unique system of limited government that divides and balances government power by giving each branch – executive, legislative, and judicial – a role in protecting our liberty and security. The founders of our state understood from personal experience that such a system was fragile and could well break under the strain of fear and hysteria.

Terrorism represents a deliberate effort by those who would attack our freedoms to frighten us into changing the character of our society. It is in such a moment when the risk to our way of life is greatest.

Restoring Checks and Balances to the USA PATRIOT Act

The USA PATRIOT Act has become a symbol for many Americans of a disturbing trend in our government's response to terrorism that involves sidelining judges, Congress and the public in exercising new powers that are said to be required for terrorism cases, but actually can be used widely in all types of government investigations. While much of the

Act includes needed, incremental changes that may enhance security and are not controversial for mainstream civil libertarians including the ACLU,[1] a few of its more radical expansions of government power do give us real pause.

The USA PATRIOT Act was the product of an extraordinary time, just after September 11, in which Congress and the Administration were working quickly, under extreme pressure, to give law enforcement and intelligence agencies new surveillance powers. The United States Capitol, and many Congressional offices, were closed as a result of the anthrax mailings. Many members candidly acknowledge they did not find it possible under the circumstances to closely scrutinize the Act. No public hearings were held in which civil libertarians could explain their concerns about the bill.

Given that context, it is not surprising that some of its provisions need adjustment to restore critical checks and balances. An excellent, bipartisan first step would be to pass the Security and Freedom Enhanced (SAFE) Act of 2003, sponsored by Republican Senator Larry Craig from our neighboring state of Idaho and by Democratic Senator Dick Durbin of Illinois.

Mr. Chairman, one of your constituents who wrote to support the SAFE Act received a letter from your office, that she shared with me, that said you do not support the SAFE Act because, according to the letter, the SAFE Act "seeks to repeal parts of the USA PATRIOT Act." That information is not accurate.

Some members of Congress and public figures, such as Rep. Dennis Kucinich (D-OH), and former Vice President Al Gore, have called for repeal of all or part of the USA PATRIOT Act.[2] However, Senators Craig and Durbin have not done so. In fact, their legislation does not repeal any provision of the USA PATRIOT Act. Rather, it modifies a few key surveillance powers of the USA PATRIOT Act to restore necessary checks and balances while specifically preserving those powers for use in terrorism and other cases.

Far from repealing the USA PATRIOT Act, the SAFE Act modifies three of its surveillance provisions and broadens the Act's "sunset clause" – amending four out of 158 provisions of the Act, or less than 3% of the entire Act. The attached memorandum to interested persons explains in detail how even with respect to those provisions, passage of the SAFE Act would still leave the government with substantially more power than it had before the USA PATRIOT Act was passed.

In sum, the SAFE Act merely:

---

[1] In testimony before this Committee in November in Washington, DC, Professor Nadine Strossen, President of the national ACLU, included as an appendix a chart of USA PATRIOT Act provisions to which the ACLU did not object or even supported.

[2] The ACLU favors repeal of those provisions of the USA PATRIOT Act repealed by H.R. 3171, the Benjamin Franklin True Patriot Act, sponsored by Reps. Kucinich (D-OH) and Paul (R-TX). The ACLU also supports the efforts of those – including Senators Craig and Durbin – who would fix, rather than repeal, parts of the USA PATRIOT Act.

- Restores key judicial safeguards in order to delay notice of the execution of an ordinary criminal search warrant – including a seven-day limit (which can be renewed) and a requirement to give specific reasons for delayed notice;

- Requires "articulable suspicion" of a connection to a spy, terrorist or other foreign agent (a standard far lower than probable cause, but more than nothing) before a secret foreign intelligence court may approve demands for library, bookstore, medical or other sensitive records, and clarifies that libraries are not "communications service providers" subject to FBI "national security letter" records demands that require no court order at all;

- Requires that a "roving wiretap" in intelligence cases have the same standards to guard against interception of innocent conversations as roving wiretaps in criminal cases – i.e., the roving wiretap order must specify *either* the identity of the target *or* the "facility" (telephone or other device) being used, and the government must "ascertain" that the target is using the facility; and

- Expands the USA PATRIOT Act's "sunset clause" to require Congressional review, by 2005, of three new surveillance provisions – nationwide search warrants, broad "sneak and peek" searches, and expanded "national security letters."

These additional safeguards would not prevent the government from using "sneak and peek" searches, secret court orders for library or other sensitive records, or roving wiretaps – even in non-terrorism cases. Instead, these safeguards simply require more meaningful judicial scrutiny of these powers. Likewise, the inclusion of a few more provisions in the USA PATRIOT Act's "sunset clause" does not mean those provisions will necessarily expire in 2005 – rather, it encourages Congressional oversight by giving the Congress additional leverage to question the Administration about its use of those powers.

Have Civil Liberties Been Eroded?

For better or for worse, in the public mind the issue of the USA PATRIOT Act has also grown to include the entire array of new government policies adopted after September 11, 2001. As you know, these include many policies – military tribunals and detentions (including of United States citizens), monitoring of attorney-client conversations without prior judicial review, changes to the FBI's investigative guidelines to allow monitoring of political and religious meetings, and new immigration detention policies that sideline immigration judges – that Congress did not authorize in the USA PATRIOT Act. Many of the policies were adopted not only without legislation but also without even meaningful consultation with members of the House or Senate judiciary committees.

One of the more alarming new proposals has been the formulation for widespread data surveillance that could track every American's private life through combining public and private sector computer databases without any safeguards or court oversight. Utahns

have a strong tradition of skepticism towards government power, particularly surveillance power unchecked by judicial or other authority. For that reason, Utah has now joined the growing chorus of states rejecting the MATRIX – the Multistate Anti-Terrorism Information Exchange. The MATRIX is a surveillance system that combines more than 20 billion records about individuals from government databases and private-sector data companies. Those dossiers are available for search by government officials and combs through the millions of files in a search for "anomalies" that may be indicative of suspicious activity – even though many computer experts argue such searches simply cannot work. These notions of intrusive surveillance offended Utahns across the board.

Defenders of the government's anti-terrorism policies have argued that the public's concern about the PATRIOT Act is misplaced because much of what is criticized is not actually found within the USA PATRIOT Act. I disagree. The public associates these policies with the USA PATRIOT Act's problem provisions because, like those provisions, they sideline judicial, Congressional, or public oversight of anti-terrorism, intelligence or law enforcement powers. That these policies were not approved by the Congress makes them more, not less, problematic from a civil liberties standpoint.

Defenders of the government's policies have also argued that the actual abuses of civil liberties that have occurred since September 11, 2001, alarming so many Americans, have often involved these other government policies. For example, the Inspector General of the Department of Justice has reported the results of an investigation in which he found widespread disregard of the constitutional rights of the hundreds of individuals detained after September 11 who were labeled "of interest" to the investigation but were never connected to the attacks. The Inspector General has also reported examples of physical abuse of these detainees. The Inspector General has not investigated the use of the USA PATRIOT Act, although the Act (at section 1001) set up a process for the Inspector General to receive reports about civil liberties abuses and report to Congress. The Inspector General has received many reports of civil liberties abuses, but has not received reports involving the USA PATRIOT Act.

Mr. Chairman, there is a straightforward reason why the Inspector General's reports have not involved the USA PATRIOT Act but instead involve abuses of the government's detention power. Detainees know they are being detained and have, despite serious impediments, been able to communicate with lawyers, family members, and civil liberties organizations about their detention. But the section of the USA PATRIOT Act that involves detention (section 412) has never been used – instead, the government has rewritten its detention procedures in a way that effectively sidesteps section 412's safeguards, such as a seven-day time limit on detention without charge.

Most of the other contentious provisions of the USA PATRIOT Act involve secret surveillance. For the most part, whether and to what extent those provisions have been used remains secret. Indeed, in many cases, the law specifically imposes gag orders on those who receive surveillance orders. As a result, persons under surveillance will not know they are under the government's watchful eye. Americans are fearful, however – and with good reason – that their reading habits, their homes and businesses, and other

deeply private aspects of their lives – can be searched more easily without their knowledge and without any ability to challenge such surveillance.

