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PROTECTING OUR NATIONAL SECURITY FROM TERRORIST ATTACKS: A REVIEW OF CRIMINAL TERRORISM INVESTIGATIONS AND PROSECUTIONS

HEARING

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PROTECTING OUR NATIONAL SECURITY FROM TERRORIST ATTACKS: A REVIEW OF CRIMINAL TERRORISM INVESTIGATIONS AND PROSECUTIONS

TUESDAY, OCTOBER 21, 2003

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

The Committee met, pursuant to notice, at 10:05 a.m., in Room SD–226, Dirksen Senate Office Building, Hon. Orrin Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch, Kyl, DeWine, Craig, Chambliss, Cornyn, Leahy, Kennedy, Biden, Kohl, Feinstein, Feingold, Schumer, and Durbin.

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

Chairman HATCH. Good morning. I want to welcome everyone to the first in a series of Judiciary Committee hearings that Senator Leahy and I and others on this Committee are organizing to examine the adequacy of the Federal laws designed to protect the American public against acts of terrorism on U.S. soil.

The first responsibility of government is to protect its citizens. The Judiciary Committee has a special responsibility to see that our Nation's laws and law enforcement network is up to the challenging task of thwarting terrorist attacks. I want to thank my colleague, Senator Leahy, for his cooperation and support in planning these important hearings. We are committed to working together to ensure that the Committee examines a number of important issues relating to our country's war on terrorism.

As we announced several weeks ago, the Committee's inquiry will focus on the adequacy of Federal laws to help prevent and respond to acts of terrorism against the United States; whether additional tools, the reporting obligations, and oversight may be needed and the implications to security, privacy and civil liberties of current laws and any new proposals. We have tentatively scheduled our next hearing for November 5. That hearing will focus on how civil liberties have been affected by counterterrorism activities, and while we must act decisively to identify, stop and punish potential terrorists, we must be vigilant to respect traditional American civil rights and liberties.

Over the recess, Senator Leahy and I may conduct field hearings to examine issues of local and national concern relating to the war

on terrorism. When we return next year, we expect to schedule additional hearings. Senator Leahy and I welcome any suggestions from other members on topics that should be addressed and information that the Committee may need to conduct its inquiry.

Let me also state that as part of this oversight inquiry, Senator Leahy and I plan to invite relevant witnesses to appear before the Committee to address important issues, including Attorney General Ashcroft, FBI Director Mueller, Department of Homeland Security Secretary Ridge and other appropriate officials. The administration has told me that it welcomes these hearings and will cooperate fully with the Committee's inquiry.

At the outset, I want to emphasize that I am committed to conducting a rigorous examination of these important issues. These hearings, in my view, can best serve the public by fairly and objectively assessing the key law enforcement issues relating to curtailing acts of domestic terrorism.

We have all read or heard about claims being made by various interest groups concerning how well or how poorly the Federal Government has conducted its domestic counterterrorism program. This Committee's inquiry will attempt to cut through the rhetoric, confusion and distortion to get to the facts necessary to find out if we are protecting our citizens' lives and their liberties.

I am sure that everyone on this Committee shares the common goal to protect our country from additional terrorist attacks. We are all committed to this goal and must do so with regard for fundamental freedoms and the security of our people.

Our Committee has a historical tradition of joining together to examine, debate and resolve important national issues. We are once again faced with an important task which will have a profound impact on our country's security and cherished freedoms. Two years ago, our country faced an unprecedented challenge. We suffered a devastating attack on our shores which resulted in the murder of over 3,000 of our fellow Americans. The President, Congress and our Nation rose to the challenge and worked together to ensure that we can prevail in the war against terrorism. Here in Congress, we have passed the PATRIOT Act and other laws in order to provide the tools, information and resources necessary to defeat the terrorist enemy, and while we have accomplished much, there is much more to be done.

The threat of harm to our country remains. It is evolving and committed fanatics who continue to threaten our way of life. Today's hearing will focus on the existing legal authorities used by the Government to investigate and prosecute terrorists for criminal offenses, so I look forward to learning how the existing authorities, some of which were enacted as part of the PATRIOT Act, facilitate criminal investigators' and prosecutors' ability to track down, arrest and prosecute terrorists around the world.

[The prepared statement of Senator Hatch appears as a submission for the record.]

At this time, I will turn it over to Senator Leahy for his opening statement. After that, I will ask each member of the Committee to make a short, two-minute opening statement if they so desire.

Senator Leahy?

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Well, thank you very much, Mr. Chairman, and as you said, the two of us do see these hearings as a bipartisan effort to review the effectiveness of our antiterrorism laws, and you and I have worked on similar things for well over 20 years, and I am delighted to be working with you on this.

As you have said, of course, the Attorney General is going to have to participate in these hearings. I am disappointed that he is not here today. I think we have some very fine members of the staff of the Department of Justice and appointees of the Department of Justice. I do not want to denigrate their positions, but they are not the Attorney General. And it seems most senior administration officials do regularly participate in oversight hearings of the various Committees I serve on, but the Attorney General has appeared before this Committee only once this year and then for a very short time, which surprises me, because he has recently sent me a letter saying how important these kinds of oversight hearings are and how it is absolutely important that the Congress do oversight.

I know he is a very busy man, but he has been able to make a lot of highly-publicized appearances all over the country in a public relations campaign on the PATRIOT Act, so I would hope that he would find some time to drop by here. There are a lot of Senators on both sides of the aisle who have questions for him, and, as I did when I was chairman, we accommodated his schedule, and I know that Chairman Hatch will do the same thing.

Now, one of the focal points, of course, of the hearings will be the PATRIOT Act. We passed that 2 years ago this month after the 9/11 attacks. Since its passage, the PATRIOT Act has raised concerns with citizens around the country, actually across the political spectrum, from the far right to the far left. I think anti-PATRIOT resolutions, I have been told, have been passed by more than 190 communities in 34 of our 50 States.

Now, the Justice Department, of course, as part of their PR does take a very dismissive attitude. According to the Justice Department, they said, quote, "half of these resolutions, half are either in cities in Vermont, very small population, or in college towns in California, it is a lot of the usual enclaves." I think when you are talking about this showing up in 34 States, I think that is kind of an arrogant dismissal by the Department of Justice. I think it is beneath the dignity of the Department of Justice, and I cannot speak for the other 33 of those 34 States, but we see Vermont to be a very progressive State, certainly one of the most international of States, certainly the most law-abiding. I think we have the lowest crime rate of any State in the country.

So we find it arrogant, dismissive, condescending, of the Department of Justice. Now, is an opportunity to engage in public discourse, one of the most essential rights of Americans, and I think it is great that American people, the public, raise these issues and talk about their liberties. The administration should not dismiss them. Peoples' talk about their First Amendment rights or Second Amendment rights or Fifth Amendment rights or any others should not be dismissed in a condescending way by the administration.

The communities represent actually millions of Americans, not just a few liberty and privacy conscious Vermonters, as the Justice Department insinuates. But I think if you impugn the people of these 34 states who are dedicated libertarians or United States Senators for asking questions or raising concerns does not advance the debate or instill public confidence in the Department of Justice or the vast power it wields. It achieves just the opposite.

Now, having said that, I am a strong proponent of the First Amendment, and I want to add, of course, the Department of Justice and its spokespeople have an absolute right to say anything they want, no matter how stupid it might be. Now, in a democracy, there is always going to be an inherent tension between government power and privacy rights. The threat of terrorism—and this, I would say on behalf of everybody—the threat of terrorism does heighten that tension, and that is difficult for the Department of Justice, and I readily concede that. And then, when you overlay that with excessive Government secrecy and a lack of cooperation and accountability taken by the administration in dealings with the Congress and the public, you further compound the tension, the risk to our free society.

I remember when the Republican Chairman of the House said that he might have to subpoena the Attorney General to get answers. Undue secrecy undermines the system's built-in checks and balances. But it also corrodes people's faith that the Government will protect their freedoms, and we have enormous freedoms in this country, and that is one of the reasons why we are the most powerful democracy ever known. I think the reporter is probably picking up all of our conversations here. I can move to a different microphone.

But if we are going to protect those freedoms, we have to have confidence that the Government will respect them, and that is what is necessary. Now, we have another 2 years before the powers we granted in the PATRIOT Act expire, so it is not too soon for us to take a look at these powers: what is working? What is not? What can we do better? Obviously, the PATRIOT Act has become the most visible target of public concerns, but the next hearing in the series will address a broad array of civil liberties issues, including issues relating to the 9/11 detentions that the DOJ Inspector General talked about in his excellent report earlier.

So, I would hope that people take it seriously. The witnesses here were selected by Senator Hatch more than two weeks ago, but I understand some of the testimony did not arrive until 5:30 last night. I would hope that you would actually take things seriously. I mean, if I sounded somewhat annoyed before about the condescending attitude toward Congress by the Department of Justice and the condescending attitude toward 270 million Americans, it is because of things like that. We have been setting time aside; we have been preparing for this. We let you know about this two weeks ago. And to have testimony sort of slipped under the door at 5:30 at night does not help.

I recall what happened: Chairman Sensenbrenner canceled a hearing when this happened, so I am looking forward to hearing; I want to hear how the administration feels about some of the bills that other Senators and I have introduced like the Grassley-Leahy-

Specter Domestic Surveillance Act, the Grassley-Leahy FBI Reform Act, the First Responders Act, the PATRIOT Oversight Restoration Act that Senators Craig and Sununu, Durbin, Reed and myself put in. I think these are important things.

But, Mr. Chairman, I commend you for doing this, and I think your idea of the possibility of field hearings is an excellent one and, of course, as always, I will work closely with you on that.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman HATCH. Well, thank you.

We will turn to Senator DeWine and then Senator Kennedy.

STATEMENT OF HON. MIKE DEWINE, A U.S. SENATOR FROM THE STATE OF OHIO

Senator DEWINE. Mr. Chairman, I just want to thank you very much for holding this hearing. I am looking forward to hearing the testimony from the witnesses, and I think that one of the things that we want to look at today and keep in mind is how much of the complaints that we hear has to do with the PATRIOT Act and how much has to do with other things. And I think that is one of the things that we need to talk about today and focus on.

I also am anxious to hear, frankly, from people who are in the field: Mr. McNulty has been in the field now for a few years now and has had the opportunity to deal directly with the PATRIOT Act. I have had the opportunity to talk with two U.S. Attorneys in Ohio, and they have had the opportunity to implement the PATRIOT Act as well as Mr. McNulty.

And so, I think people like the U.S. Attorneys who have to deal with this on a daily basis have a lot to tell us about how this actually has worked. We were involved in writing this PATRIOT Act with suggestions from the administration, but to get the reports back about how it actually works; where it has been helpful; maybe where it has not worked as well as we had hoped it was going to work is the type of testimony that this Committee needs and will help inform our opinion as we try to make a determination about where this law needs to be changed in the future.

So again, Mr. Chairman, I thank you for holding this hearing today, and we look forward to the testimony.

[The prepared statement of Senator DeWine appears as a submission for the record.]

Chairman HATCH. Senator Kennedy?

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you, Mr. Chairman. Thank you and Senator Leahy for having this hearing.

Rarely in recent years have the activities of the Justice Department been so often at the forefront of public discussion, so controversial and so much need of close scrutiny by Congress, particularly in times of threats to national security. Congress, as you pointed out, Mr. Chairman, and as Senator Leahy pointed out, we have a special obligation to prevent excessive restrictions on the individual freedoms that are the essence of democracy and that symbolize our country in the world.

Two years ago, in the attacks on September 11, we learned the oceans can no longer protect us from terrorism that has plagued other nations. We learned that our law enforcement agencies and our intelligence agencies were not adequately organized, trained or prepared to identify terrorists and prevent them from striking. We learned, especially from the report of the Senate and House Intelligence Committees of the serious problems in analyzing information, sharing it between agencies at the Federal, State and local levels and even between Federal agencies.

As the FBI Director told the Committee, no one can say whether the tragedy of 9/11 could have been prevented if those problems had been corrected before 9/11. But 9/11 was certainly a wake-up call to these agencies. They were on notice that, whatever the reasons for their failures to connect the many dots which their separate activities had uncovered before the terrorist attacks, they needed to change their ways.

We still do not know whether the basic nuts and bolts improvements that might have prevented 9/11 have been made. We do know that by the end of the first year after 9/11, there had not been enough improvements to prevent the sniper attacks here in the Capital area, even though there were many dots that could have been connected. The witnesses today have little to say on that key issue. Instead, like the Attorney General, they insist that defending extreme measures which may well threaten basic freedoms more than they prevent acts of terrorism.

Only the Attorney General can supply adequate answers to our questions, and I, like others, regret that he is not here to do so. He has not reported to the Committee since early March, yet, he has had time to barnstorm the country in an exercise that is far more a public relations, not a law enforcement, exercise. We need better answers to a few basic questions.

Why should we sacrifice liberty in hopes of greater safety until the Department has addressed the nuts-and-bolts problems with law enforcement and intelligence identified by the Joint Intelligence Committees? How can the Department ask for intrusive new Federal antiterror powers when basic law enforcement procedures are not up to date? For example, 2 years ago, after 9/11, we know that 15 states still lack the readily available modern fingerprint technology which could quickly have connected the dots and helped prevent the fatal shootings of the D.C. snipers. We did not know the D.C. snipers, whether they were deranged individuals or potentially even terrorists trying to terrorize the community.

What will the Department and the administration do in response to the impressive report of the Department's own Inspector General and the unprecedented complaints by the International Red Cross about the continued detention without any due process of so many hundreds of citizens and noncitizens alike? Was the attempted intimidation of a dissenting diplomat by linking his wife's covert CIA role a careless act by a freelancing White House aide or a shameful symptom of the administration's bent on punishing its domestic enemies?

Finally, how can the Department of Justice say with a straight face that it is necessary to ride roughshod over the basic Constitutional principles of the First, Fourth, Fifth and Sixth Amendments

in order to meet the needs of law enforcement and then insist that a Second Amendment right to bear arms prevails over the obvious need of law enforcement to keep guns out of the hands of criminals and terrorists? In the meantime, we intend to do our best to obtain answers to these questions in this and future hearings and begin with the answers of our witnesses today.

[The prepared statement of Senator Kennedy appears as a submission for the record.]

I thank the chair.

Chairman HATCH. Thanks.

Senator Chambliss?

STATEMENT OF HON. SAXBY CHAMBLISS, A U.S. SENATOR FROM THE STATE OF GEORGIA

Senator CHAMBLISS. Thank you, Mr. Chairman. I, too, appreciate you and Senator Leahy convening this hearing. Senator Kennedy and I, in our Subcommittee on Immigration, Border Security and Citizenship have held a series of hearings regarding the operation, particularly, of our visa system and some other integral parts of the war on terrorism, and we are seeing some significant improvements made in the way that business is being conducted between the Department of Homeland Security, the Justice Department, the State Department and all of our other Federal agencies who are integrally involved in this particular issue of fighting terrorism.

Today, we have an opportunity to again conduct some oversight into an area that we knew was going to be controversial when we enacted it, because we did move into an area of the post-9/11 world that none of us had ever been involved in before. And I think it is going to be interesting, particularly, to hear from folks who have been out there on the front lines as to whether or not what we did is working the way we anticipated it would work but most significantly the way they need for it to work and whether or not we need to expand, retract or whatever; that is what we are here to find out, and we have got the right people here to tell us how it is operating on a day-to-day basis, and I look forward to hearing from all of these gentlemen.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you, sir.

Senator Biden?

STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator BIDEN. Thank you very much.

Let me begin by commending you, Mr. Chairman, for holding this hearing. To state the obvious, it is somewhat repetitious, it is critically important that we be vigilant about the new power that we have granted the Department in our function as an oversight function. The fact is we all know the threat—I apologize for my cold—the threat that we face now is different, and it is real. And by all accounts, the Justice Department and the Criminal Division, the U.S. Attorneys' offices in particular have done a pretty good job in terms of implementing that law. The Department has obtained 152 convictions for defendants like the would-be shoe bomber and the American Taliban John Walker Lindh as well as disrupted ter-

rorist cells in everyday American cities of Buffalo, Seattle, Portland and Detroit. And for that effort, I think the Department should be commended.

I must pause, however, to take a page from what I thought that my friend, Senator DeWine was going to say. I think that some of the criticism of the PATRIOT Act is not so much about the words written—and now my words—but how they are enforced and how you guys and women use it.

Back in 1995, some 8 years ago, so I have a clean—I am straight with you all—I stood in the well of the United States Senate imploring my colleagues to adopt a series of antiterrorism tools designed to deter and apprehend terrorists before they engaged in their acts. And at that time, I stated unequivocally that it simply did not make any sense to me that many of our law enforcement tools were not available to fight terrorism.

Perversely, the FBI could get a wiretap to investigate the Mafia, but it could not get one to investigate a terrorist cell. And I stand by my 1995 position that that sort of outcome was absurd.

Today, I stand by my support of the USA PATRIOT Act. It contained many of the provisions that I argued for back in 1995. Parenthetically, I should add that in 1995, it was my Republican colleagues, led in part by the now-Attorney General of the United States, who argued against those provisions that I opposed in 1995. But because of the tragic events of 9/11, we took another look, a fresh look, at those proposals and some others.

That said, I am fully aware of the tide of criticism that has been directed at some of the PATRIOT Act's provisions. However, as the Washington Post editorialized back in August, I believe that some measure of the criticism is both misinformed and overblown. While portions of the act are indeed sweeping and imperfect, it represents a good faith effort to find some compromise to date what we all agree to be a foremost threat facing the United States of America, and that is a more radical, a more radicalized enemy intent on inflicting harm on American citizens.

That is not to say, however, that the Justice Department should be absolved of the responsibility for its missteps and, I believe, poor judgment. Frankly, what I imagine is most alarming to the American public is not only the possibility that government can gather more information in cases on national security, which does disturb a lot of Americans, but also the administration's designation of U.S. citizens as enemy combatants. What is alarming is that we are denying them meaningful access to lawyers. What is alarming is the administration's liberal use of the detention of immigrants after 9/11, a practice condemned by the Inspector General of the Justice Department.

And by the way, I am personally troubled by the Department's lack of candor regarding the implementation of the PATRIOT Act's provisions. At a time when government has increased authority to find out more information about individual citizens, the Department has been less and less willing to share basic information about its activities. The Department operates in a shroud of secrecy, refusing to cooperate with Congress' basic request for information. At this rate, the administration, in my view, stands to squander the new tools that this body reluctantly granted it 2

years ago. The Department's implementation of the act, if not improved, will surely doom this legislation's continued life.

That is not a threat. I think it is simply a word of advice. And I predict to you that the act will be repealed if you guys do not get your act together. The Department's apparent strategy of conceal and ignore will be to the Department and this Nation's detriment. And the idea that the Attorney General of the United States has to be in Philadelphia meeting about a Mayer Street or whatever the hell, the heck, he is doing and not being willing to be here before this Committee is outrageous. It is absolutely outrageous that he would not be here, and I just want the record to reflect that that is my view, and I thank you.

Chairman HATCH. Senator Cornyn?

STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. Thank you, Mr. Chairman, and I want to thank, as the other members of the panel have, the Chairman and the Ranking Member for convening this important hearing. I was not a member of this body on September 11 when the terrorist attacks occurred on our own soil, nor was I here when bipartisan majorities of the U.S. Congress overwhelmingly passed the USA PATRIOT Act several weeks later by a vote of 98–1 in the United States Senate and 357–66 in the House.

I have, of course, reviewed the record, and I have taken note of the numerous Senators on both sides of the aisle who praised that act for strengthening our law enforcement and intelligence tools to fight terrorism while respecting and preserving the civil liberties of American citizens, and Mr. Chairman, I would like to ask that a list of some of those statements, representative statements, be made part of the record.

Chairman HATCH. Without objection

Senator CORNYN. I am also aware that there have been voices of consent, critical of both the act and of Congress for approving legislation that, in their view, deprives individuals of their civil liberties. Thank goodness we live in a country where dissent and free speech are matters of constitutional right, and as an advocate of open government, I firmly believe that only through free speech and open government can we be sure that our liberties are secure even during a time of war.

There have indeed been wartime deprivations of civil liberties in this country in the past: the internment of Japanese-Americans during World War II, censorship of the press during World War I; these things happen. But we should remember that this has been an issue since the earliest days of our history, when the Alien and Sedition Acts of 1794, four laws enacted in the wake of hostile actions of the French Revolutionary Government on the seas and in the councils of diplomacy, including the infamous XYZ Affair.

So I strongly believe it is important for us to monitor our government to ensure that civil liberties are always adequately protected, even as we take the steps necessary to secure ourselves against terrorism and to stop our enemies who would do us great harm. Mr. Chairman, I do think that, so we put this in proper context, we do take due note that the Congress and the administration, including

the Department of Justice and all of those who are allied in the war on terror must be doing something right, since, thank goodness, this country has been spared from further terrorist attacks on our own soil since September 11, and I think we should always remember and put all of this discussion in that context.

It is because I worry about civil liberties that I worry about hysterical claims about civil liberties abuses. Every false claim of a civil rights violation discredits every true claim of a civil rights violation, and I believe that that hurts us all. I look forward to hearing today's testimony and to learning whether the USA PATRIOT Act actually has served the purpose that Congress intended, and that is to save lives and to protect Americans from terrorist attacks without harming civil liberties, as I believe and as a bipartisan majority of the 107th Congress believed that it would and that I believe the act does.

Thank you, Mr. Chairman.

[The prepared statement of Senator Cornyn appears as a submission for the record.]

Chairman HATCH. Thank you.

Senator Kohl, we will turn to you.

STATEMENT OF HON. HERBERT KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KOHL. Thank you, Mr. Chairman. We are here this morning to review the Justice Department's efforts to investigate and prosecute suspected terrorists under the PATRIOT Act. Many of us are uneasy with the perception generated by the PATRIOT Act, namely, that Federal law enforcement is more powerful, more intrusive and less concerned with Constitutional rights than ever before.

This concern is shared by many Americans. In fact, a recent poll showed that 52 percent of Americans feel that the PATRIOT Act has gone too far in compromising Constitutional rights. With the increased power of the PATRIOT Act comes increased responsibility not to chill or infringe upon the civil liberties of law abiding citizens. We are concerned that the administration, perhaps, does not get this balance right.

Although fighting terrorism was the rationale for enacting the PATRIOT Act, we are troubled with the aggressive application of this statute to non-terrorism cases. Critics contend that the administration is using terrorism to pursue a wider law enforcement agenda. Indeed, a Justice Department report confirmed that hundreds of non-terrorism cases were pursued under the PATRIOT Act. For example, the New York Times reported that one provision of the PATRIOT Act, specifically, a new section criminalizing threats to mass transportation systems was used by authorities to sentence a 20-year-old lovesick woman to 2 years in Federal prison for leaving threatening notes on a cruise ship simply because she wanted the boat to return to port so that she could see her boyfriend.

Though such hoaxes should be taken seriously, we must ask if the PATRIOT Act was really intended to send such individuals to Federal prison. Arguably, the PATRIOT Act has made Federal law enforcement more invasive in the lives of Americans than at any

other time in our history. For example, the PATRIOT Act allows the Treasury Secretary to require banks to keep even closer tabs over their customers. This mandate has rankled many banks and citizens alike, forcing them to question the need for these provisions in the war on terrorism.

We need to be reassured that the good that the PATRIOT Act has brought outweighs the bad and whether there has been overuse or abuse of the new powers granted by this law. We should examine whether or not the PATRIOT Act needs to be reigned in. So we look forward to having these questions addressed by our witnesses here today and at future hearings, which will address the administration's efforts to combat terrorism.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator.

Senator Feinstein?

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman, for holding these hearings. Senator Kyl and I held an oversight hearing in the Terrorism and Technology Subcommittee on the full PATRIOT Act about a year ago in October, but this is the first hearing this Committee has held. And I think it is really very important to hold these hearings. I happen to agree with what Senator Biden said: the Attorney General really should be here. He sets the policy.

I have tried to see what has happened in the complaints that have come in about the PATRIOT Act, and I have received to date 21,434 complaints. Conversely, I have received six calls in favor of the act. When we took a look at the letters, post cards, and emails that came in, it was very revealing. This correspondence breaks down into three sets. The first set was really against PATRIOT II, draft legislation that would have expanded the PATRIOT Act. That bill was never formally sent to the Hill. My hope is that it is dead in the water. While a great bulk of complaints are against PATRIOT II, we have never seen a final version of PATRIOT II.

Now, the rest of my mail is evenly divided regarding civil liberties in general and the National Security Entry-Exit Registration System in particular. That is the system which requires males from certain countries to be photographed, fingerprinted and interviewed. It has nothing to do with the PATRIOT Act. Now, of the 194 communities across this country in 34 states that have passed resolutions or ordinances against the PATRIOT Act, 45 of them are in California. There are three types of these resolutions or ordinances. For the most part, though, they generally complain that the Act violates civil liberties, leads to profiling, and is reminiscent of past instances of civil rights violations.

In fact, I have never had a single specific abuse of the PATRIOT Act reported to me. My staff emailed the ACLU and asked them for instances of actual abuses. They emailed back and said they had none. Additionally, there are complaints about specific sections of the PATRIOT Act. These do not assert any specific abuses, but they target individual sections. As you know, 16 sections of this bill were sunsetted after 5 years, and we sunsetted them largely be-

cause we were concerned that there might be abuses, and we wanted to watch these sections and at the end of 5 years have the ability to take a look at those 16 sections and see if they were abused.

Well, the targeted sections include Section 213—that is sneak and peek. Now, this section allows the court to delay a notice of a search warrant if the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant would have adverse effect. Interestingly enough, according to the Director of the FBI, the sneak and peek authority provided in this bill has never been used against a library, I believe. In spite of this, Congressman Otter offered an amendment in the house to an appropriations bill that would block law enforcement from using this authority.

But I think many miss the fact that section 213 is, for the most part, as I understand it, a codification of authority that was created by case law in the United States Court of Appeals for the Ninth Circuit in 1996 and the U.S. Court of Appeals for the Second Circuit in 1990. If I understand what we did in section 213, it was in some respects narrower than the authority that existed before the PATRIOT Act in the Ninth Circuit and the Second Circuit. In addition, we provided in the PATRIOT Act certain additional safeguards in the area of sneak and peek so that civil liberties are actually better protected now in California, Idaho, New York and in other states that fell under those jurisdictions than before the PATRIOT Act.

Section 215, FISA business records. This is the provision about which the libraries are worried. A number of letters commented on it. And that section removes the agent of a foreign power standard for court-ordered access to certain business records under FISA and expands the scope of court orders to include access to other records and tangible items.

I would like to hear from the witnesses today about that section and how it has been used.

Another section mentioned in letters was 218. This section, together with section 504(a), allows coordination between intelligence and law enforcement, and it was the one that changed the standard required for a FISA order from primary purpose to significant purpose. I think I first suggested that amendment. The amendment helps lower the wall between intelligence and law enforcement.

Another is section 314, which requires cooperative efforts to deter money laundering and allows the sharing of information by law enforcement and regulatory authorities and financial institutions to help detect terrorist financing and/or money laundering. And the final one is Section 411, which changes definitions related to terrorism and makes it easier to deport aliens who raise money for terrorist organizations and broadens the definition of terrorist organizations.