I offer additional comments from a local perspective on Section 215 of the USA PATRIOT Act. These specific remarks are also based upon my associations and background as an independent bookstore owner and bookseller in the relatively conservative Utah County, and as past president of the multi-state Intermountain Booksellers Association.

Because I enjoy a comfortable relationship with booksellers and librarians in Utah many of them have felt free to express specific concerns related to the message Section 215 carries to library patrons and bookstore customers.

The Committee may not be aware of the extremely sensitive relationship that exists between booksellers or librarians and their customers. For a variety of reasons people who walk into a bookstore or library carry a burden of insecurity: they worry they are not smart enough, that they might be choosing a book that somehow labels them, that the content of the book might be suspect to someone else, or that "someone is watching." It is the task and duty of librarians and booksellers to calm these fears and create an atmosphere of inclusion and lack of suspicion.

This is the living, breathing manifestation of our basic American concepts of freedom of the press, freedom of expression and freedom from government intrusion and personal information gathering, or privacy. Library and bookstore patrons must expect to be able to obtain written material without additional concerns about their basic civil liberties.

If in fact the government has not utilized Section 215 to obtain personal records, then it makes no sense to further alienate people with threats of intrusion into these areas that are so instinctively protected. These concerns should prompt further review of Section 215 to find the balance between its efficacy and the problems of perception that it creates, which could at least be ameliorated by a restriction of its use to those for whom there is individualized suspicion.

At the end of 2005, a few sections of one title of the USA PATRIOT Act – representing 14 of 158 sections or less than 10% of the total – will expire if not reauthorized by the Congress. Congress should be using that opportunity to thoroughly review the use of those provisions of the USA PATRIOT Act, and ask tough questions of the Administration. If a power such as section 215 was never used, why not? If the government can obtain the records or other items it needs in other ways, involving traditional powers, what is the benefit of the new power? If the power was used discretely, why not include greater safeguards? Were there abuses, or warning signs that show a future Administration could be tempted to abuse the power? These vital questions require searching oversight, not merely a few hearings at which members can hear arguments on both sides.

Congress should also use the leverage that the sunset clause represents to review other parts of the USA PATRIOT Act which pose real problems for civil liberties. Further, Congress should take the opportunity presented by the sunset clause to review anti-terrorism policies that are not part of the Act itself, but have become inextricably linked with the Act in the public mind.

The standard for addressing the serious flaws of the USA PATRIOT Act should not be whether any particular provision has resulted in widespread abuses. Safeguards, including meaningful judicial review, are designed to prevent such abuses from ever taking place. The founders of our nation did not wait to see if the new federal government abused its powers before ratifying the Bill of Rights, and we should not wait for abuses of the USA PATRIOT Act before adopting meaningful checks and balances on its new authorities.

Conclusion

Mr. Chairman, I wish again to commend you for holding this hearing to discuss the USA PATRIOT Act in an open and straightforward way. You have asked critics of the Act, and other government policies adopted since September 11, to make their criticisms concrete, and to suggest changes to the law that could improve accountability. The SAFE Act represents just such an effort. It does not repeal any part of the USA PATRIOT Act, but instead brings some of its more troubling provisions back into line with Constitutional principals of judicial review and Congressional accountability. I hope you will examine it carefully.

Congress plays a crucial role in assuring the public that its civil liberties are protected. A public that is afraid that the government is seeking to obtain unchecked power will become suspicious even of legitimate anti-terrorism efforts. Congress must preserve and expand the sunset provision that will guarantee real oversight. Abandoning the leverage of the sunset provision this year would be a serious mistake.

Again, I thank you for the opportunity to testify and sincerely appreciate the fact that you have noted that your constituency is worried. And I agree, it is noteworthy in this state known for its patriotism that its two leading newspapers, the Salt Lake Tribune and the Deseret Morning News, often ideologically opposed, have both published several editorials expressing criticism of the USA PATRIOT Act. It is also remarkable, as has been commented upon elsewhere, that the ACLU of Utah joins not only the League of Women voters, but also the Eagle Forum, Grassroots, the Conservative Caucus, and the Libertarian Party in expressing concern related to the Patriot Act. That is a combination we do not often see here in Utah.

I thank you for the opportunity to testify on behalf of the ACLU of Utah. I hope we can continue to work together to keep Utah – and America – safe and free.

CALIFORNIA

COMMITTEE ON APPROPRIATIONS
COMMITTEE ON ENERGY AND NATURAL RESOURCES
COMMITTEE ON THE JUDICIARY
COMMITTEE ON RULES AND ADMINISTRATION
SELECT COMMITTEE ON INTELLIGENCE

United States Senate
WASHINGTON, DC 20510-0504
http://feinstein.senate.gov

April 9, 2004

Senator Orrin Hatch
Chairman
Committee on the Judiciary
United States Senate
104 Hart Office Building
Washington, DC 20510

By Hand

Dear Chairman Hatch,

I write to ask that you include the enclosed Statement for the Record at the field hearing of the Committee on the Judiciary scheduled for April 14, 2004 in Salt Lake City, Utah. I also want to thank you for holding this hearing, because I believe it is critical that we conduct meaningful and in-depth oversight of the laws available to combat terrorism, including the USA-Patriot Act. Unfortunately, my schedule does not permit me to attend this hearing in your home state.

I have also enclosed a letter which I recently sent to Attorney General Ashcroft and Director of Central Intelligence Tenet, and I ask that you include this letter in the hearing record. It is my hope that Deputy Attorney General Comey, who will be testifying at the hearing, will be able to respond to the letter.

I look forward to working with you, and the Committee, on this critical issue in the coming months.

Yours truly,

Dianne Feinstein
United States Senator

enc. as described

Statement of Senator Dianne Feinstein
Committee on the Judiciary
Subcommittee on Terrorism, Technology & Homeland Security
Ranking Member

"Preventing and Responding to Acts of Terrorism: A Review of Current Law"

April 14, 2004
Salt Lake City, Utah

I would like to begin by thanking Chairman Hatch for holding this hearing, and express my regrets that I am not able to appear in person.

The business of the Judiciary Committee includes the responsibility to ensure that our laws are appropriate to the needs of our nation, and our nation clearly needs laws that will allow us to defend against, and, I hope, eliminate, terrorism. In my view the most important piece of law which has passed related to the subject of terrorism is the USA-Patriot Act, and it is my understanding that that this law in general, and some of its more controversial provisions, will be the subject of today's hearing.

The USA-Patriot Act has come to be a symbol for many of our nation's struggle to come to grips with the world after September 11, 2001.

For some it represents the seriousness and intensity we bring, as a nation, and as a government, to the fight against terrorism. For others it is a danger signal, warning against intrusions into our civil liberties.

I have come to believe that the USA-Patriot Act is both of these things, and I hope and believe the Chairman, and my colleagues on both sides of the aisle, agree. As Senators we must ensure that those who protect us against Al Qa'ida and others must be equipped with the appropriate legal authority to keep us safe, while at the same time we must ensure that our cherished liberties are maintained.

The USA-Patriot Act is, in my view, a critical tool in our nation's fight against terrorism. It also represents what I believe to be an essential step in reconfiguring our law enforcement and intelligence authorities and practices to address the new asymmetric threats which face our country in a post-Soviet world.

I have been, and remain, a supporter of the USA-Patriot Act as a whole. In fact, the bulk of what I believe to be its most critical section, Title

IX, which governs intelligence matters, was drafted largely by Senator Bob Graham and myself and was included in the final legislation.

Thus I am increasingly concerned with the confrontational tone of discussions about the USA-Patriot Act in general, and the sixteen provisions (out of one hundred and fifty six) which are set to expire in 2005. It is my hope that the Congress can carefully and thoroughly evaluate these provisions in a timely fashion to ensure that no needed authority is taken from our law enforcement and intelligence agencies. I believe that this hearing, and ones which I hope will follow, show how seriously we are taking this task. I hope that under the leadership of our Chairman this confrontational tone can be diminished.

I would note that the December 2005 sunset date was not accidental. When I voted for the Act I believed that by putting the sunset date in late 2005 we would accomplish two things: first, there would be enough time for the testing period to be meaningful and effective; and second, the date was after the 2004 Presidential election, and thus I hoped to insulate this issue from the politics of an election year. I believe it is essential that we hold to this schedule.

Recently I sent a letter to the two government officials most directly involved with implementing the USA-Patriot Act asking them to help the Congress carry out this job. In that letter, a copy of which I have appended to my statement and ask be printed in the record, I asked the Attorney General and the Director of Central Intelligence to:

> "ensure that a critical and comprehensive review of the implementation, value and importance of each of the sixteen provisions at issue be undertaken by elements of the Department of Justice and the Intelligence Community. Such a review, reduced to a single document, would significantly assist the Congress in carrying out its duty to review these provisions under the USA-Patriot Act."

The point of the letter is a simple one: the most controversial of the provisions in the USA Patriot Act, as a result of negotiation and compromise, include a "test period." This was a period of time, extending until December 2005, during which we could see if these laws work as well

as they can, or whether they have unintended consequences. In short, it allows the Congress and the Administration to work together to "fine tune" the USA-Patriot Act. Thus, I asked the Attorney General and the Director of Central Intelligence to begin the evaluative process necessary for a wise and reasoned decision.

I have not yet received a response to my letter, and would hope that Deputy Attorney General Comey would be able to comment on the letter during his testimony.

Again, I would like to thank Chairman Hatch, and our witnesses here today, for helping us do our job as intended by the text of the USA-Patriot Act: to carefully, soberly and reasonably assess the USA-Patriot Act and its sunsetting provisions. I look forward to reviewing the transcript of the witnesses' testimony.

DIANNE FEINSTEIN
CALIFORNIA

COMMITTEE ON APPROPRIATIONS
COMMITTEE ON ENERGY AND NATURAL RESOURCES
COMMITTEE ON THE JUDICIARY
COMMITTEE ON RULES AND ADMINISTRATION
SELECT COMMITTEE ON INTELLIGENCE

United States Senate
WASHINGTON, DC 20510-0504
http://feinstein.senate.gov

March 23, 2004

The Honorable John Ashcroft
United States Attorney General
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

The Honorable George Tenet
Director of Central Intelligence
Washington, D.C. 20505

Dear Attorney General Ashcroft and Director Tenet,

The USA-Patriot Act is, in my view, a critical tool in our nation's fight against terrorism. It also represents what I believe to be an essential step in reconfiguring our law enforcement and intelligence authorities and practices to address the new asymmetric threats which face our country in a post-Soviet world. I write to you both in your roles as head of the two parts of our government which are most responsible for this issue: the law enforcement community and the Intelligence Community.

As you know, I have been, and remain, a supporter of the USA-Patriot Act. In fact the bulk of what I believe to be its most critical section, Title IX, which governs intelligence matters, was drafted largely by Senator Bob Graham and myself and included in the final legislation.

Thus I am increasingly concerned with the confrontational tone of discussions about the USA-Patriot Act in general, and the sixteen provisions (out of one hundred and fifty six) which are set to expire in 2005. It is my hope that the Congress can carefully and thoroughly evaluate these provisions in a timely fashion, to ensure that no needed authority is taken from our law enforcement and intelligence agencies. To that end I write seeking your assistance.

I ask that you ensure that a critical and comprehensive review of the implementation, value and importance of each of the sixteen provisions at issue be undertaken by elements of the Department of Justice and the Intelligence Community. Such a review, reduced to a single document, would significantly assist the Congress in carrying out its duty to review these provisions under the USA-Patriot Act.

My hope is that such a document, drawing on the insights of both the law enforcement and intelligence agencies, would be able to set forth, with respect to each provision, an explanation of how it has been used, whether it has proved to be valuable in counter-terrorism efforts, and whether it needs to be retained, improved or eliminated.

I would appreciate if you could respond to me as soon as possible outlining a schedule for the completion of such a review. I look forward to working with you on this matter, and remain,

Yours truly,

Dianne Feinstein

Dianne Feinstein
U.S. Senator

The USA PATRIOT Act
Comments from Commissioner Robert Flowers, Utah Department of Public Safety

It has been interesting to watch the debate concerning the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act). As a public safety official, I have become increasingly concerned with the continual attacks on an effective and much needed law enforcement tool. It seems to me the critics of the Act may not have an understanding of the challenges law enforcement faces on a daily basis.

The Utah Department of Public Safety is tasked with the responsibility of addressing issues of prevention, response, and mitigation in fighting the war on terrorism. These three terms when spoken in bureaucratic sentences seem to lose power. I translate those three terms into PROTECT, PROTECT, AND PROTECT. This becomes a very powerful charge from the citizens I serve.

I have been charged with the responsibility to protect the citizens of the State of Utah, a role I am honored to accept. However, with that responsibility must come the ABILITY. The PATRIOT Act takes a major step towards giving law enforcement the tools it needs to protect the public. The ability to gather, analyze, and share information so critical to our charge is essential. Our success at prevention, response, and mitigation will largely depend on our ability to gather, analyze, and share information.

Our enemies have moved among us, using our very laws to hide, gather resources, and then turn those resources upon us in an effort to destroy us. They use asymmetrical tactics that will require extraordinary efforts previously unknown inside the United States. While some merely want to debate the efficacy of the PATRIOT Act, law enforcement does not have the luxury to sit and wait while discussions rage on. We need

the tools provided in the PATRIOT Act today to enable us to address the critical issues of public safety.

The Act has provided additional tools that can be used by law enforcement to fight terrorism. One of the major benefits to state and local law enforcement has been the elimination of barriers to information sharing that existed between federal and state law enforcement. Barriers that prevented state and local law enforcement from accessing information from federal agencies have been greatly reduced. The PATRIOT Act has facilitated communication between police officers, emergency service personnel and federal intelligence officers. For example, § 701 of the Act is an expansion of a regional information sharing system to facilitate federal, state and local law enforcement response to terrorist activity. Section 903 states the intent of Congress that officers and employees of the federal intelligence community should be encouraged to establish intelligence relationships with "any person, entity or group" to acquire or maintain information on terrorist activity. National task forces have been established as a result of the PATRIOT Act that aid state and local law enforcement. In Utah, the Anti-Terrorism Task Force meets to share and coordinate intelligence information. I now meet on a regular basis with federal officials to share information related to infrastructure protection, emergency response and criminal activity.

Increased communication of intelligence information with federal law enforcement and prosecutors has provided an incentive for the Department of Public Safety to increase our intelligence gathering efforts. I have established a full time intelligence unit that acts as a fusion center for criminal intelligence between state, local and federal agencies. We have organized this intelligence center, staffed it and supported

it with existing resources. We continually emphasize this center and the improved information sharing we now enjoy with our federal partners to city and county law enforcement in an effort to make law enforcement throughout the state aware of available resources. The PATRIOT Act has also benefited our ability to protect critical state infrastructure. The Critical Infrastructure Protection Act, part of the PATRIOT Act, has enhanced our ability to coordinate with federal officials and private business interests in a joint effort to protect state infrastructure. We have created a Critical Infrastructure Committee that includes representatives from major industry groups, including all major utilities, and local, state and federal officials.

Title VI of the PATRIOT Act provides for expedited payment of benefits to state public safety officers injured or disabled in the line of duty while preventing, investigating or rescuing persons from terrorist activity. The law also increases benefits for the public safety officers benefit program. These are examples of funding benefits that have been made available to local law enforcement under the provisions of the Act and evidence the intent of Congress to help state and local governments. Other benefits provided under the PATRIOT Act that will greatly aid local efforts in the fight against terrorism include the First Responders Assistance Grants. These grants to state and local law enforcement, fire protection and first responders will strengthen a state's ability to not only respond, but also prevent acts of terrorism.

Many of the provisions of the PATRIOT Act are directed at federal law enforcement officials and prosecutors rather than state. For example, several tools used by federal law enforcement to fight organized crime and drug trafficking are now applied to the war on terrorism. Such tools as roving wiretaps, delayed notification search

warrants and other enhanced surveillance procedures will assist federal law enforcement officials doing terrorism investigations. Although not directly applicable to state law enforcement, these provisions in the PATRIOT Act that remove many of the obstacles to investigating terrorism that existed prior to September 11th will have a concomitant positive impact on the State of Utah. By broadening the definition of domestic terrorism to include activities that "involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any state;" (emphasis added), the PATRIOT Act makes the fight against domestic terrorism a common objective of federal and state law enforcement. Additionally, the Act provides incentives to federal, state and local law enforcement to pool resources in a united effort.