Now, in my judgment, there is a lot of public concern out there about this bill. I find it interesting that of the over 21,000 comments I received—now, I generally wait until I get about 30,000 before I come to any specific conclusions—but of the 21,434 who have written or called, to have half really against a bill that has never been introduced is interesting, and to have a substantial number

relate to the National Entry-Exit Registration System, which is not part of the bill, is also interesting.

Now, what I have deduced from this is that there is substantial uncertainty, perhaps some ignorance, about what this bill does and, secondly, how this bill has been employed. So I look forward to these hearings as a way of clearing some of that up.

I thank you, Mr. Chairman.

Chairman HATCH. Thank you.

Senator Feingold?

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you, Mr. Chairman.

Thank you for agreeing to hold the series of oversight hearings on the administration's counterterrorism efforts. My first priority and I strongly believe Congress' first priority in a post-September 11 America is to fight terrorism. Today, the Committee will hear the administration's perspective on its counterterrorism initiatives, and I am eager to hear what the administration has to say.

I also look forward to our next hearing, when I am told we will hear from experts outside the administration who believe that our government can do a better job fighting terrorism without sacrificing the values that make us the greatest democracy on Earth. I understand the hearing will be held on November 5, and I commend the Chairman and the Ranking Member for their collaboration in arranging those hearings.

Mr. Chairman, I think we must be mindful that while there have been important successes in the war on terrorism, there are legitimate concerns, legitimate concerns, about whether some of the administration's conduct has been fair, just and effective. According to the Justice Department's own Inspector General, many of the over 750 men who were rounded up and detained on immigration violations in the aftermath of September 11 were haphazardly and indiscriminately labeled as terrorist suspects. But none were ever charged with a terrorism offense, and some were treated in an inexcusably harsh and unfair manner. I remember very well that those of us who raised questions about the treatment of these detainees at the time were accused of, quote, "aiding the terrorists," unquote.

Now, the Inspector General has vindicated our concerns but 2 years too late to help those whose rights were violated. In addition, three men, two of whom are U.S. citizens have been designated enemy combatants and are currently detained by the military here in the U.S. They are locked up with no access to attorneys or family and no guarantee that they will ever be charged or have their day in court. This treatment raises questions that I think go to the very core of the Bill of Rights.

Mr. Chairman, then, there is the PATRIOT Act. As I made clear during the debate on the bill 2 years ago, I supported 90 percent of the USA PATRIOT Act. But the bill went too far in some respects, and I am very pleased that there is a growing bipartisan support, including some of our colleagues from both sides of the aisle on this Committee, to modify the law to ensure that it is consistent with the Constitution and not be subject to abuse.

There is too much confusion and misinformation about this issue, as the Senator from California just indicated. The first is the notion that I think I heard somebody say that the sneak and peek provisions are sunsetted, which they are not, and that they have not been used, which is not the case. They are being used, and they do need review. They do need to be sunsetted, and they do need to be modified.

Secondly, I do acknowledge that the administration has indicated that they have not used the Section 215 library provisions, provisions that they described as essential to the fight against terrorism. Now, which is it? That they have never used them, or that they are essential? And what is the objection, then, to reasonable modifications if they have not even been used?

Finally, the Senator from California effectively demonstrated the vast number of Americans that are raising questions about this bill. Of course, not everybody who raises those objections knows all of the details of the bill, just like the members of the Senate did not know the details of the bill when they voted for it. But they do sense that something is wrong.

The way to handle that is not to refer to people who have concerns as hysterical. The way to handle that is to talk to the American people about their concerns, to carefully go through what is needed and what is not needed, what is being used, and what is not being used. I regard the administration's attempt to marginalize and dismiss those who criticize this bill as highly objectionable and not consistent with the fundamental goal, and the fundamental goal, Mr. Chairman, is to bring the American people together as we fight terrorism, not to label people who have questions as marginal or hysterical.

So, Mr. Chairman, I thank you for having this hearing, and I look forward to this one as well as the next one that is specifically on the USA PATRIOT Act. Thank you, Mr. Chairman.

[The prepared statement of Senator Feingold appears as a submission for the record.]

Chairman HATCH. Senator Craig?

STATEMENT OF HON. LARRY E. CRAIG, A U.S. SENATOR FROM THE STATE OF IDAHO

Senator CRAIG. Well, thank you very much, Mr. Chairman. I am here basically to listen and to see what is happening within this law. As you know, I have recently joined with a group of my colleagues in crafting some reform to the PATRIOT Act that we are now calling the SAFE Act that we believe have some essential grounds for clear review before this Committee.

But I must say that whether it is SAFE Act or PATRIOT Act or where we go, let me give you a new statistic. I just came from doing an interview on Social Security card issuances. I am Chairman of the Aging Committee. And it is frustrating to me: last year, we issued 12.4 million Social Security cards in this country, 1.2 million, 22 percent, to noncitizens: no background checks, no indication that these were all legal, foreign aliens in our country; 1.2 million. We have got problems everywhere when it comes to effectively tracking those who are in our country, handling them right

and handling them reasonably and giving our law enforcement the appropriate tools to do so while protecting our civil liberties.

Gentlemen, I am anxious to hear your testimony.

Chairman HATCH. Well, thank you, Senator.

Senator Schumer?

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Mr. Chairman, thank you for holding these hearings. These hearings are entitled Protecting our National Security from Terrorist Attacks, a Review of Criminal Terrorist Investigations and Prosecutions.

Well, the investigation that I am most interested in—it should come as no surprise—is that into the allegation that someone in the administration leaked the name of a covert CIA agent. It is, in my opinion, a dastardly crime, and it goes to the heart of our ability to deal with terrorism.

Let me start by welcoming the three witnesses who are here this morning. It is unfortunate that the two people who can best answer questions about that investigation, Attorney General Ashcroft and John Dion, head of the Counterespionage Section, are not here today. It is a shame that Attorney General Ashcroft has chosen to stay away from the hearing, since he is a close ally of the President and has refused to recuse himself from the investigation thusfar.

We do not have the slightest idea about the extent of his involvement. We do not know, for instance, if he is involved in determining what witnesses can be interviewed or whether a new line of questioning can be pursued. These are crucial questions that deal with the integrity of this investigation.

Now, I sent a letter to Chairman Hatch, and we called the Justice Department asking that Mr. Dion be here today, because other than Attorney General Ashcroft, he is really the only one who can tell us what we need to know about who is running the investigation and how independent it really is. It is a shame that he, too, is not here today, but at least we will have the opportunity to ask Mr. Wray to shed some much-needed light here.

There are a lot of questions that we need answered in this investigation. These do not deal with the specific facts of any ongoing investigation; rather, they deal with the structure and independence of the investigation, something that is well within this Committee's purview and something I hope we will pursue with some degree of diligence. But here are some of the questions that I would like answered: first and foremost, who is really in charge of this investigation? While DOJ says that career prosecutors are running this investigation, it is quite clear that close associates and allies of the President are in the line of command and have not recused themselves.

Does Mr. Dion have the power to take whatever investigative steps he deems appropriate? Or can he be blocked from subpoenaing documents, putting a witness in the grand jury or doing anything else he believes is essential to finding out who committed this dastardly crime? If someone with a conflict of interest or an apparent conflict of interest can block Mr. Dion from investigating this case the right way, that is a very, very big problem.

I, for one, want to know what is being done about it. Why have we seen such unusual delays? Why did the Department of Justice accede to a White House request to delay telling employees to preserve evidence? And why has a special prosecutor not been appointed to run this investigation?

I take the Justice Department's criminal investigation into the leak of a covert CIA operative's identity very seriously, because it is an act so vile and so heinous that it is a shock to the conscience. It demands a full and fearless investigation that is above politics, but so far, the way that this probe has been conducted falls short of that bar. These questions go to the heart of whether the public can trust that the investigation is being conducted in a responsible manner. It should not take a hearing to determine that, but that is what we are left with.

Now, Mr. Chairman, I advised Mr. Wray's staff that I would be asking these questions today, so there is no surprise here. We do not want to surprise anyone, catch anyone off guard. We just want the answers we have been seeking for weeks. This Committee has important oversight responsibilities, not only on the PATRIOT Act but about this investigation as well, and we owe a duty to the American people and our intelligence operatives, brave men and women on the front lines risking their lives for us, to ensure that this investigation is done right, and I look forward to getting some answers today.

Chairman HATCH. Thank you.

[The prepared statement of Senator Schumer appears as a submission for the record.]

Senator Durbin?

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Thank you very much, Mr. Chairman. I want to thank those who are here before the Committee today, particularly Pat Fitzgerald, who comes to us from the Northern District of Illinois, and I was happy to support Senator Fitzgerald's—no relation—nomination of Pat Fitzgerald. He has done an excellent job as our U.S. Attorney and may be one of the most knowledgeable people in this whole subject of terrorism. So I am looking forward to his testimony. Though we may disagree on a point or two, I certainly respect him and all of the other witnesses who are before us.

But the point has been raised over and over again: there is an empty chair here today, a chair which should be filled by the Attorney General of the United States, who, frankly, has been a rare visitor to Capitol Hill when it comes to justifying his administration's process and procedure that they are using to fight terrorism. It really strikes me as indefensible that we are here in the Judiciary Committee reviewing the most critical piece of legislation involving civil rights and liberties in America, and the Attorney General of the United States is too busy to be here.

I do not understand that. I do not think it makes any sense, and I do not think it is fair. And it is not just a matter of his personal appearance. I have had an experience that other Senators have had that this Department of Justice is unresponsive to letters and requests for information. They really believe that they are above it

all, that oversight is not something that they really have to submit themselves to.

In the name of fighting terrorism, they are ignoring their basic Constitutional responsibility. Now, I am glad that the people who are before us today will be able to answer questions, but Attorney General John Ashcroft should be in one of those chairs before that microphone answering the questions that we have had raised by citizens all across America about the PATRIOT Act. And I think that the fact that he is not here is a sad commentary on this administration's attitude toward its Constitutional responsibility.

Put in historical context the PATRIOT Act: it was passed at a critical moment in the history of the United States. It was a moment of tragedy; it was a moment of fear. It was a moment when we moved, at the Government's suggestion, to give our Government more powers to apprehend those responsible for crimes of terrorism. And there were misgivings on our part. Many of us on this panel wondered: have we gone too far? Have we given the Government more authority than we should have, more than it needs? Have we infringed on the Bill of Rights that we have all sworn to protect on both sides of the table?

We were not sure, but because we were certain that we wanted to make America safe, we voted for this PATRIOT Act, and now come voices back to us asking questions about whether we did go too far. And I listened to Senator Feinstein, and I think she is probably right. If you ask the average critic of the PATRIOT Act, be specific, what is it about this law that you do not like, many are at a loss to be that specific. But keep in mind what is at play here. Who has the burden of proof when it comes to taking away the rights and liberties of Americans? It certainly is the Government's burden to prove that. The individual citizen should not have to make that case. The Government ought to stand up and say this is why we are taking away your rights and liberties. This is why order is more important than liberty.

They have that burden. And the fact that individuals writing us letters cannot give us chapter and verse as to exactly why they are troubled by the PATRIOT Act I think, frankly, shifts that burden. It says to the average person in the street, you have to come up with an explanation of why this Government is going too far, a Government through an Attorney General who refuses to be held accountable, refuses to submit himself to the oversight of this Committee.

And listen to what that Government, what that Attorney General says of his critics: when he did appear before this Committee in a rare appearance, he said, quote, "to those who scare peace-loving people with phantoms of lost liberty, my message is this: your tactics could only aid terrorists, for they erode our National unity and diminish our resolve. They give ammunition to America's enemies and pause to America's friends. They encourage people of good will to remain silent in the face of evil."

And that was not the end of it. On September 19 of this year, another quote from Attorney General Ashcroft about the critics of the PATRIOT Act: "The charges of the hysterics are revealed for what they are: castles in the air built on misrepresentations supported by unfounded fear held aloft by hysteria." That is what the

Attorney General of the United States said to those Americans and those Senators and Congressmen questioning whether the PATRIOT Act went too far.

And that, I believe, is why he is not at the table today, because if he were held to the same standard of proof of why this Government needs to take away our rights and liberties, I think he would be at a loss.

Now, people on both ends of the political spectrum have come together, right and left, and said that there are at least three areas of this law that went too far. And the Government, in response, has said, well, we have not even used it. Well, it is 2 years after September 11, and if you have not used them, perhaps you do not need them. And frankly, those you have used, sneak and peek, for example, raise serious questions as to whether they infringe on our Constitutional rights.

I hope, Mr. Chairman, the next time we have a meeting of this Committee, the Attorney General will not be too busy to come before us and be held accountable, to be subjected to the oversight that this Committee, I think, has a responsibility to exert on behalf of people all across America who believe as I do that the presumption is on the side of American citizens in protecting our rights and liberties, and the burden is on the Government to prove time and again that they have to infringe on those rights and to establish new law.

Thank you, Mr. Chairman.

[The prepared statement of Senator Kennedy appears as a submission for the record.]

Chairman HATCH. Well, let the record show that we did not invite Attorney General Ashcroft to this hearing. The purpose of this hearing is to have these law enforcement officials help us to understand some of these things better. He will be invited. He has said he will come. And I just want to make that record clear.

Now, one other thing: you know, I listened to Senator Schumer, and I have to say that a leak concerning intelligence information or agents can never be condoned. I do not believe that there is anyone who disagrees with that proposition, and I join in Senator Schumer's desire that the identity of the person who leaked this serious information be discovered.

But I believe that the Department of Justice is the appropriate agency to look into this matter. Historically, the CIA notifies the Department of Justice—

Senator LEAHY. Mr. Chairman, if I could just interrupt for just one second—

Chairman HATCH. Sure.