In conclusion, please accept my personal thanks for what you do on our behalf. I also need to acknowledge the many great people here in Utah that are committed to the charge of fighting terrorism and supporting this national effort. I am proud to serve with them.

Thank you.

DATE: April 14, 2004

TO: Senator Orin hatch
Senate Judiciary Committee

FROM: The Green Party of Utah

SUBJECT: **PATRIOT ACT/DOMESTIC SECURITY ENAHNCEMENT ACT 2003**

WE would like to thank Senator Hatch and his committee for holding this field hearing today While we were disappointed that we were not allowed to give oral testimony, we appreciate the opportunity to submit a written position of the Green Party of Utah on the Patriot Act and the Domestic Security Enhancement Act 2003 for the record.

WE believe that, with the facts as presented, that Congress and the Administration acted hastily and without any careful or systematic effort to determine whether weaknesses in our surveillance laws had contributed to the attacks, or whether changes that they were making would help prevent further attacks. Clearly, many of the acts provisions have nothing at all to do with terrorism.

WE believe the result of this Act is unchecked government power, and capricious license to rifle through individuals financial records, histories, Internet usage, bookstore purchases, library usage, travel patterns, or any other data that leaves an electronic record.

WE are opposed to, and assert that the First Patriot Act gutted the First, Third, Fourth and Fifth Amendments, and seriously damaged the Seventh and the Tenth. The Second Patriot Act reorganizes the entire Federal government as well as many areas of state government under the dictatorial control of the Justice Department, the Office of Homeland Security and the FEMA NORTHCOM military. It is, by its structure, vulnerable to abuse, and closely resembles dictatorship.

WE strongly oppose the Second Patriot Act and believe it strips American citizens, and foreign nationals living in America, of most of their civil rights . It grants the government and its private agents total immunity from prosecution for crimes eerily similar to those inventoried as just cause for invasion of foreign countries.

These are a few of the noted sections in this specious legislation:

SECTION 501 (Expatriation of Terrorists) expands the Bush administration's "enemy combatant" definition to all American citizens who "may" have violated any provision of Section 802 of the first Patriot Act. (Section 802 is the new definition of domestic terrorism, and the definition is "any action that endangers human life that is a violation of any Federal or State law.") Section 501 of the second Patriot Act directly connects to Section 125 of the same act. The Justice Department boldly claims that the incredibly broad Section 802 of the First USA Patriot Act isn't broad enough and that a new, unlimited definition of terrorism is needed.

Under Section 501 a US citizen engaging in lawful activities can be grabbed off the street and thrown into a van never to be seen again. The Justice Department states that they can do this because the person "had inferred from conduct" that they were not a US citizen. Remember Section 802 of the First USA Patriot Act states that any violation of Federal or State law can result in the "enemy combatant" terrorist designation.

SECTION 201 of the second Patriot Act makes it a criminal act for any member of the government or any citizen to release any information concerning the incarceration or

whereabouts of detainees. It also states that law enforcement does not even have to tell the press who they have arrested and they never have to release the names.

SECTION 301 and 306 (Terrorist Identification Database) set up a national database of "suspected terrorists" and radically expand the database to include anyone associated with suspected terrorist groups and anyone involved in crimes or having supported any group designated as "terrorist." These sections also set up a national DNA database for anyone on probation or who has been on probation for any crime, and orders State governments to collect the DNA for the Federal government.

SECTION 312 gives immunity to law enforcement engaging in spying operations against the American people and would place substantial restrictions on court injunctions against Federal violations of civil rights across the board.

SECTION 101 will designate individual terrorists as foreign powers and again strip them of all rights under the "enemy combatant" designation.

SECTION 102 states clearly that any information gathering, regardless of whether or not those activities are illegal, can be considered to be clandestine intelligence activities for a foreign power. This makes news gathering illegal.

SECTION 103 allows the Federal government to use wartime martial law powers domestically and internationally without Congress declaring that a state of war exists.

SECTION 106 is bone-chilling in its straightforwardness. It states that broad general warrants by the secret FSIA court (a panel of secret judges set up in a star chamber system that convenes in an undisclosed location) granted under the first Patriot Act are not good enough. It states that government agents must be given immunity for carrying out searches with no prior court approval. This section throws out the entire Fourth Amendment against unreasonable searches and seizures.

SECTION 109 allows secret star chamber courts to issue contempt charges against any individual or corporation who refuses to incriminate themselves or others. This sections annihilate the last vestiges of the Fifth Amendment.

SECTION 110 restates that key police state clauses in the first Patriot Act were not sunsetted and removes the five year sunset clause from other subsections of the first Patriot Act. After all, the media has told us: "This is the New America. Get used to it. This is forever."

SECTION 111 expands the definition of the "enemy combatant" designation.

SECTION 122 restates the government's newly announced power of "surveillance without a court order."

SECTION 123 restates that the government no longer needs warrants and that the investigations can be a giant dragnet-style sweep described in press reports about the Total Information Awareness Network. One passage reads, "thus the focus of domestic surveillance may be less precise than that directed against more conventional types of crime."

*Note: Over and over again, in subsection after subsection, the second Patriot Act states that its new Soviet-type powers will be used to fight international terrorism, domestic terrorism and other types of crimes. Of course the government has already announced in Section 802 of the first USA Patriot act that any crime is considered domestic terrorism.

SECTION 126 grants the government the right to mine the entire spectrum of public and private sector information from bank records to educational and medical records. This is the enacting law to allow ECHELON and the Total Information Awareness Network to break down any and all walls of privacy. The government states that they must look at everything to "determine" if individuals or groups might have a connection to terrorist groups. As you can now see, you are guilty until proven innocent.

SECTION 127 allows the government to takeover coroners' and medical examiners' operations whenever they see fit. See how this is like Bill Clinton's special medical examiner he had in Arkansas that ruled that people had committed suicide when their arms and legs had been cut off.

SECTION 128 allows the Federal government to place gag orders on Federal and State Grand Juries and to take over the proceedings. It also disallows individuals or organizations to even try to quash a Federal subpoena. So now defending yourself will be a terrorist action.

SECTION 129 destroys any remaining whistle blower protection for Federal agents.

SECTION 202 allows corporations to keep secret their activities with toxic biological, chemical or radiological materials.

SECTION 205 allows top Federal officials to keep all their financial dealings secret, and anyone investigating them can be considered a terrorist. This should be very useful for Dick Cheney to stop anyone investigating Haliburton.

SECTION 303 sets up national DNA database of suspected terrorists. The database will also be used to "stop other unlawful activities." It will share the information with state, local and foreign agencies for the same purposes.

SECTION 311 federalizes your local police department in the area of information sharing.

SECTION 313 provides liability protection for businesses, especially big businesses that spy on their customers for Homeland Security, violating their privacy agreements. It goes on to say that these are all preventative measures - has anyone seen Minority Report? This is the access hub for the Total Information Awareness Network.

SECTION 321 authorizes foreign governments to spy on the American people and to share information with foreign governments.

SECTION 322 removes Congress from the extradition process and allows officers of the Homeland Security complex to extradite American citizens anywhere they wish. It also allows Homeland Security to secretly take individuals out of foreign countries.

SECTION 402 is titled "Providing Material Support to Terrorism." The section reads that there is no requirement to show that the individual even had the intent to aid terrorists.

SECTION 403 expands the definition of weapons of mass destruction to include any activity that affects interstate or foreign commerce.

SECTION 404 makes it a crime for a terrorist or "other criminals" to use encryption in the commission of a crime.

SECTION 408 creates "lifetime parole" (basically, slavery) for a whole host of crimes.

SECTION 410 creates no statute of limitations for anyone that engages in terrorist actions or supports terrorists. Remember: any crime is now considered terrorism under the first Patriot Act.

SECTION 411 expands crimes that are punishable by death. Again, they point to Section 802 of the first Patriot Act and state that any terrorist act or support of terrorist act can result in the death penalty.

SECTION 421 increases penalties for terrorist financing. This section states that any type of financial activity connected to terrorism will result to time in prison and $10-50,000 fines per violation.

SECTIONS 427 sets up asset forfeiture provisions for anyone engaging in terrorist activities.

As to the notion that the Patriot Act brought down the "wall" between the FBI and CIA and now allows "open" legal communication between the two is utter nonsense. We are not misdirected by this ruse aimed at deflecting criticism and discouraging dialogue. This construct is merely the result of excuse making and blame shifting by those testifying before the kangaroo court referred to as the 9/11 Commission. History will not be so kind in its analysis of these events.

While many other sections need to be covered, in the interest of brevity we would propose to this committee that:

The Patriot Act in its entirety should not be reinstated and should be allowed to expire. We are, in effect, "shocked and awed" by the despotic nature of the first Patriot Act. The second Patriot Act dwarfs all police state legislation in modern world history.

News Release

JUDICIARY COMMITTEE

United States Senate • Senator Orrin Hatch, Chairman

April 14, 2004

Contact: Margarita Tapia, 202/224-5225
Heather Barney, 801/524-4380

Statement of Chairman Orrin G. Hatch
Before the United States Senate Committee on the Judiciary
Hearing on

"PREVENTING AND RESPONDING TO ACTS OF TERRORISM: A REVIEW OF CURRENT LAW"

I want to welcome everyone today to this special hearing in our great state of Utah. Today's hearing is another in a series of bipartisan hearings which the Senate Judiciary Committee has initiated to examine the adequacy of our Federal laws to protect the American public from, and respond to, acts of terrorism against the United States. I am pleased to hold this hearing at home and I am grateful to all of the participants for taking the time to be with us today.

I would especially like to welcome Deputy Attorney General James Comey who has made a special effort to join us here in Utah. I would also like to acknowledge the many federal, state and local leaders of our community, including Chief Judge Dee Benson of the United States District Court. We will also be privileged to hear from distinguished members of our community. I would also like to thank U.S. Attorney Paul Warner for hosting a Project Safe Neighborhoods breakfast this morning and Dean Scott Matheson, Jr. and the University of Utah S.J. Quinney College of Law for providing a forum for this hearing.

Let me note at the outset, that like our neighbors across America, we in Utah have much to learn about this cruel, but real, threat of terrorism. We can be proud, however, that Utah's experience with the Winter Olympics provided the Nation with a tangible example of the importance of federal, state, and local officials joining together, with an informed citizenry, to establish a safe and secure environment. This took an immense amount of cooperation, coordination, and communication among many individuals and organizations. And I am proud to recognize many of those responsible for that successful event and the security we continue to enjoy are here with us today.

Today's hearing will focus on the issue of protecting our nation while at the same time observing our traditional civil liberties in the aftermath of the horrific September 11th attacks. Certainly, September 11th and the war on terrorism are a reality that we are still addressing today. The unprovoked and unjustified attacks on September 11th forced us to take appropriate steps to

make sure that our citizens are safe and that terrorists do not strike on U.S. soil again. The first duty of national government is to protect our citizens from threats from abroad. We will not shirk this responsibility.

Senator Leahy, the Ranking Democrat Member of the Senate Judiciary Committee, and I have worked together for a long time to examine these important issues. In fact, when he was the Chairman of this Committee, we worked closely together to craft the Patriot Act in a bipartisan manner which carefully balanced the need to protect our country without sacrificing our civil liberties. Without the leadership of Senator Leahy and the support of my fellow colleagues across the aisle, we could not have acted so effectively after September 11th to pass this measure by a vote of 98-1.

But passing the Patriot Act did not finish our job. Congress has the responsibility to oversee that the laws we pass are implemented properly, as we intended. I am confident that we will continue to work cooperatively in the future as we continue this series of hearings.

There are some who say that the cost of protecting our country from future terrorist attacks is an infringement upon our cherished freedoms. Some have suggested that our anti-terrorism laws are contrary to our nation's historical commitment to safeguard civil liberties. I disagree.

I believe that we must have both our civil liberties and national security or we will have neither. Thomas Jefferson said, "The price of freedom is eternal vigilance." Congress and the nation must be vigilant. True individual freedom cannot exist without security, and our security cannot exist without protection of our civil liberties. We *must,* and we will, have collective security and individual liberties.

Unfortunately, much of the rhetoric regarding our nation's anti-terrorism laws appears based on misinformation and unjust speculation. Additionally, some critics have tried to divert attention to those leading the implementation and review of these laws – including me, Attorney General Ashcroft, or President Bush – rather than making specific, documented critiques of these laws and how they believe these laws have been enforced.

Our Nation has strived to make a major and reasonable response to the tragic events of September 11th, including fixing some significant deficiencies in the Pre-9/11 law that the Deputy Attorney General, James Comey, will address in his testimony today. And Deputy Comey should know, since he was one of the key prosecutors in the case against the first World Trade City bombers. Mr. Comey will tell us why it was important to change the law to update our anti-terrorism provisions to include the same capabilities to use the same methods and technologies that are used against drug trafficking, pornography, and organized crime.

Today we will focus on evaluating the tools that are in place to protect us from the clear and present threat of terrorism on our soil. I want to look forward and make sure the tools we have in the law are implemented effectively and not being abused.

While we all share a common commitment to security and freedom, the question we are examining today is how best to do so in an environment where terrorists – like the 9/11 attackers – will continue to attempt to operate within our borders, using the very freedoms that we so dearly cherish to carry out deadly plots against our country.

Let me remind everyone that the 9/11 attackers were able to enter into our country within the strictures of immigration laws, enjoy the fruits of our freedoms, secure for themselves all the necessary trappings of law-abiding members of our society, and then carry out their terrible attacks, under the radar screen of law enforcement, intelligence and immigration agencies.

This hearing will examine the government's efforts to protect our freedoms – not just the freedom to live in a safe and secure society – but the freedoms that our country was founded on, the freedoms that we enjoy each and every day, and the freedoms that are the lifeblood of our society.

I am especially interested in hearing from today's witnesses about the details of any specific abuses that have occurred under our current laws. We have invited several representatives of groups critical of our Nation's counter-terrorism laws to express their concerns.

We must not let the debate fall into the hands of those who spread unsubstantiated or outright false allegations when it comes to these important issues. We are interested, of course, in hearing thoughtful criticism and ideas about how current law should be modified to better protect our national security while maintaining our civil liberties.

If we need to refine the law we will. If we need to strengthen the law, we will. If the facts show that we have gone too far, in one area or another, we will make appropriate adjustments.

But first, we must find the facts. That is what we are doing here today.

Today we are discussing a very serious matter—our Nation's security. I know that we will carefully examine these issues today.

I am very pleased with the distinguished panelists that are joining us today. On our first panel we have Deputy Attorney General Comey, who will be followed by United States Attorney for the District of Utah, Paul Warner. As I mentioned, Deputy Attorney General Comey brings a breadth of experience not only as Deputy Attorney General, but as the former lead prosecutor in the 1993 World Trade Center bombings. Mr. Comey, we look forward to hearing from you.

Also with us today is Paul Warner, the United States Attorney for the District of Utah, and former head of the Attorney General's Advisory Committee. Mr. Warner has worked closely with local, state, and federal law enforcement agencies in a collaborative effort to combat terrorism. Mr. Warner, thank you for taking the time to be with us today.

# # #

United States Senate Judiciary Testimony

Frank D. Mylar, J.D., M.B.A.

April 14, 2004

Chairman Hatch and honorable members of the Judiciary Committee, thank you for allowing me to submit testimony on these crucial issues facing our Constitutional Republic.

My name is Frank D. Mylar. I am an attorney in private practice. My firm, Mylar and Associates, specializes in law enforcement civil rights, employment claims, parental rights issues, religious freedom claims, business disputes and general litigation. I am a member of the Utah State Bar, the Tenth Circuit Court of Appeals and the U.S. Supreme Court Bar.

I further served as an Assistant and Special Assistant Utah Attorney General for over 12 years and I am very familiar with the increasing challenges facing law enforcement officers in the 21st Century.