Senator LEAHY. We did request that Mr. Ashcroft come here to testify, and we did express the concern that, with all due respect to Mr. Wray, Mr. Fitzgerald and Mr. McNulty, this is usually the level we see for a staff briefing, not for the full Committee.

Chairman HATCH. Well, let me just make it clear: I think these are three of the top law enforcement officials in the country who are on the front lines, and we decided to go with them first. But let us also make it clear, in all fairness to the Attorney General that we did not invite him. So I do not think that we should be

pounding on the Attorney General for failing to appear here when he was not invited. And that is the point I am making.

Now, with regard to leaks, approximately 50 times a year, every year, the Justice Department is asked to investigate complaints about the leak of classified information. The Department has career professionals dealing with these matters, and their professionalism and experience will ensure a competent and complete investigation.

When you talk about career prosecutors, I am told that one of the most experienced career prosecutors in this area is John Dion, a career Justice employee who is heading this investigation. Now, consider that Mr. Dion has participated in the investigation and arrest of those responsible for breaching national security during both Republican administrations—the Walker spy ring, for example—and during Democratic administrations, like the Robert Hansen and Aldrich Ames cases. This is the quality of this man. He is obviously a man who follows the evidence wherever it may lead, and because of this experience, I cannot understand why anyone would suggest that the Department would appoint anyone other than Mr. Dion to look into this matter.

He is a career Department prosecutor, and he has the authority to look at this. Now, Attorney General Ashcroft has directed this matter to be undertaken with the kind of thoroughness, promptness and professionalism that Mr. Dion has exhibited throughout his service and his entire career across a variety of administrations. Now, having John Dion here today would serve no real purpose other than propounding questions to him that he cannot answer because of the ongoing investigation, and more importantly, having him here would take away from actually conducting this investigation.

Mr. Dion represents the nature of career employees within the FBI and the Department of Justice. The continuity of service within our law enforcement community through Republican and Democratic administrations is what makes the criminal justice system in this country the best that there is in the world today.

Chairman HATCH. Now, I just wanted to set the record straight, because the purpose of this hearing is to get into some of these questions that people have raised and to get it straight from the horse's mouth, from people who are prosecuting these matters. We have the chief of the Criminal Division today, Hon. Christopher Wray, who will begin our discussion. He is the chief of the—excuse me; just let me introduce them and then—he is the chief of the Criminal Division of the United States Department of Justice; Hon. Patrick Fitzgerald, the U.S. Attorney for the Northern District of Illinois, one of the top U.S. Attorneys in the country, as is Hon. Paul McNulty, whom we all know from having served up here on Capitol Hill, U.S. Attorney for the Eastern District of Virginia in Alexandria, Virginia.

And I am interested in what you have to say, and then, we are going to have a series of these hearings, and we will have the Attorney General, the Director of the FBI and others in here to add to what you folks have to say and to answer any questions that anybody on this Committee will care to ask. And we will do that, and we will do that at the appropriate time.

Senator SCHUMER. Mr. Chairman, just briefly—

Chairman HATCH. Sure.

Senator SCHUMER. —because you addressed me, and I just want to briefly—and I know the Committee's time is valuable, address them.

Chairman HATCH. Right.

Senator SCHUMER. Two things: there are many leak investigations. There has not been, to my recollection, a leak of a covert agent's name, number one; that is a crime. And second—

Chairman HATCH. They are all crimes.

Senator SCHUMER. —that it was alleged by a reputed columnist that it was done by high-level administration officials. We do not know who they are. That is quite different from a regular leak investigation. I have no doubt about Mr. Dion's integrity. You are right: he is a fine career employee. But on a highly sensitive investigation like this, it may be and it may not be that his higher-ups have asked him to check with them before he does, that or the other thing. It might be Attorney General Ashcroft; it might be somebody else.

Those questions—it is our obligation to find those out. Those do not interfere with the ongoing investigation. In fact, in fact, Mr. Chairman, with all due respect, that makes sure that we have a real ongoing investigation that gets to the bottom of this. To ask about the structure of an investigation is different from questions who are you questioning and what have they said, which I do not think that this Committee should do.

So I would just hope that we could either bring Attorney General Ashcroft here, who I think speaks volumes by his absence, or, at the very minimum, or, at the very minimum, we bring Mr. Dion here to ask him those questions. And I think that is perfectly not only appropriate but within the role, within the obligation of this Committee, because let me tell you: at least in my State, in New York, this is not a partisan issue. I get questions from people of both parties, of all political persuasions, and all they want to do is get to the bottom of this. It does not matter who it was, as long as you find out who it is and punish them.

Chairman HATCH. I understand, and you will be able to ask Attorney General Ashcroft those questions when he comes.

Now, with regard to Mr. Dion, we will see, but it is an ongoing investigation, and let us just see where it goes.

With that, we will turn to Mr. Wray. Then, we will go right to Mr. Fitzgerald and then to Mr. McNulty. And you each have 7 minutes. We would appreciate it if you could cover everything that you can in that limited period of time. And then, we will have questions.

STATEMENT OF CHRISTOPHER WRAY, CHIEF, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. WRAY. Mr. Chairman, members of the Committee, thank you for asking the three of us here today. I am pleased to be able to discuss with you the Justice Department's efforts in the war on terror and how the PATRIOT Act has helped prosecutors and agents on the front lines of that war.

Like many of you, I remember where I was on September 11 when I first learned of the attacks on the World Trade Center and the Pentagon. I recall vividly the chill I felt as I watched the television footage of the wounded Manhattan skyline, and I will never forget the conversations that I had with my wife and children after learning of the tragedy, or the grim faces of my colleagues at the Justice Department, or the dense weight that settled in my stomach for the rest of that mournful day.

Just as memorable, though, were the heavy burdens of the next few months. All of us in the Department jolted with a start and a quickened pulse every time our pagers went off, whether it was in the middle of the day or the middle of the night. Our adrenaline went racing with every report of white powder in someone's mail. Every airplane pilot who did not promptly respond to radio calls brought a familiar cold knot to our stomachs, and we were determined not to miss something that would cost more innocent lives. So each of these incidents made us think with dread, not again.

I also shared the frustration felt by our agents and prosecutors who were working around the clock to prevent more terrorist attacks and to apprehend those responsible for September 11. Those of us who had spent many years fighting non-terrorism crimes were incredulous to learn that the law barred us from using many of our trusted tools to fight terrorism. Faced with a sophisticated, well-financed and ruthless enemy determined to kill vast numbers of Americans, we could not pursue terrorists with the same methods we used against drug dealers.

This was maddening, and as we continued to check our pagers and our cell phones, we knew that we could be and should be doing more. Thankfully, when confronted with this sober situation, Congress responded with the PATRIOT Act. After six weeks of intense scrutiny, negotiation and debate, Congress passed the Act by overwhelmingly bipartisan margins, and to those of us in the field, the Act was nothing short of a breakthrough.

Now, prosecutors and agents can communicate far more easily with intelligence and military officials and coordinate their efforts. They can adapt to the sophisticated methods now used by terrorists. They can use tools that have long been available to fight non-terrorism crimes. They can punish terrorists and their supporters more severely. Such measures are an absolute necessity when all that the enemy seeks is a base hit, and we have to pitch a perfect game every single day.

The PATRIOT Act removed the legal barriers that prevented law enforcement officials from sharing information with the intelligence and military communities. Before the Act, the law required these groups to form separate huddles that could not readily talk to each other, and naturally, the collective defense against terrorism was weaker than it should have been. And that information sharing post-PATRIOT Act has proven effective. It led to the indictment of Sami Al-Arian and other alleged members of the Palestinian Islamic Jihad in Tampa, Florida. PIJ is responsible or believed responsible for over 100 murders, including those of two young Americans, 20-year-old Alisa Flatow and 16-year-old Shoshana Ben-Yishai.

Intelligence information sharing also assisted in the investigation of Ilyas Ali in San Diego, California, who was charged with conspiring to exchange hashish for anti-aircraft missiles for sale to Al Qaeda. The PATRIOT Act also brought the law up to date with current technology, so we no longer have to fight a digital-age battle with antique weapons. Terrorists, like other criminals, now use modern technology to conduct their activities. To us, the PATRIOT Act simply leveled the playing field by allowing investigators to adapt to these measures.

The PATRIOT Act has also given prosecutors and investigators stronger tools with which to deter and disrupt terrorist activity. By increasing the maximum sentences for a number of terrorism-related offenses, the Act ensures that terrorists and their supporters are punished appropriately and, just as importantly, leads to more information and cooperation from those linked to terrorism.

Another important tool that a number of the members of the Committee have already mentioned has been the delayed-notice search warrant. This tool allows investigators to delay, not to deny, notifying the target of a search for a limited time while the court-approved warrant is executed. The use of this tool has long been upheld by courts in investigations of organized crime and drug offenses. The PATRIOT Act simply codified the case law in this area to provide certainty and consistency in terrorism and other criminal investigations; for example, in a recent narcoterrorism case, one court issued a delayed-notice warrant to search an envelope that had been mailed to the target of the investigation.

By getting that kind of a warrant, it allowed the officials working on the case to continue investigating without compromising a wiretap. That search ultimately confirmed that the target was funneling money to an affiliate of the Islamic Jihad terrorist organization.

It is easy to be lulled into complacency about the terrorist threat, and as September 11 recedes in time, it is natural for it to begin to resemble some hazy, horrible nightmare. But as we know, and as Congress recognized when it passed the PATRIOT Act, this was not a bad dream. Every morning, officials in the law enforcement, intelligence and military communities are confronting the threat on a very real basis. There are many who will gladly take the place of the September 11 hijackers, who are just as intent on killing many more innocent Americans. And the fervor and organization of our enemy requires us to be vigilant. Figures like Osama bin Laden continue to exhort their followers to fulfill their holy duty of killing Americans. One such message, as the Committee knows, from bin Laden, aired just this past Saturday.

And terrorists have gained footholds everywhere, even in our own backyards. They now operate from places like Idaho and Lackawanna, New York, and Portland, Oregon, and Tampa, Florida.

The Department has enjoyed key successes in the war on terrorism. Since the attacks of September 11, we have charged 284 defendants as a result of terrorism investigations. To date, over 150 of them have been convicted. We have broken up terrorist cells in Buffalo, Charlotte, Detroit, Seattle and Portland. Through interagency and international cooperation, over half of Al Qaeda's lead-

ership worldwide has been captured or killed. And more importantly, since September 11, 2001, we have not seen another major terrorist attack on American soil.

For this blessing, we can thank not only our dedicated front line agents and prosecutors but also the enhanced capabilities that the PATRIOT Act affords them. I should say that the Act has not gone unnoticed amongst the terrorists themselves. As the Attorney General pointed out last week, they are, in fact, explicitly complaining about the Act. Jeffrey Battle is a member of the Portland terrorist cell who recently pleaded guilty, and the investigation revealed that he was explaining to one FBI informant during the course of the activity that his enterprise was not as organized or well-financed as it should have been because, and I quote, "we don't have support."

Because of the PATRIOT Act, defendant Battle complained, "everybody is scared to give up any money to help us." And I would respectfully submit that this Committee and the Congress can and should be proud of results like that. I want to assure the members of the Committee that the Department is well aware of its responsibility to uphold the rights of every American while protecting the country from terrorist attacks. Congress itself embedded a number of procedural safeguards in the PATRIOT Act, including the fact, and I cannot emphasize this enough, that almost everything that the Department does under the Act is reviewed by an independent Federal judge.

To date, no provision of the Act has been held unconstitutional by any court. We also observe comprehensive constitutional, statutory and administrative rules that guide all Justice Department investigators and prosecutors. The PATRIOT Act, in our view, from the front lines, successfully balances our National security with our civil liberties, and the Department is committed to protecting the freedoms that we all so dearly cherish.

Mr. Chairman, I thank you again for inviting us here and for giving us the opportunity to discuss how the PATRIOT Act is being used every day in the field to fight terrorism. I would also like to thank the Committee for its continued leadership and support. And after you hear from my colleagues, Mr. Fitzgerald and Mr. McNulty, I would be happy to take a shot at any questions that you all would like to ask us.

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

Chairman HATCH. Thank you, Mr. Wray. We appreciate your testimony.

Mr. Fitzgerald, we will turn to you.

STATEMENT OF PATRICK FITZGERALD, UNITED STATES ATTORNEY, NORTHERN DISTRICT OF ILLINOIS, CHICAGO, ILLINOIS

Mr. FITZGERALD. Thank you, Mr. Chairman and members of the Committee. I am very happy to be invited here today, really for two different reasons. One is I think it is very, very important that we get the record straight as to what has led to the PATRIOT Act and how it has been put into effect.

Something that Senator Feinstein mentioned, I think, is very true: there is much misinformation and confusion out there. In talking to the community in Illinois, I can tell you that many people have genuinely-held concerns about the PATRIOT Act that are based upon misinformation that is in the public domain. Everything that we can do to set forth what is and what is not in the PATRIOT Act I think would be helpful to the American people.

And the second important reason is I would like to thank this Committee and Congress on behalf of the prosecutors in the field and the FBI agents working these cases for finally ending the wall that was part of the PATRIOT Act. I come to this Committee having worked for 7 years on terrorism cases before the PATRIOT Act and can give the Committee, I think, a sort of before and after view.

The most important thing the PATRIOT Act did was to end the wall that blocked criminal and intelligence investigators from talking to each other. And let me give you a concrete example: in New York, FBI agents, criminal agents, and prosecutors work together—I was part of the team—in 1996 when we began the investigation of Osama bin Laden. And here were the ground rules: we could talk to the FBI agents working the criminal case; we could talk to the New York City Police Department; we could talk to other Federal agencies in the Government, including the intelligence community; we could talk to citizens; foreign police; and foreign intelligence, including spies.