I have extensive personal involvement in several local and national conservative and Republican groups. I am not here as a paid lobbyist, but out of personal conviction and was asked by Utah Grassroots to speak for them because they share these beliefs. It should give this Committee pause that I am joined by the ACLU and Libertarians in objecting to portions of the USA Patriot Act.

I was a National Delegate for President George W. Bush and I unequivocally support him in his re-election campaign. Our President and Congress, however, are not immune from tunnel vision in their efforts to fight terrorism. I would be doing our President, this Committee, our Country, and my children a dis-service if I remained silent on the critical constitutional issues raised by the USA Patriot Act.

I have the utmost respect for Chairman Hatch and I have no doubt that all members of this committee feel the weight of responsibility to protect this great country from sequels to 9/11. I applaud the work this committee does on an ongoing basis. However, none of us are perfect and our zeal to do what seems right can lead us astray if the actions we take are not anchored in constitutional principles. Simply put, the "ends never justify the means" for the means we employ necessarily will alter our course to a "Brave New World" of unintended consequences.

We all know that even if Congress passes the most restrictive laws imaginable, we will not prevent future acts of terrorism, but we will have changed forever who we are as a nation and a people beyond recognition. It is for this reason that we must proceed with caution and courage in fighting terrorism and avoid being led by our emotions and fears down a path of certain tyranny in the name of fighting this war.

Already we fear that the moral imperative of fighting terrorism has and will result in unintended consequences that abrogate the personal liberties of all Americans, which is incompatible in a free society like ours. Too quickly we have willingly surrendered constitutional principles out of outrage and fear over 9/11. Ironically, the most significant danger resulting from 9/11 is the

temptation to accept the "Faustian bargain" to trade liberty for assurances of peace and safety and order.

In 1775, Benjamin Franklin in response to similar fears stated "They who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety."

I submit to you that if we bargain away our liberties we will have neither safety nor liberty and the terrorists will have won.

One of the most critical problems with the USA Patriot Act lies in its disregard of the Fourth Amendment of our U.S. Constitution, which protects all Americans from unreasonable searches and seizures of our property and person. The importance of this unalienable right was largely born out of the events leading up to the American Revolution.

In 1761, the Boston lawyer James Otis resigned his post in service of the crown to attack the British issuance of so-called "writs of assistance" to imperial customs inspectors. Granted without any specific mandate or showing of wrongdoing, these writs justified the unfettered search of any home or building and the seizure of any property.

During his impassioned closing argument against these writs, another young lawyer in the audience by the name of John Adams wrote, "Then and there, the child Independence was born."

Created also was the seed of the Fourth Amendment to the Constitution, which immunizes Americans against "unreasonable search and seizure," and demands that warrants only be issued upon "probable cause, supported by Oath or affirmation," and that they "particularly" describe the location to be searched, and the person or things to be seized.

The birth of our country was sparked by British disregard for these natural liberties and right to personal privacy – codified in the Fourth Amendment. However, in our understandable rush to protect our way of life from foreign threat, we have too quickly overlooked what our founding fathers called, "unalienable" God-given rights. If you as a committee and we as a country truly believe these rights to be "unalienable" we cannot compromise or abrogate these rights no matter how "good" the cause or how compelling the justification, for to do so mocks our belief that we are made in the image of God and that these rights are endowed by our Creator. The "good" we would seek to achieve in compromising these rights will be swallowed by the tyrant we will have created.

The Fourth Amendment is arguably the heart of the Bill of Rights. It permits the government to issue warrants, seize property and arrest criminals – which protects society and empowers the people to govern – and protects individuals from undue search and seizure, or overly broad warrants.

The Fourth Amendment helps law enforcement focus their investigations on seeking truth and justice. We seek justice in America, and justice requires truth. Police officers who have to meet certain procedural standards are both less likely to abuse law-abiding citizens and more likely to actually bring criminals to justice. It strikes a delicate balanced based upon the Biblical concept that

it is equally detestable to punish the innocent as it is to acquit the guilty as found in Proverbs 17:15.

However, key parts of the USA Patriot Act and other post-9/11 counter-terrorism initiatives such as the Total Information Awareness program disregard basic Fourth Amendment requirements, thus disrupting this important balance. They ignore that while the government must have search and seizure powers to protect its citizens, it also must convince an impartial judge and provide specific and particular details about what government agents seek.

Section 215 of the Patriot Act violates these Fourth Amendment requirements by allowing federal agents to monitor what we are reading in the library and could require any person or business to produce any books, records, or items, including mental health, financial, and employment records. Section 215 threatens our liberty because it allows agents to seize our records without evidence that we have committed a crime. For decades, law enforcement has been able to look into what we read and obtain other private records, but they always had to obtain warrants or court orders based on a particularized suspicion that our activities were *actually connected to crimes or terrorism.*

Incidentally, we should note that the "tangible things" description of items and records that can be seized using Section 215 court orders encompasses basically anything from a diary to records of firearms purchases to actual firearms themselves.

Another problem in the Patriot Act, Section 213, is "authorizing" or "allowing" secret searches of peoples' homes and workplaces. These so-called "sneak and peek" searches, are contrary to well-established Fourth Amendment requirements that government agents must "knock and announce" prior to conducting a search to allow those who have been served with a warrant to challenge things like mistaken identity or an incorrect address. Under Section 213 you may never have an opportunity to challenge an illegal search because he may never receive notice that a search was conducted at all.

"Sneak and peek" searches allow agents to enter your home, search your belongings, seize certain items and download information from your computer, all without telling you for a indefinite period of time. In fact you may never be informed of an illegal search of your home or business. The fact that some of these searches may have been performed in certain contexts before 9/11 does not justify their broad application as codified in the Patriot Act.

In particular, prosecutors previously had to show probable cause first and then meet one of several exigent or emergency requirements to justify the search, including whether notice would endanger evidence, life, or could result in flight from prosecution.

The Patriot Act, by enshrining this power in statute, adds an additional justification that allows prosecutors to argue that if notice "would otherwise seriously [jeopardize] an investigation or unduly [delay] a trial" they should be allowed the warrant. Obviously, this is a catch-all provision for which any prosecutor could make an argument. This will make the use of sneak and peek warrants routine, rather than an extraordinary step taken only when absolutely necessary.

No doubt "sneak and peek" searches authorized under the Patriot Act are efficient tools. However, I would rather be hampered by the burdens of freedom than shackled by the efficiencies of tyranny.

Of crucial importance among conservatives, is not how the Patriot Act powers might be employed by President Bush, but how it could be co-opted to stifle conservative voices in this country under a liberal administration. In the past it is believed that Attorney General Janet Reno's office may have targeted Pro-life groups under the RICO laws even though no evidence or criminal wrong-doing was known. The Patriot Act goes much further in allowing unbridled discretion in the name of fighting terrorism. It is quite conceivable that a future Attorney General, like Janet Reno, would target conservative groups such as Second Amendment supporters, pro-life organizations, and defense of marriage proponents with these extraordinary powers.

Of course our constitution will not be completely discarded and shredded merely by one law such as the Patriot Act. Instead, it will be the constant chipping away, piece by piece, act by act over time in the name of the public "good" until we are no longer free people. Certain provisions of the Patriot Act constitute an unacceptable erosion of our unalienable rights that have been recognized in this country before its birth.

Conclusion

The same specter of the "writs of assistance" fought by Otis in 1761 haunt us today in the subtle guise of the USA Patriot Act. For the same reasons we must oppose such writs to protect the country that was conceived in fighting for such rights.

For over two-hundred years the Fourth Amendment requirements that searches and seizures be reasonable, that warrants be particular and specific, and that reasonable suspicion of an individual nature of criminal activity be present before the government intrudes upon a citizen have served us well and have caused us to be the envy of free people and those who wish to be free around the world. Vile acts of terrorism, such as 9/11, cannot justify compromising these constitutional principles.

As patriotic Americans we cannot bargain away our liberty in the name of stamping out terrorism, for if we do, we will cease to be American, the land of the Free and the terrorists will have won. I for one, would not trade my liberty today even if you could tell the American people that by doing so we could avoid all future terrorist attacks.