We did that. We went overseas to talk to people. We could even talk to Al Qaeda. We took Al Qaeda members and associates, and we hauled them before a grand jury and asked them questions, and I will describe some of that today, because usually, that is not public, but it has since become public. And beyond that, we talked to Al Qaeda members who agreed to defect, and we debriefed overseas and worked with us.

It is amazing that we could talk to Al Qaeda, but we had a group of people we were not allowed to talk to. And those were the FBI agents across the street in Manhattan working the parallel intelligence investigation. We could not talk to them. And we knew then, and we know now, that any system that allows prosecutors to talk to just about anyone in the world, including Al Qaeda, but not the FBI agents investigating the same case was broken. And what the PATRIOT Act did was to shatter that dysfunctional wall that prevented us from doing our jobs.

Let me give you a concrete example of how that came into play, involving a person named Ali Mohamed. On August 7, 1998, two embassies, two American embassies, one in Nairobi, Kenya and one in Dar es Salaam, Tanzania, were bombed nearly simultaneously, 10 minutes apart. It was quickly clear to us that Al Qaeda was involved. And the criminal investigation team deployed to Africa did some investigative steps, made some arrests over there and then returned to the United States.

At that point in time, we knew about a person named Ali Mohamed, who was a U.S. citizen living in California. He had become a U.S. citizen after serving in the American Army from 1986 to 1989. We knew he had links to Al Qaeda and knew the people over in Nairobi who had carried out the bombing but had not left

the United States effectively for about 5 years. He was a person of interest to our investigation.

We subpoenaed him to a grand jury in Manhattan, brought him into the grand jury, where he lied, and he left the building. We knew that he had plans to fly to Egypt, and we had a decision to make that day: do we arrest him, or do we let him go? We had to make that decision without knowing what was on the other side of the wall. We did not know what evidence we would have from the intelligence investigation.

And as we sat and made that decision, we got lucky. We decided to arrest him that night and not let him leave the country. After we made that decision, which we made with only knowing part of our hand because of the wall, we later received the evidence that had been obtained in the intelligence channels, from the intelligence investigation in California, and we found a search had happened which recovered many documents, including handwritten communications with Al Qaeda members that, had we known about, would have made our decision a lot easier.

Later on, as a result of further investigation, Ali Mohamed plead guilty, and he admitted in court that he is the one that largely trained the Al Qaeda network in terrorism techniques, in intelligence, in counterintelligence techniques. He trained bin Laden; Ayman Al-Zawahiri, the number two; Muhammad Atef, the former military commander, and many others.

Chairman HATCH. That is Ali Sheikh Mohamed?

Mr. FITZGERALD. This is Ali Mohamed. His middle name is not Sheikh. It is Ali A. Mohamed from California.

And he trained those members. He also conducted the surveillance of the American Embassy in Nairobi back in 1993 and showed surveillance photographs to Osama bin Laden afterwards. As part of his plea, he admitted that had he not been arrested in New York in September 1998, he intended to rejoin Osama bin Laden overseas in Afghanistan. Had we made the wrong decision because we had not seen what was on the other side of the wall, instead of being in a jail, Ali Mohamed could be in cave in Tora Bora or who knows where else, were he with Osama bin Laden right now.

And the notion, when I hear in the public debate that the PATRIOT Act too quickly took down the wall in a rush after 9/11, I bang my head against a desk and say it was too late. For 10 years, we worked under this sort of broken system where we were not allowed to know what each other were doing. So I applaud this Committee for taking down the wall and allowing those cases to proceed.

I will rely upon my written record and compare now what we do post-PATRIOT Act. Before, when we had two teams connecting the dots separately, at the risk that they did not put their dots together, now, we do not have that broken system. In Chicago, I work with the SAC, the Special Agent in Charge of the FBI, Tom Kneir, and his agents and my staff, and we sit down and decide what is the FBI looking at? Who are the terrorist suspects? What intelligence are they gathering? We compare notes on what criminal cases we are doing, and we decide if we have information that we can put together.

We make a decision about whether or not criminal charges can be brought. Then, we make an informed policy decision about what cases should be brought. We can turn around and decide that it is better for national security to let an intelligence investigation proceed, or we can decide that we are safer taking this person out of existence, putting them in jail so that they cannot operate and hoping to get information out of them.

That seems logical and simple, to decide what is the best for our country based upon full information, and it is. It was not that way before the PATRIOT Act, and I applaud this Committee and the Senate for having enacted it.

With that, I will rely upon my written statement and be happy to answer any questions at the end of the testimony.

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

Chairman HATCH. We will put the full written statements in the record.

Let me just add back in 1996, when we passed the Hatch-Dole Anti-Terrorism Effective Death Penalty Act, I tried to get a number of these provisions into law then. Senator Biden mentioned that he had worked on that as well, which he had.

We were stopped then by the far left and the far right complaining about American civil liberties, which, as you have pointed out, have been protected in the PATRIOT Act. And the same arguments were used then. But had we had those provisions that are currently in the PATRIOT Act, we might very well have interdicted and caught these terrorists on 9/11. And that is something we cannot know, but it is something that will haunt me the rest of my life, that we were unsuccessful in getting that through, in getting a lot of these ideas through back in 1996, even though that was a major step forward in the fight against terrorism in this country.

But we are grateful to people like the three of you for the work that you are doing. I just wanted to make that point, because there are a number of us who have really tried to get these tools to law enforcement through the years but were stopped by the extremists on both ends, both extremes, who seem to be dominating the debate in the media today.

Mr. McNulty?

STATEMENT OF PAUL MCNULTY, UNITED STATES ATTORNEY, EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA, VIRGINIA

Mr. MCNULTY. Thank you, Mr. Chairman and members of the Committee. I am glad to have the opportunity to be here today to discuss what is happening in the Eastern District of Virginia in the war on terrorism, and I am proud to report that the men and women in my office are fully devoted to this cause and have sacrificed countless hours, precious time away from home and family, to do all they can to prevent terrorism and to prosecute terrorists and those who support them.

Of course, the top priority in the Eastern District is terrorism. We have developed a strategic plan to ensure that we have the most proactive and comprehensive effort in pursuit of this top priority.

An early step in our strategic planning process was to examine the actions of the September 11 hijackers and determine what we could do to prevent future terrorist acts of a similar nature. We discovered, among other things, that the terrorists obtained fraudulent identification, received large financial resources to sustain themselves for long periods of time, and breached security at the airports.

These facts have played a significant role in the development of our district's strategic objectives in counterterrorism. Mr. Chairman, we have six objectives: first, identify the terrorist threats. What Mr. Fitzgerald talked about in terms of the exchange of information between U.S. Attorneys' offices and the FBI is part of that effort to serve that objective: identify the threats. Two, eliminate material support to terrorists. Three, restore the integrity of our identification, financial and immigration systems. Four, protect the vital infrastructure of Eastern Virginia. Five, successfully prosecute terrorists. And six, protect our National security information.

Generally speaking, these objectives can be summarized in the goal of identifying and disrupting terrorist networks in the United States. The challenge is to find and stop terrorist killers among us before they can carry out their plans.

Now, crime prevention, by its nature, is difficult to measure. How do you quantify that which does not happen? But by aggressively attacking the method and means of terrorism, I believe we have been effective in preventing it. Shortly after I took office more than 2 years ago, I created a terrorism national security unit with more than a dozen experienced prosecutors assigned full-time to terrorism cases, and this group of dedicated individuals, working with many other people in law enforcement, have disrupted the activities of terrorists and their supporters. We have closed off whole avenues that terrorists have used in the past to sustain themselves in the United States. We have clamped down on illegal money remitters, gone after credit card bust-out schemes, and made it harder for people to pretend to be somebody they are not or to pretend that they are legally in this country.

In short, our objective has been to make it much more difficult for terrorists to operate. Let me briefly highlight some of our initiatives: in the area of identification document fraud, we are seeking to unmask the terrorists by stopping the large-scale purveyors of fraudulent documents and by strengthening the integrity of our Nation's identification system. Identification document fraud is pervasive, and Virginia appears to be a hub of this activity. If a person is willing to pay the price, fraudulent identification can be obtained for any purpose, no questions asked.

Identification document fraud is big business. A pair of defendants dealing in fraudulent immigration documents, labor certificates, made no less than $6.3 million in the space of 18 months, including $1 million in cash seized from a suitcase under one of the defendants' beds. Identification document fraud directly undermines our homeland security. It creates huge holes in our immigration and naturalization controls. It helps terrorists enter and remain in our country, and it facilitates other crimes, such as credit card fraud, mortgage fraud or bank fraud.

And this is no abstract concern. Seven of the September 11 hijackers obtained genuine Virginia identification cards by submitting false proof of Virginia residency to the DMV.

Now, with regard to financing, as I said earlier, terrorists need financial support. Sleeper cells cost money. Mr. Wray's earlier anecdote about admissions by one defendant is very telling. And in order to dry up potential sources of terrorist financing, we now take cases to develop informants and cooperators who may provide valuable information. Criminals who smuggle cigarettes or sell bogus baby formula, for example, may provide information about terrorist financiers. We investigate such cases because the money from these scams sometimes heads back to terrorists.

Similarly, we now examine suspicious activity reports from financial institutions that too often went unread for lack of resources. We seize money from and prosecute unlicensed money remitters and money couriers at the international airports, and we scan bankruptcy reports to detect credit card fraud among individuals claiming that they ran up hundreds of thousands of dollars in credit card debt but cannot pay it back because, in reality, they transferred it to Pakistan.

We have been very aggressive in our investigation of terrorist financing, especially on money sent from America to support terrorism overseas. Based on an indictment that has been recently unsealed, I can tell you that tens of thousands of dollars were sent from organizations and individuals in Northern Virginia to Salaam Al-Arian, who presently awaits trial in Tampa, Florida, on terrorism charges involving the Palestinian Islamic Jihad.

I am also pleased to tell you that we recently obtained our first conviction in this wide-ranging financial support investigation. Soliman Biheiri, the founder of a company known as BMI, was convicted of immigration fraud. In the course of a related investigation, a BMI accountant contacted an FBI agent and told him that, quote, "funds the accountant was transferring overseas on behalf of the company may have been used to finance the embassy bombings in Africa."

But preventing document fraud or drying up financial resources is not enough. We must also take away opportunities for terrorists to strike. Recent news reports about box cutters on airplanes reminds us that we must be vigilant about who has access to secure areas of our Nation's airports, maritime ports, power plants and military bases. Last year, we established a task force to investigate 28,000 holders of secure area access badges at Reagan National and Dulles Airports. In the end, approximately 120 of them were charged with various crimes, including making false statements, Social Security fraud and immigration fraud. Another 20 badge holders were arrested by INS on administrative charges.

Finally, Mr. Chairman, the dedicated men and women in my office must be equipped with the proper tools and resources for this fight. Our success is dependent on it. The USA PATRIOT Act, in my view, is an integral part of our efforts to identify terrorists and disrupt their activities in the United States. It provides law enforcement with important tools to enhance our Nation's domestic security and to prevent future acts of terrorism.

We used a PATRIOT Act provision to obtain a court order, for example, and a search warrant from a single United States District Court in a complex, multi-state financial investigation of terrorists' financial networks. This provision in the PATRIOT Act greatly expedited the investigation and saved precious time that would have been spent obtaining warrants in other districts. And that tool is something we make frequent use of, being able to centralize location for seeking warrants that have a nationwide reach.

Another example: delayed notification search warrants. These warrants have been used in drug cases for years, and the PATRIOT Act now allows this tool to be used in terrorism cases. In one recent case, the court authorized a delayed notice of a business in Virginia. Surreptitious entry permitted law enforcement agents to copy numerous records without removing them related to the offenses under investigation. Pursuant to the court order, a copy of the warrant was not left on the premises of the business at the conclusion of the search. We believe that proceeds of the drug trafficking activities supported operations of Islamic extremist organizations, including Al Qaeda.

Without this authority, the investigation, as well as the safety of cooperating witnesses, would have been seriously jeopardized. And by the way, that notice has now been made.

In conclusion, Mr. Chairman, the word from the front lines of the domestic war on terrorism is hopeful. We are making progress in prosecuting terrorists and disrupting the criminal activity that supports them. And the PATRIOT Act has played a significant part in the successes we have enjoyed to date.

Thank you, and I look forward to your questions and discussing these issues with you.

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

Chairman HATCH. Well, thank you so much. We have appreciated all three of you being here and patiently listening and also contributing here.

Let me ask each of you the same question. We start with you, Mr. Wray. From a law enforcement perspective, is our country in a better position today to prevent acts of terrorism than we were on September 10, 2001? Tell us if we are; tell us why.

Mr. WRAY. Thank you, Mr. Chairman. My answer to your question is that absolutely, we are in a better position today to fight against the enemy that would do us harm, in no small part because of the PATRIOT Act. The information-sharing wall that has been overcome that Mr. Fitzgerald talked about and I think all three of us made reference to, in particular, is really a sea change in how law enforcement, intelligence and military officials, lawyers and agents, all interact with each other. It means that the Government's effort is an integrated, coordinated one in a way that I can only say from having been in the Department before September 11, been in the Department during September 11, and been in the Department after September 11, is just a really dramatic and very positive change. I think the American people would be proud of the cooperation and coordination that that provides.

Another crucial thing I would add is that some of the greater penalties that the PATRIOT Act provides, especially on material

support, have been used to get greater cooperation. One of the complaints that you used to hear a lot when people were trying to figure out what went wrong is that we did not have enough sources of human intelligence—that we had lots of electronic interceptions of different sorts, but it was ambiguous and oblique, and we could not really tell what it meant.

But one of the best ways to get inside any organization is to get cooperators, to get human intelligence. And to do that, you need leverage, and the PATRIOT Act provided us with useful leverage in getting cooperation. I would mention, for example, the recent Detroit terrorism prosecution, which is a nice little juxtaposition. You had two defendants, Koubriti and Elmardoudi, who were both convicted of the same offense, but the conduct of one of them went beyond the time frame of the PATRIOT Act. Therefore, he was covered by the PATRIOT Act, and he now faces a significantly greater penalty as a result of that.

So in conclusion, I think that we are in much better shape than we were, but we have, obviously, a long way to go, and we look forward to being able to continue to work with this Committee in the future.

Chairman HATCH. I think you mentioned since the PATRIOT Act, how many suspected terrorists have been apprehended, and how many have been convicted?

Mr. WRAY. We have charged, I believe, about two hundred and eighty something defendants as a result of terrorism investigations.

Chairman HATCH. These are within the United States of America?

Mr. WRAY. All charged within the United States, some convicted for crimes that targeted Americans overseas, but the charges are here in the United States.

Chairman HATCH. How many convicted?

Mr. WRAY. A little over 150 so far.

Chairman HATCH. That is a remarkable record.

Mr. Fitzgerald, do you care to add anything here?

Mr. FITZGERALD. I would just reaffirm that I think we absolutely are safer today because of the PATRIOT Act, if nothing else due to the taking down of the wall. That is the single greatest change we needed, and it was made.

Chairman HATCH. Thank you.

Mr. McNulty?

Mr. MCNULTY. Yes; without question. People have been stopped in their planning who may have gone undetected in the past. Iman Ferris, for example, has pleaded guilty in Eastern Virginia. This is a gentleman who was scoping out the Brooklyn Bridge as a future target for Al Qaeda. Major sources of money have been dried up. Just extremely large sums, accounts have been frozen, and many of the groups that were involved in financing have been slowed or stopped in their actions, and the systems and vulnerabilities that I discussed in my testimony have been improved. There is still a long way to go there, but it is harder to get certain kinds of fraudulent identification than it was before, because we are more aware of that weakness in our system.

So there have been a number of relatively minor, in the sense of comparison to prosecuting a live terrorist, but important systems

issues that I think have been improved to make a difference as well.

Chairman HATCH. All right; now, all of your testimonies are replete with references to the PATRIOT Act. Please help the Committee and the general public by telling us what happens at the operational level when a suspected terrorist is arrested. Are they charged under the PATRIOT Act or under other statutes? Please explain how the post-September 11 PATRIOT Act works with regard to pre-existing criminal statutes.

Do you want to start?

Mr. WRAY. Thank you, Mr. Chairman.

When a defendant, say one of these 280 that I mentioned, is arrested in the course of a terrorism investigation, they generally would not be charged with a crime under the PATRIOT Act per se. There are some who would be charged with material support, which was a crime that existed before the PATRIOT Act but was improved and enhanced by the PATRIOT Act. Some of them would also be charged under a provision—I think it is 373—which goes to unlicensed money transmitters or hawalas, because a lot of what is going on in the effort to prevent further terrorist attacks is the targeting of fundraising and support that exists.

However, the PATRIOT Act is used quite frequently in the course of the investigations that lead up to those charges. So, in other words, you might have a defendant who was charged with false statements or some kind of identity theft or something of that nature who would never be charged with a terrorism offense at that time. But in the course of the terrorism investigation that led to that charge, PATRIOT Act tools, investigative tools, would have been used.

Chairman HATCH. Do you care to add anything?

Mr. FITZGERALD. I would simply add that there are people probably using the PATRIOT Act and not aware that they are, because when you are a prosecutor, you take out Title 18, and I start at Section 1 and read to the back to make sure I look at every possible option.

So if you use one of the material support statutes or a money laundering statute, you may not recognize that that has been modified by the PATRIOT Act, because as a field prosecutor, you do not care which tool you are using. You want the right one. But I think what Chris said is the most important point is you may be having an arrest because of the PATRIOT Act because the information is being shared.

Without the information being shared, you may not know to arrest someone in the first place. Once you make the arrest, you pick whatever statute works, whether it is 100 years old or 1 year old.

Chairman HATCH. Let me just say, a lot of people fail to recognize that a lot of the things that we put in the PATRIOT Act were already in law with regard to prosecuting hardened criminals, drug lords, et cetera, et cetera. What makes the PATRIOT Act so much more dangerous when it is basically just codifying the law enforcement that we were able to use against mobsters and racketeers and others who commit heinous crimes in our society?

Mr. WRAY. Mr. Chairman, I do not think the PATRIOT Act is dangerous, and I think you have focused exactly on the right issue.

There is, as several members of the Committee recognized, a level of confusion in the discourse about the PATRIOT Act and what is part of the PATRIOT Act and what is not.

Chairman HATCH. Would it be fair to say that we just bring the PATRIOT Act up to the level, in most cases, of what already is the law with regard to other violent crimes?

Mr. WRAY. There are a number of illustrations of that in the PATRIOT Act. For example, the wiretap provisions are a classic example of that.

Chairman HATCH. Pen register trap and trace provisions.

Mr. WRAY. Exactly.

Chairman HATCH. Getting the phone numbers in and out of a terrorist's phone; you could not do that before the PATRIOT Act. You could not knock down this wall and have discussions between the various segments of law enforcement. You could go on and on, I guess. Give me some other illustrations, if you care, please.

Mr. WRAY. Well, the other thing is that some of the provisions that are criticized are actually efforts to bring the intelligence investigators closer to the criminal powers. But in some cases, the ability to investigate a person for credit card fraud is easier to use on the criminal side than it would be to investigate the same person for a bombing.

Chairman HATCH. Well, as a matter of fact, sometimes, it is a little bit more difficult using the PATRIOT Act, because you have more onerous provisions in the PATRIOT Act than you have to meet than there are under current criminal laws; is that not correct?

Mr. WRAY. Yes. If you were looking for business records, if I suspected a person was engaged in credit card fraud, I or any one of 130 prosecutors in my office could issue a subpoena in very short order without judicial oversight before the issuance of the subpoena to obtain those business records—

Chairman HATCH. Sure.

Mr. WRAY. —based upon a showing of relevance. But if an agent were doing it to investigate a terrorist bombing plot in Chicago, he would have to make a showing in Washington to get the approval to do so. So whenever FISA court approval is required for something or a higher-level approval, you are looking at a higher standard than is required for a person investigating a criminal case.

Chairman HATCH. Right; and then, with regard to the library situation that has been blown out of proportion in most of the newspapers in this country, it has never been used, but you can use it for violent crime. That is the ability to go after business records, including library records, that was used in the Unabomber case, right?

Mr. WRAY. That is correct.

Chairman HATCH. And in other cases as well.

Mr. WRAY. Yes.

Chairman HATCH. So all we are doing is giving the same rights to go after terrorists that we have already in existence to go after violent criminals.

Mr. WRAY. And even to go after nonviolent criminals involving loss of money. If there is a Federal violation for loss of money, those powers are still available.

Chairman HATCH. And before the PATRIOT Act, you could not do those things with regard to terrorism or suspected terrorism.

Mr. WRAY. Correct.

Chairman HATCH. Well, my time is up. We are going to limit everybody to exactly 10 minutes. I let everybody go over on their statements, which everybody did, and we will start with Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman, and I have found both the discussion and the answers interesting. Incidentally, Mr. McNulty, you may want to be careful using the example. I understand the temptation about what we have seen recently with the box cutters and all. I think if anything, that should be an example of sheer embarrassment for our Government. Those things sat there that long. There were many who feel that the prosecution of the person who put it there is more to cover the fact that the Government dropped the ball. I am not suggesting that that is the reason at all, but that is not one of the brightest lights of things we have seen recently.

Mr. Wray, on October 14 of this year, a few days ago, the FBI announced it is going to recruit more language translators because of the FBI's expanding coverage into areas that require translation support. It is interesting the timing of that. Two years ago, I authored the provision in the PATRIOT Act that was designed to help the hiring of more translators by the FBI. Section 205 granted them the authority to expeditiously hire translators. I did that because of the reports about getting involved in material that sat there that was never translated.

Now, in July 2002, last year, whistleblowers in the FBI said they are still not doing anything on the FBI translation program. So I asked the Attorney General specific questions. President Bush had signed into law this act. Section 205 was the law. Why was it not being followed?

A year later, the Attorney General got around to answering my letter; actually, on July 17 of this year, and said the FBI's success in recruiting, vetting and hiring linguists has eliminated the need to implement the provisions set forth in Section 205 of the act. In other words, the Attorney General said we do not have to follow what you wrote into the law.

That is fine. I have heard that before. But, so, on July 17, the Attorney General, 2 years later and 1 year after I asked the question, said we do not have to follow that part of the law, but on October 14, he said that, well, now, we do have to hire more translators. Is there an inconsistency there? Is that section now, finally, after 2 years being followed?

Mr. WRAY. Senator—

Senator LEAHY. Just curious.

Mr. WRAY. I am sorry.

Senator LEAHY. I said just curious.

Mr. WRAY. I am not intimately familiar with the FBI's current translator hiring program. I certainly share your concern that translators are a vital part of our terrorism investigations and that the speed with which we need to move, which I know you recognize, is directly affected by that.

Senator LEAHY. You are familiar with the Department of Justice and their handling, and in July, we were told by the Department of Justice we did not need to follow this section. Now, apparently, we are. Is there an inconsistency in that? I do not care about the FBI. I am talking about the Department of Justice generally.

Mr. WRAY. And in the instance of the particular correspondence that you are describing about this provision, I am not familiar with those particular letters, so I cannot speak to it.

Senator LEAHY. All right.

Mr. WRAY. It does sound like there has been a delay in responding to you, and that is unfortunate.

Senator LEAHY. One of the reasons we would kind of like to have the Attorney General come here. But I will repeat it for the record, and I expect an answer back. This has been on the books for 2 years. We were told in July we do not have to follow the law, and then, about a week ago, we are told that we need the law. I just want to know which is accurate.

Now, the Attorney General has announced that the Department has not used Section 215 of the PATRIOT Act to obtain records from libraries or from anyone else, for that matter. But in a letter to the House Judiciary Committee dated June 13 of last year, the Department stated that the FISA court order under Section 215 could conceivably be served on a public library or bookstore then added that the more appropriate tool would be a national security letter.

So the FBI could seek the production of certain library records. I am speaking now not in specifics but just in the law. The FBI could seek the production of certain library records using NSLs, national security letters; is that right?

Mr. WRAY. Senator, the national security letters do provide for production of some records. They do not cover as many types of business records.

Senator LEAHY. I understand. I understand the difference. I was there at the drafting of this legislation. Go ahead.

Mr. WRAY. And the other relative disadvantage to national security letters over the FISA business records request is the relative speed with which one can compel production.

Senator LEAHY. Has the FBI served any NSLs on libraries since September 11?

Mr. WRAY. Not that I am aware of.

Senator LEAHY. And they have not used Section 215.

Mr. WRAY. That is correct. That number was recently declassified.

Senator LEAHY. Now, I know that in your answers to the chairman's question, you were talking about the number of people being convicted of terrorism, and it sounded like a pretty good conviction record. Actually, we find in 2003, there were 616 defendants convicted in cases classified as terrorism, in fiscal year 2003, 616 defendants convicted in cases classified as terrorism cases. That is a pretty high number. I suppose we are doing one heck of a battle. But then, it says only 236 were sentenced to prison terms, and the median prison sentence was 2 months.

Are we putting a whole lot of cases in under the rubric of terrorism that really do not belong there to make the statistics look

good? You do not have to answer that, but let me ask you this: has the Department of Justice notified U.S. Attorneys around the country to reclassify as many cases as they can to make them terrorism cases and not routine immigration cases or whatever?

Mr. WRAY. The Department has, over the course of the last year or so, tried to make significant improvements in the accuracy of its record keeping on investigations, specifically terrorism investigations. One thing that I would say about—

Senator LEAHY. Is that a way of saying—is that a bureaucratic way of saying that they have reclassified a lot of cases that were not called terrorism, and now, they are called terrorism?

Mr. WRAY. No, it is not.

Senator LEAHY. Okay. What does it mean?

Mr. WRAY. What it means is that there are a number of terrorism investigations—and I think each of my colleagues could speak to this as well from their respective districts—but there are a number of terrorism investigations where the decision is made at the charging stage to charge the defendant with a non-terrorism crime in order to protect, in particular, national security and classified information that may be exposed, sources and methods and that sort of thing, that may be jeopardized by the criminal discovery that would ensue if we were to charge the terrorism offense.

So sometimes—in fact, fairly frequently—the judgment is made that a lesser non-terrorism offense, a fraud offense, that sort of thing, will be charged as a result of a terrorism investigation in connection with somebody whom intelligence links to terrorist organizations.

Senator LEAHY. But, Mr. Wray, let us be serious about this. A few months after September 11, when there was—just about the time that there had been a lot of criticism that maybe the Department of Justice had dropped the ball; in fact, one of the senior Republican Senators had said that had they connected the dots, the Department of Justice connected the dots, we might have avoided September 11. I do not know if I would draw that conclusion or not, but there was criticism there. And then, all of a sudden, everything is reclassified, and lo and behold, we are just getting more terrorism convictions than we had ever seen. Nothing seems to have changed that much but more terrorism convictions.

And then, we find that the average sentence or the median sentence is 2 months. Now, real terrorists are not getting two-month sentences. I mean, the Department of Justice is not going to stand for that. I point that out because it is great to say look at all of these huge new convictions we are getting in terrorism, but two month sentences? I mean, this is like looking at the, you know, look at the enormous job we have done on bank robberies. We got the guy who stole $800.

Mr. Fitzpatrick, you have a tremendous career investigating and prosecuting terrorism cases in the civilian judicial system: U.S. Embassy bombing case, prosecutions of Sheikh Omar, Abdel Raman, Ramsey Youseff, and so on. Since September 11, the administration has decided some terrorism suspects will not be given a trial in Federal court but will be designated as enemy combatants: Jose Padilla, Yaser Hamdi, Ali al-Marri; two of those cases, of course, originated in Illinois.