The most dangerous and formidable foe to tyrants and terrorists throughout the ages has always been those people who are truly free because they have something to lose, something worth fighting for to the death. Such courage caused Patrick Henry to state, "Give me liberty or give me death."

We, as a nation, have been entrusted by those before us to preserve freedom. Let us not forget the words and actions of our founding fathers, by setting aside the principles for which they paid the ultimate price. For our country and our children's sake, let us boldly wage the war on terrorism as free people with our liberty in tact.

Thank you again Chairman Hatch and honorable members of this committee for allowing me the opportunity to submit testimony.

Respectfully Submitted,

Frank D. Mylar

Frank D. Mylar, J.D., M.B.A.
Speaking for Utah Grassroots

Testimony Submitted to the
U.S. Senate Judiciary Committee on
"Preventing and Responding to Acts of Terrorism: A Review of Current Law"
by
Aaron Turpen
Libertarian Party of Utah

April 14, 2004

Chairman Hatch, distinguished Members of the Committee, I thank you for the opportunity to testify on the state of our freedoms and the USA PATRIOT Act's impact on current law and our natural rights.

My name is Aaron Turpen and I am Secretary of the Libertarian Party of Utah. I am also the webmaster for CivilDisobedience.us and work with several action groups protecting our rights under the Constitution of the United States of America.

I applaud your oversight and dedication to our beloved Constitution. While it is not always easy to preserve our liberties from encroachments, however good their intentions, it is always right to do so.

Mr. Bob Barr stated it correctly when he said, before this same Committee, "The question before us today—whether the government response to those [9/11] attacks has adversely affected our individual liberties, including the right to privacy—could not be more important. It is at once complex and simple."

The threat of terrorist attack on this nation, following the tragedy of September 11, 2001, is considered real and present. While the danger of further attack is ever present, the danger of losing what we most cherish is even more so.

Our nation was founded on the principles of liberty: soon after ratification of the Constitution, the founders of this nation thought it necessary to ensure protection against government encroachment on liberties, and so, in 1791, the first ten amendments to the Constitution—commonly known as the Bill of Rights—were enacted.

The hastily-drafted and hastily-enacted Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (commonly known as the USA PATRIOT Act or the Patriot Act) was an attempt to give federal agencies the powers they needed to combat and prevent future terrorist attacks on our nation. However, most members of Congress have now admitted that they did not read the Act and many have stated that they no longer support the powers given by it.

In response to that, many acts of legislation have been proposed which would amend the USA PATRIOT Act to bring it more in line with the rights of the people. Among these are Senate Bill 436 (the Domestic Surveillance Oversight Act of 2003), Senate Bill 1709

(the SAFE Act), and Senate Bill 1552 (Protecting the Rights of Individuals Act). I and the Libertarian Party of Utah strongly support these bills and ask that the Judiciary Committee move them out of committee and onto the Senate floor for a vote.

Our concerns with the powers given to agencies of the federal government by the Patriot Act are many. Without digressing into a discussion of basic libertarian thought and the state of our nation today, I would like to address provisions of the USA PATRIOT Act specifically and their ramifications—both documented and theoretical.

The Act changes the purview of three major parts of the federal code: Title III, the Electronic Communications Privacy Act (ECPA), and the Foreign Intelligence Surveillance Act (FISA). The latter meant solely for foreign intelligence gathering.

Section 206 of the Act expands FISA to permit what is termed a "roving wiretap" authority from "specified in court-ordered surveillance" to instead include unnamed and unspecified third parties: thus opening the authority up to generic orders that could be used to infringe on the privacy rights of untold numbers of people, especially those who access the Internet via public libraries, schools, and cyber cafes. Because these are issued in secret, no accountability for the execution of these warrants is given. This is a direct violation of not only the First and Fourth Amendments to the Constitution, but also to the checks and balances therein. Not to mention the intended jurisdiction of FISA itself.

Further, Section 212 allows for nearly the same powers to be demanded by the Department of Justice of an Internet Service Provider or telephone company—whether a search warrant is issued or not. To ad insult to injury, this power, which was to sunset in 2005, was made permanent by the passage of the Homeland Security Act (Section 225).

The often-touted Section 213 of the Act allows for what are commonly known as "sneak and peek" warrants to be used. While the idea of a "sneak and peek" warrant has been heavily debated against the Fourth Amendment protection of "probable cause" and "oath and affirmation," the Act's vague definition of "reasonable period" is often overlooked. This definition is used to describe when such a warrant is to be announced to the searched person or persons. Even the Department of Justice's own Field Guide advises that this is a "flexible standard." In addition, these searches apply to all searches for material that "constitutes evidence of a criminal offense in violation of the laws of the United States." Clearly not just terrorism investigations!

Section 215 of the act, also often mentioned, allows for FBI access to "any tangible things." In the popular press, this has been touted as the direct attack on libraries and book stores. Not quite as well known is the scope of the authority given, which applies to any record relevant to the individual and held by a third party. This could include hospitals, places of worship, schools, civic clubs, and more. All without showing "probable cause," but with only the claim that the records may be related to an ongoing investigation "related" to terrorism! Worse yet, those served with the warrants must comply and divulge these records and are under a federal gag order (with criminal penalties) to not disclose that the records were requested and given! This provision

allows for potential wholesale record-gathering and database building on persons for literally any reason the Justice Department may deem needful now and in the future.

It is important to note that the powers listed above (Section 215) were available to the FISA Court before the USA PATRIOT Act was enacted. It is equally important, however, to understand that there were two major safeguards countering this power which were removed by Section 215. These checks included a definition of specific records that were available under this provision and the requirement that the FBI present the FISA Court with "articulable facts giving reason to believe" that the person being investigated was a spy or terrorist. Both of these protections, again, were removed by Section 215.

Moving into Title III of the Patriot Act, we come to Section 315, which authorizes extended powers for foreign corruption offenses and money laundering crimes. With the designations of these crimes and the definitions thereof, it should be well noted that these basic laws have been in effect for years now under prevue of the Department of the Treasury. Money launderers and multi-national fraudsters have been flouting these same laws since their inception with relative impunity. There is little chance that foreign terrorists would not use the same techniques in their actions.

I could write volumes on the various aspects of the forfeiture clauses of Section 806 and its corresponding attacks on personal and private property rights. Property forfeiture without due process is, itself, a fundamental attack on the rights of the People and cannot be lambasted enough. The discussion of it, while bearing mention here, is somewhat out of the scope of this testimony.

Beyond the technical aspects of the Patriot Act itself, one with a libertarian mind is forced to consider the further Constitutional ramifications of the Act's consequences. In our nation's constitutional framework exist three separate and distinct branches: the executive, the legislative, and the judiciary. The balance of powers between these three branches is what we term "checks and balances." These checks and balances assume a certain amount of visibility and accountability for each branch.

One of the heaviest of the erosions to this balance is the general loss of accountability for the Executive Branch. In 2002, the House Judiciary Committee demanded that the Department of Justice answer questions about how it was using the new authorities given by the USA PATRIOT Act. Touting "national security issues," the Justice Department refused to give anything more than the letter of the law required. It was only after intense public pressure that the Executive acquiesced and produced more information.

This erosion of accountability resulted in a heavy mistrust of the Executive branch and illustrated the relative weakness the legislative branch now holds in weighing its side of the checks and balance sea-saw.

Related to the issue of accountability and the checks and balances of our government the overall issue of new attitudes and regulations within various government agencies

regarding Freedom of Information Act (FOIA) requests has also been disconcerting. A general "closing of the doors" has been witnessed and recounted by many journalists, lobbyists, activists, and others who have come to rely on the general availability and openness of information available from, about, and thanks to our government agencies. Many records which were previously openly available have become closed under the guise of "national security." This circling of the wagons by agencies of the government appears to have done little to safeguard our nation and much to undermine trust in our nation's government.

Ultimately, in our representative republic, those chosen to serve in the name of the People are accountable to those who asked them to serve. Consequently, those laws which are enacted by those called to serve are also accountable to the People for which they were written. Therefore, the laws with which the People are not content may be revised or removed to suit the Will of the People.