Do you think Padilla and al-Marri could have been prosecuted successfully within our civilian judicial system?

Mr. FITZGERALD. I do not know the facts of those cases to give you an honest opinion, and to be blunt, I never like to speak about other people's cases if I do not know the facts. I can tell you, obviously, that I understand it is a heavy decision the President has to make to make a decision, do we go with what is the ordinary criminal process versus a special case. And I recognize people are concerned that we would like to do things in the regular judicial system. But I also recognize that the President has to look at situations sometimes where there may be very good reason to believe that if the person is allowed to walk around on the street, that they can kill, and there may not be the ability to use information as evidence in a courtroom and that the answer is not to let a citizen wander the street through Times Square and everywhere else because we cannot prevent that from happening.

But I cannot tell you—

Senator LEAHY. You had no role in the Padilla case?

Mr. FITZGERALD. I was on the periphery of Padilla, because he had come through Chicago; went back to New York as a material witness, so he was briefly in Chicago, so I knew about him. And then, he went back to New York, and Southern New York was looking at him, and then, I learned about the decision after it was made by the President.

And if I could just answer just one brief thing on the last question you asked Mr. Wray, I certainly was given no directive from Washington to sort of pump the numbers on the terrorism side.

Senator LEAHY. I appreciate that, and as I said, Mr. Fitzgerald, I have a great deal of respect for you and the work that you have done in the past. It is not in the abstract; it is in the concrete, and we have all benefitted by that. Thank you.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you.

Senator LEAHY. I will submit other questions for the record.

Chairman HATCH. Thank you, Senator. We will all submit questions to the record if desired.

Senator DeWine?

Senator DEWINE. Thank you, Mr. Chairman.

Mr. McNulty, Mr. Fitzgerald, you both are on the front line in the war on terrorism, but you also run offices and run the gamut of criminal prosecution. Since September 11, we have asked the FBI to do really a sea change in how they approach things, and they are obviously doing a lot more preventive work in regard to terrorism.

When the FBI testifies here, I ask them what are you doing less of? And so, I am going to ask you what are you doing less of? What are you prosecuting less of? If I looked at your office records for the last couple of years, what do I see less of? What are you prosecuting, Mr. McNulty, less of than you were a couple of years ago?

Mr. MCNULTY. Well, I do not know if the statistics would actually bear that out.

Senator DEWINE. Or anecdotally will be fine.

Mr. MCNULTY. Yes, but my sense is, of course, that we struggle more now to get the resources we need in generally speaking the

white collar area. And I think if you talk to my colleagues around the country, they would acknowledge that with the FBI's first priority in terrorism and the considerable effort that each field office is making to do all that they can to detect and disrupt and to prevent future acts that we have had to try to be a little more innovative when it comes to finding investigative resources for the wide range of frauds that we may have been able to have resources for in the past.

I work closely with the Washington Field Office of the FBI. They have additional burdens. When the anthrax attacks occurred, that office was diverted in its resources to try to deal with that investigation. So these are real problems that each SAC struggles with. I might add, by the way, that we are meeting as a group this week together, the Special Agents in Charge and all of the U.S. Attorneys, to work through these very questions to find out how we can do more with sometimes less in certain categories for investigations.

Senator DEWINE. What about drugs?

Mr. MCNULTY. Drugs? We have not seen a real problem there. Now, the FBI's role in drugs has been largely through the OCDF program in the past; continues to be. I mean, they have had, certainly, a substantial number of investigations in drug trafficking activity that has not only been in OCDF, but that has been a key focus. And because of the DEA's commitment there and the task forces with local law enforcement, I think the Director of the FBI would say that he has probably fewer agents today doing drug investigations, but I have not seen, in the Eastern District of Virginia, that be a problem.

Senator DEWINE. You are not seeing that change?

Mr. MCNULTY. I am not seeing a change in the number of our cases. Our cases, we have more drug cases now than we had before 9/11.

Senator DEWINE. Really?

Mr. MCNULTY. Yes; part of this goes back to an effort just by the prosecutors and other resources to lean forward even more and make that a priority.

Senator DEWINE. Mr. Fitzgerald?

Mr. FITZGERALD. I have not seen a decrease in our caseload. In the office, we did receive additional resources for terrorism. I think our caseload in the year after 9/11 went up about 50 percent. So we have not seen a change in volume. I can say, working with the FBI, that the FBI has reallocated resources to terrorism. It has not hurt in the drug area because they have done it smartly. As Paul said, they work through OCDETF, and they work through HIDTA, which are task force programs, and they have made it an emphasis to make sure that where the FBI agents are participating, it is because they are adding value and letting DEA take more of a role.

So in the drug area and in the violent crime area, the FBI has scaled back smartly. In the white collar area, it is still one of the top priorities of the office, and it is the same with the FBI, so we get their attention to focus on the biggest cases we have. The concern that I have is that the medium-level cases in white collar, not just because some resources have to go to terrorism, but we have taken some of their best agents in the white collar area because we

need to go after terrorism financing. I think it is a smart move, because the best way to fight terrorism is to dry up the money.

We do want to make sure we keep up the experience level. Separate from that, there is a demographic, I think, in a lot of law enforcement agencies where there are a lot of agents who have a lot of experience in white collar crime who are coming of age to retirement, and we lose those people to the private sector. There is a brain drain, because they cannot draw a second pension. So irrespective of 9/11, we are seeing that in IRS and other agencies, where we are losing lots of experienced white collar investigators. So that is an issue out there.

But by and large, I think the FBI is dedicating lots more resources to terrorism. They have done it smartly and efficiently, particularly in the drug area. We are still going after white collar cases, in fact, harder, but I think long-term, we should look past 9/11 and look at the demographic of the brain drain on all law enforcement agencies in the white collar area.

Senator DEWINE. Mr. McNulty, Mr. Fitzgerald, what is your total—and then, I will move on—but what is your total number of assistant U.S. Attorneys? How does that compare? How has it changed in the last 2 years?

Mr. MCNULTY. Well, I had substantial growth in the Eastern District largely as a result of the terrorism resources, but I have 120 attorneys and probably another 30 or more Special Assistant United States Attorneys. And we have grown about 25 percent as an office in the last 2 years because of increased positions for terrorism prosecution and some gun positions and cyber-crime positions.

Senator DEWINE. Mr. Fitzgerald?

Mr. FITZGERALD. In Chicago, we had not had growth basically in about a decade. In the last year, we have grown by 11 assistants, I think, to about 149. We picked up nine assistants for terrorism and I think two for cyber-crime and an additional gun position.

Senator DEWINE. All right; you both have described some of the benefits of the new PATRIOT Act. You have described how it has worked effectively. Could you describe for us any area that it has not worked or any area that needs to be improved?

Mr. FITZGERALD. I think it needs just to be understood better by the public. So much of what people are angry about does not concern the PATRIOT Act or does not involve it. Sometimes, you hear about the expression of a tree falls in the woods, and no one hears it; with the PATRIOT Act, a tree has not fallen, but lots of people hear it loudly. And I mean that, that people legitimately have concerns about the PATRIOT Act, about parts of it that are simply not there, and I think I have been trying in Illinois to meet with community forums and educate people on what the act does and does not do, because there is a great misapprehension there.

I think a lot of what people are concerned about, they should not be concerned about, but nevertheless, they are. We need to address that.

Senator DEWINE. Mr. McNulty?

Mr. MCNULTY. Nothing comes to mind that is a problem. I certainly agree strongly with Pat's point about the disconnect between much of the rhetoric we hear and then what we are actually doing,

and the use of the PATRIOT Act provisions, so many of the things that are talked about are not even within the scope of the PATRIOT Act.

So, but nothing comes to mind as being a weakness or a problem that we have run into with the act.

Senator DEWINE. Mr. Fitzgerald, you mean none of your assistants come to you and ever say they cannot understand why these Senators or Congressmen did not get this, and why they did not write this a little differently? That is kind of a little hard for me to believe that they—you know. I think I used to do that when I was a lowly county prosecutor, wonder why the stupid state legislature did not write the law differently, you know. I know I did that.

Mr. FITZGERALD. They do come to me and say why do they not fix this law, but I do not think because it is such a patchwork quilt, people can figure out which law comes from the PATRIOT Act and which does not. So they say here is what ought to be fixed, or here is what we need, but they are not going back saying if you look at Section 3, such and such, in the PATRIOT Act, why did they not change this comma?

There are some fixes that may be needed to some statutes that are modified by the PATRIOT Act that may need further modification, but they are not coming in and complaining about the PATRIOT Act as a problem.

Senator DEWINE. So you do not have any advice for us, I guess?

Mr. MCNULTY. On the PATRIOT Act or on terrorism laws?

Senator DEWINE. You have the opportunity today to talk about anything you want to.

Mr. FITZGERALD. I just think that we need to look at terrorism financing, because those cases are hard to prosecute in a way that money laundering is hard to prosecute, squared, because in money laundering cases, you need to prove that the person laundering the money knew that it was going to a specific crime such as drugs. In terrorism financing cases, when people move money overseas, then, that money is used for a violent act, you often not only have to prove that the person facilitating the movement of money knew about the crime committed, but you may or may not have to deal in court with the defenses of the person overseas, such as if they were a freedom fighter who thought that they were authorized by law to fight. There are many issues like that that make terrorism financing cases harder to prosecute than even money laundering, and that is because they make us prove that the person supported terrorism.

It is hard to prosecute, under the current law, someone who sends money overseas just to support violence, without putting the terrorism label on it. There may be areas of conflict overseas where there is violence going on where our country may or may not take a position, but we should not have private citizens on our soil funding fighting, particularly since some of those fighters may turn out to be Al Qaeda fighters who may be fighting in a regional conflict today and be coming after us tomorrow.

So I think there is a need to look at terrorism financing laws to see whether there ought to be a law against just supporting violence, not in a terrorism context, not having the terrorism penalties, but allowing us to stop people from funding violence from

our soil as private citizens. That can lead to death overseas and can also lead to the further training of Al Qaeda.

Chairman HATCH. Senator, your time is up.

Senator DEWINE. Thank you very much.

Chairman HATCH. Senator Kennedy?

Senator KENNEDY. Thank you very much, Mr. Chairman.

Thank you. I guess, Mr. Wray, you have spoken about the need to give law enforcement the necessary tools to prevent acts of terrorism. One measure that is clearly necessary in today's America is the Undetectable Firearms Act. That act makes it illegal to make or possess a firearm that is not detectable by walk-through metal detectors or the type of x-ray machines commonly used at airports. As you know, the act is set to expire in December.

To my knowledge, the administration has not taken any steps to see that this critical law is renewed. Tomorrow, I will introduce a bill to renew the Undetectable Firearms Act, make it permanent. Will the Justice Department support the bill?

Mr. WRAY. Senator, I agree that the issue of weapons being undetected is an important one. I would be happy to review the legislation and get back to you on that. I am not familiar with the legislation as it now stands.

Senator KENNEDY. Well, it is time-sensitive, so we would appreciate it.

I join Senator Schumer—I know he has been the leader on these issues in the Senate, but I join him in sending the letters to the Department about the leak investigation, and I heard our Chairman speak on this issue earlier.

As far as we can tell, Mr. Wray, you are the Presidential appointee directly supervising the career attorney in charge of this inquiry, Mr. John Dion, the chief of your counterespionage section. So can you tell us who is the highest official in the Department who is getting briefed on the progress of the inquiry or has any decision making power over it?

Mr. WRAY. Senator, as you mentioned, John Dion—

Senator KENNEDY. Dion?

Mr. WRAY. Dion, right. I am sorry.

Senator KENNEDY. No, you were right.

The Chief of the Counterespionage Section, who is a 30-year veteran of the Department specializing in this area, is the one who is the head of the investigation and who has the day-to-day responsibility for it. He reports, in turn, to Bruce Schwartz, who is also a career prosecutor, a Deputy Assistant Attorney General in the Criminal Division, and together, they report to me as the head of the Criminal Division. And although I am a political appointee, I have spent the bulk of my career as a prosecutor in the system, both in this administration and in the U.S. Attorney's office before this administration.

Senator KENNEDY. So you are—

Mr. WRAY. I am sorry?

Senator KENNEDY. Go ahead.

Mr. WRAY. And then, I, in turn keep the Attorney General apprised of the progress of the investigation. But the day-to-day responsibility for the investigation, the day-to-day management of the investigation, the decision making in the investigation, is done

by the career prosecutors and agents who have the expertise in this area.

Senator KENNEDY. So the Attorney General has not recused himself?

Mr. WRAY. The Attorney General has said that he keeps all options open, but at this time, he has not recused himself.

Senator KENNEDY. So what role is he playing?

Mr. WRAY. As I said, he is kept apprised of the progress of the investigation, and he has communicated, in no uncertain terms, his commitment that this investigation be done thoroughly, fairly, professionally and impartially.

Senator KENNEDY. So he is ultimately the one who will make the decision on whether to appoint a special prosecutor or not?

Mr. WRAY. I believe that the law on special prosecutor, on special counsel, I think is the correct term, reserves that power specifically to the Attorney General under the regulations and the statute that applies.

Senator KENNEDY. And he has not felt that it is necessary for him to recuse himself in this matter?

Mr. WRAY. As I mentioned, the Attorney General has said specifically that he keeps all options open as the investigation progresses but that he, like I, has tremendous confidence in the career prosecutors and agents who are the people who have been doing these kinds of investigations for years.

Senator KENNEDY. Well, we all have that confidence, and there is no reason not to have confidence in others that are making decisions. But that is not what we wanted to know; what the line of authority—let me just ask you, and then, I want to move into another subject. Are you the person at the Department, then, dealing with the White House Counsel or anyone else at the White House in the investigation procedures?