The USA PATRIOT Act has shown its ability to galvanize the Will of the People against its draconian provisions. Regardless of political ideology, religious belief, or lifestyle choice; people around the nation have come together to voice their opposition to the tyrannies they perceive coming from the Patriot Act.

That you are holding this hearing today shows that you, as servants of the People, have heard our collective voices and are willing to listen to our requests for change. We the People are asking that you, as our elected representatives, reconsider the actions taken in 2001 and revise the USA PATRIOT Act to restore the natural rights bestowed upon us and enumerated in the first ten amendments to the Constitution of the United States of America.

Thank you for this opportunity to speak with you today in support of the principles of freedom upon which our nation was founded.

STATEMENT OF
PAUL M. WARNER
UNITED STATES ATTORNEY FOR THE DISTRICT OF UTAH

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

APRIL 14, 2004

Good morning, Mr. Chairman, and Members of the Committee. And thank you, Chairman Hatch for that kind introduction. I consider it an honor to be here today with Deputy Attorney General James Comey, an outstanding former United States Attorney and a good friend. I appreciate the opportunity to testify today about the USA PATRIOT Act. You have my full written testimony, and I ask that you make it a part of the record of this hearing.

I have served as the United States Attorney for the District of Utah for almost six years. I have seen many changes in how our country has dealt with the threat of terrorism during that time. From 1998 to the end of 2000, I chaired the Subcommittee on Terrorism for the Attorney General's Advisory Committee of United States Attorneys. I was frustrated at that time with the obvious lack of tools necessary for us to properly investigate threats of terrorism.

As an example, the Attorney General's Investigative Guidelines, as they existed at that time, handcuffed and blind-folded the FBI. For instance, they were not allowed to attend meetings that were otherwise open to the public, or to research materials on internet sites that virtually anyone else in the public was free to access. Further, because of then existing provisions of law and policy regarding the Foreign Intelligence Surveillance Act (FISA),

information sharing between criminal investigations and intelligence investigations was virtually non-existent. Likewise, the investigative tools that we did have available for terrorism were often outdated, insofar as technology was concerned.

With the passage of the USA PATRIOT Act shortly after 9/11, federal law enforcement and federal prosecutors were given many new tools to deal with the reality of terrorism as we had all come to know it. Some provisions of the USA PATRIOT Act gave investigators and prosecutors new tools for fighting terrorism. Other investigative tools, used for years in a wide range of other types of criminal investigations, are now explicitly permitted in terrorism cases under the provisions of the Act.

Let me give two quick examples. First, section 213 of the USA PATRIOT Act allows federal agents, with court approval, to give delayed notice that a search warrant has been executed, in certain narrow circumstances. Critics have referred to this provision as "sneak and peek," and claim that it has expanded the government's ability to search private property without notice to the owner. However, the truth is that delayed notification warrants are a long-existing, crime-fighting tool upheld by courts nationwide for decades in organized crime, drug, and child pornography cases. Section 213 of the USA PATRIOT Act simply codified the authority allowing law enforcement to seek and execute delayed-notice search warrants - - an authority that had already received judicial approval. Indeed, the U.S. Supreme Court has declared delaying notice of a search to be constitutional.

Second, section 215 of the Act allows federal agents to obtain ex parte orders from the FISA court to require the production of any tangible items, including books, records, documents, and the like, in an investigation to protect against international terrorism or clandestine intelligence activities. Obtaining business records is a long-standing law enforcement investigative tool. Ordinary grand jury subpoenas, with no court approval necessary, have been used for years to obtain all kinds of business records, including records of libraries and bookstores. And, of course, section 215 contains a number of safeguards that protect civil liberties, including providing for Congressional oversight of the Department's use of this tool (*e.g.*, by requiring the Department of Justice to report to Congress on a semiannual basis regarding requests for ex parte orders made pursuant to this section).

The USA PATRIOT Act also gave us tools that allow investigators and prosecutors to effectively deal with terrorists' use of modern technology in the planning and execution of their operations. For example, the so-called "roving wiretap" provisions in section 206 now give us the authority in terrorism investigations to use the same tools we had used in a wide range of criminal cases, including drug and racketeering cases, since 1986. At the same time, we can now use new technology to track wireless phone calls reflecting the realities of our digital world.

Likewise, the USA PATRIOT Act has greatly facilitated information sharing and cooperation among government agencies so they can now better connect the proverbial dots. The Act removed the legal impediments that kept the law enforcement and intelligence communities from sharing information and coordinating activities in the common effort to protect our national

security.

Here locally in Utah, we have enjoyed an unprecedented amount of information sharing among federal, state, and local law enforcement agencies. And, for the first time in our history, Assistant U.S. Attorneys from my office regularly sit down with local FBI agents to review intelligence investigations, and to coordinate matters where criminal and intelligence issues intersect. Our local FBI Special Agent in Charge, Chip Burris, is an enthusiastic partner with me in this sharing effort.

I am aware that almost as soon as the USA PATRIOT Act was passed, many well-intentioned people raised concerns about the Act in terms of the potential denigration of civil liberties and rights of privacy. In communities throughout the nation, there has been much public debate about the Act. I have participated in a number of these discussions. The public debate of these issues is important, and consistent with our cherished freedom of speech. It is also in keeping with the great traditions of our country. All of us are concerned with the delicate balance of protecting our freedoms without destroying them in the process. However, terrorists must not be allowed to abuse our cherished liberties by using them as a shield to escape prosecution for their acts. If so, they will thereby be afforded an unimpeded opportunity to destroy us and the freedoms we all hold so dear.

The concerns about the USA PATRIOT Act have often focused on the potential abuse of the new investigative tools that have been provided to law enforcement. Yet, as with any set of

tools, they can be used constructively to help build a solid defense against terrorists, or, they potentially can be abused in ways that infringe on the rights of law abiding citizens. To a certain extent, there is always a risk when you put a new tool in someone's hands. But this risk is minimized significantly when the tool is put in the hands of professionals who are closely monitored, not only by the Department of Justice, but also by the courts and by Congress. That is the case with the USA PATRIOT Act. I am personally much more fearful of unchecked terrorism in America, for a lack of tools to fight it, than I fear the potential for abuse of the law by the federal agents and prosecutors we have entrusted with these tools.

In the wake of 9/11, Attorney General Ashcroft clearly articulated the importance of preventing terrorist acts from happening in the first place, by disrupting terrorist plotting and planning. Accordingly, prevention and disruption have become our primary goals since 9/11.

This paradigm shift meant there had to be a change in the means and methods of investigating if we were to prevent and disrupt terrorism. Prosecutors and investigators must make more effective use of tools already in place in order to prevent and disrupt terrorist activity, rather than merely react by prosecuting such activity after the fact. The USA PATRIOT Act provided new tools necessary to do the job. Hence, sections 213 and 215, which I referred to earlier, are vital parts of our strategy of prevention and disruption, detecting and incapacitating terrorists <u>before</u> they are able to strike.

Unfortunately, I believe that to a certain extent we are victims of our own success. Because so far there have not been any successful attacks here in the United States since 9/11, many people have become complacent. Such complacency is a mistake, in my opinion. Some of those who criticize the USA PATRIOT Act focus unreasonably on the perceived potential abuses that could occur by way of the Act, rather than the real success that has already been achieved, and the absence of any actual abuses.

Finally, I certainly respect those who disagree with my views, and likewise support and defend their right to express that disagreement. I must add, however, that it is easy to sit on the sidelines and criticize those who are actually in the arena, and who have the responsibility to keep us safe, and who are trying to do that job to the best of their abilities consistent with the rule of law and our Constitution. The good news is that, two and one-half years after 9/11, we are much safer and much better at what we do in fighting terrorism. But much still needs to be done. Let us not make the mistake of again putting the handcuffs and blindfolds on federal law enforcement that existed prior to 9/11, and yet continue to ask them to protect us in our post-9/11 world. We must have the tools necessary to do this job. The USA PATRIOT Act gives us many of these tools and is critical to ensuring the safety of our country.

Mr. Chairman, I thank you for the opportunity to appear before the Committee today to discuss this important subject. I would be pleased at this time to answer any questions that you or other Members of the Committee may have.

○