Mr. WRAY. Do you mean generally or in the context of this particular investigation?

Senator KENNEDY. With regard to this investigation.

Mr. WRAY. The lawyers handling the case, the prosecutors handling the case, are the ones who interface with all of the folks with whom they interact in the course of the investigation.

Senator KENNEDY. So they are the lead person for dealing with the White House Counsel would be Mr. Dion, then?

Mr. WRAY. And Mr. Swartz.

Senator KENNEDY. Those two would be the ones?

Mr. WRAY. Right, they are the career prosecutors handling the investigation.

Senator KENNEDY. Let me ask you, because the time—I am concerned about the Department's commitment to address the abuses identified by the Inspector General, Glenn Fine, in his June 20, 2003, report on the treatment of immigrants detained after 11. In your statement, Mr. Wray, you encourage all Americans to read the Website, lifeliberty.gov, to learn about, quote, "how the PATRIOT Act protects our Nation's security or protects the personal liberties we so dearly cherish."

On that Website, the Justice Department has posted an article by writer Heather McDonald titled "Straight Talk on Homeland Security." The posted article says the following about the IG's report:

"Fine report, however measured in its language. It is ultimately as much a misrepresentation of the Government's post-9/11 act as the shrillest press release from Amnesty International. It fails utterly to understand the terrifying actuality of 9/11. Fine's cool and sensible recommendations read, frankly, like a joke in light of the circumstances at the time."

Do you agree or disagree with Ms. McDonald's characterization of the IG's report, and why in the world is this being posted on the Justice Department's own Web, and does this violate the anti-lobbying law in terms of the PATRIOT Act?

Mr. WRAY. Senator, I do not—

Senator KENNEDY. Are we using Department of Justice money for this kind of activity, are we?

Mr. WRAY. Senator, I do not administer the Website. I would say—

Senator KENNEDY. First of all, do you agree or disagree with the characterizations?

Mr. WRAY. What I believe is that Inspector General Glenn Fine is a career professional who, like others, has made constructive criticism of the Department's efforts, and I believe that the Department has made a responsible effort to address those recommendations. I think it is important to note that, as the Inspector General himself recognized, all of the detainees in question were held legally. They were all in violation of the laws of this country, and they were held legally. And as the Inspector General has also recognized in another report of his, that illegal aliens, when bonded out as opposed to detained, abscond at an astonishingly high rate. And so, it is not surprising that the career agents and prosecutors working on the matters at the time in the immediate wake of September 11 felt it appropriate to seek detention, which again, was found fully lawful by the Inspector General.

Senator KENNEDY. I am not going to debate the IG's report, but why is this article posted on the Justice Department's own Website?

Mr. WRAY. I am sorry; as I said, Senator, I do not administer the Website. I know there is a lot of useful information on there. But I cannot speak to the particular decision to put that particular article on the Website.

Senator KENNEDY. Well, just because my time is up, the IG's report was a detailed and thoroughly substantiated report issued by one of the Department's most respected attorneys. And yet, on the date the report was issued, the Department's spokesman issued a statement declaring the Department made no apologies for any of its actions or policies.

Mr. Chairman, my time has expired.

Chairman HATCH. Thank you, Senator.

We will turn to Senator Cornyn.

Senator CORNYN. Thank you very much, Mr. Chairman.

Thank you, gentlemen, for being here today. I think some of the questions that have come up with regard to the detention of immigrants here under our immigration laws have been raised by Senator Kennedy and others, and just to be clear, those are provisions of law that have nothing to do with the PATRIOT Act; is that correct, Mr. Wray?

Mr. WRAY. Yes, Senator Cornyn, the provisions under which the individuals who are the subject of the Inspector General's report were detained under the immigration laws and not under any provision to do with the PATRIOT Act. I appreciate your flagging that issue, because it goes to a subject that several members of the Committee mentioned in their opening statements, as did my colleagues and I, that there is a level of confusion in the public discourse about what is and is not part of the PATRIOT Act. The PATRIOT Act, for better or for worse, has become sort of a shorthand for every kind of complaint or criticism that everyone would have with respect to anything to do with terrorism. And I think Senator Feinstein acknowledged that very persuasively in her statement.

Senator CORNYN. Well, I think we all recognize the difference between constructive criticism and Congress doing its important job of oversight and reserving the right to change our laws if, in fact, the laws we have passed do not apply or are not being administered in the way that we intended, perhaps, or we find other gaps that need to be filled. But I think there is an important difference between constructive criticism and shooting the messenger.

As I pointed out in my statement, the PATRIOT Act, passed overwhelmingly by both branches of Congress; was signed by the President, endorsed by members on both sides of the aisle, as it should have been, in my opinion. But I am always amazed that where some refer to such phrases as extreme measures being taken by the Department of Justice, usually in the persona of John Ashcroft, in order to perhaps question his motives or perhaps even vilify him, to criticize the PATRIOT Act, and I worry not that people criticize but that they do so when perhaps misinformed of what the facts are, and, of course, that is the purpose, one of the purposes of this hearing here today.

And just to make one point, another point, clear, has any provision of the PATRIOT Act, since Congress passed it some 2 years ago, been held in violation of the Constitution, Mr. McNulty, Mr. Fitzgerald?

Mr. MCNULTY. I will defer to Mr. Wray. I am not aware of any, Senator.

Senator CORNYN. Mr. Fitzgerald?

Mr. FITZGERALD. No.

Senator CORNYN. Mr. Wray?

Mr. WRAY. No, Senator, none has.

Senator CORNYN. And among the two provisions of the act that people cite the most often that cause them concerns, and here, again, I understand why concerns are expressed, but just to be clear, Section 213 that deals with delayed notification of search warrants, let me ask Mr. Fitzgerald, is it not true that that delayed notification of search warrants occurs with judicial review and approval; is that correct, sir?

Mr. FITZGERALD. Yes, as it did before the PATRIOT Act, under existing legal authority.

Senator CORNYN. So Mr. Ashcroft, sitting in his office in the Department of Justice, does not decide the issue sort of sneak-and-peek search warrants without some independent judicial officer, some judge who has been confirmed by the United States Senate after nomination by the President has had a chance to review it

and determine that good cause exists for issuance of a delayed notification; is that correct, sir?

Mr. FITZGERALD. That is exactly right.

Senator CORNYN. And likewise, under Section 215, which authorizes searches for business records and other items under the Foreign Intelligence Surveillance Act, Mr. McNulty, is it not the case that, indeed, before those searches take place that Article III judges on the Foreign Intelligence Surveillance Court, in fact, have to review the application and approve it?

Mr. MCNULTY. That is right.

Senator CORNYN. I will tell you one thing that does concern me and that has sort of come up, and I know a couple of times, we have talked about immigration. Mr. McNulty, you have discussed it, and it continues to be a concern, and just most recently, Senator Craig, I believe, in his Committee on Aging this morning reviewed a recent General Accounting Office report that has to do with the issuance of Social Security numbers to non-citizens. And I believe the figure was, in 2002, some 12.4 million Social Security numbers were issued; 1.3 million of those were issued to non-citizens, an alarming percentage.

And I believe, Mr. McNulty, you talked about one of the concerns in the efforts to fight the war on terror that our law enforcement officials, including your office, is focusing on is ID document fraud. Could you please just address whether you would be similarly concerned with the issuance of Social Security numbers to non-citizens?

Mr. MCNULTY. Well, I do not have a position on that policy change, but I certainly am concerned about anything that would undermine the integrity of identification systems generally speaking, and I do not know if that would actually cause that to happen. We are seeing just the widest range of identity document fraud, of just from birth certificates to Social Security cards, driver's licenses, you name it. Often, the vendors provide all of those documents fraudulently for various prices.

And we also look at Social Security fraud and the use of numbers either that have been fraudulently established or have been stolen from someone else. We look at that very aggressively. We look at those individuals who give those numbers to obtain commercial driver's licenses or FAA pilot's licenses and then try to trace back who those individuals are to prosecute them for that fraud.

So it is a very widespread and significant problem, and I am not really in a position to comment on that particular policy change that I know is being debated in many places in the country.

Senator CORNYN. Well, just as you are concerned about those who fraudulently produce fake identification for those who are not entitled to receive that as an official document, would you be concerned about the U.S. Government, including the Social Security Administration, issuing Social Security numbers and cards to those who are not legally entitled to have those?

Mr. MCNULTY. Well, again, our primary concern from the law enforcement is to make sure that someone is who he or she says they are. It is the question of matching up the true identity with the number or document, whatever it might be. That is more of the focus we have from a law enforcement perspective rather than who

actually is the possessor of that number. That is a different question for us.

Senator CORNYN. I understand your very carefully-stated answer, and I am not trying to get you in trouble with your superiors or others. But what I am merely trying to point out is that false identification, whether it is sold by someone who is in the business of illegally manufacturing those documents, perhaps, to those who would threaten us and perhaps kill our citizens, that, I believe, is as much a problem as it is when the Federal Government, perhaps through neglect, oversight, or otherwise, issues a Government document which is the primary identification card for American citizens to people who are not entitled to them.

And I would say that, you know, the more I hear about how much of our documents are abused, how much we do not seem to have a good handle on the number of people who, frankly, are here in this country illegally and who are under final orders of deportation, some 300,000 at last count, when we do not know where they are, or whether it is the fact that perhaps 8 to 10 million people are living illegally in this country now, and we simply do not know for sure where they are and their purpose for being here just adds to my concerns about what we need to do in terms of comprehensive immigration reform.

Because I think until we get a handle on that, we cannot truly say we have done what we need to do in terms of homeland security.

Let me just—I know my time is just—

Chairman HATCH. Your time is up.

Senator CORNYN. It is up?

Chairman HATCH. Yes.

Senator CORNYN. Thank you, Chairman.

Chairman HATCH. Senator Feinstein?

Senator FEINSTEIN. Thank you very much, Mr. Chairman. I may have misspoken in my earlier comments. And for the record, I just wanted to correct them. I want to be clear that there is not a sunset on Section 213, which is the delayed notification provision, also known as the sneak and peek. In addition, I do not know how it has been used in every instance, but I do not believe that it would have been used against libraries. It is obviously Section 215 which the libraries are concerned about, because it permits the government to seize computers and other tangible things. It is my understanding from Mr. Ashcroft's public statement that that section has never been used against libraries.

Does anyone have a different view of this that is sitting here?

Mr. WRAY. No, Senator Feinstein, you are correct.

Senator FEINSTEIN. Okay; thank you. I wanted to correct that.

Now, I want to just confine my questions to specifics of the bill, if I could, or of the act. Section 412 of the act states that if an alien has been detained solely under this section because he is a threat to national security but his removal from the United States is unlikely in the foreseeable future, the Attorney General may continue to detain him for additional periods of up to 6 months.

Now, according to a booklet put out by the Justice Department called the "USA PATRIOT Act: Myth versus Reality," to date, the Attorney General has not used Section 412 but believes it should

be retained for use in, quote "appropriate situations." Is that true? What would the appropriate situations be? And if it has not been used, should we keep it in the act? Because I think this is a cause of some of the concern.

Mr. WRAY OR MR. Fitzgerald, whoever wants to take it?

Mr. FITZGERALD. Sure; thank you, Senator.

First, to my understanding, it is correct that it has not been used to date, and obviously, but I can tell you that one of the most vexing problems from the field is how we deal with terrorist immigrants. Going back 10 years to the first World Trade Center bomber, the mastermind, Ramsey Yousef, came off of a plane at John F. Kennedy Airport. My recollection was that he was one of 30 illegal aliens getting off of that flight. My understanding is that we have the capacity to only house a couple of people from that flight. He came off. He had a fake Iraqi passport with a loosely-fitting photograph in it. He was wearing a silk suit, puffy shirt, and slippers, and he was told, basically you are paroled into the country. You are admitted here because he claimed he needed political asylum because he feared persecution by Saddam Hussein.

He is then given a document that says, basically, we trust you to show up at the Federal Building in 6 months for a hearing. And he comes in; he was represented pro bono by a very prominent New York attorney thinking that they were vindicating civil liberties. And he blew up the World Trade Center, and he left.

The concern I always have with immigration is we have the person who is sitting at the borders making these decisions that if they keep everyone out, they are changing the fabric of our country. If they let someone in who blows something up, it is on their head. If a person comes in that we do not have a prosecutable case, and he or she is stopped at the border, at an airport, and perhaps we have very good intelligence information that we cannot use—maybe it is a very sensitive technique; maybe revealing it would burn a source; maybe it comes from a country that says you cannot use this information in court.

Yet, they are sitting there at the border. We do not want to parole them in to let them walk around the country, and it may well be that they are coming from a country that we would return them to that would refuse to take them precisely because they are so dangerous. So we could have a ticking time bomb landing on our shores whom our immigration policies will not let us expel; our National security policy will not let us let them in. In that circumstance, I do not know why, you know, we need to have the Attorney General have the ability to say I will invoke that provision if necessary.

Senator FEINSTEIN. Thank you. I want to move on, because I think you have answered it, really, quite adequately.

The PATRIOT Act also changed the definitions of pen registers and trap and trace devices to include devices that track dialing, routing, addressing or signalling information. And this change allows the tracking of email and Internet usage rather than just phone calls. The act also requires that pen registers and trap and trace devices not capture the contents of any communication. How extensively have you used pen registers and trap and trace devices

to track email and Internet use? And how does DOJ ensure that these devices do not capture the contents of any communication?

Mr. WRAY. Senator Feinstein, you are obviously correct that the provision specifically goes out of its way to instruct the folks on the front lines to avoid the collection of content. The provision has been used in the investigation, for example, in the murder of Wall Street Journal reporter Daniel Pearl. It has also been used in a number of cases involving terrorist co-conspirators. One interesting non-terrorism case in which it was very useful was a case in which a man had lured a 13-year-old girl from her home and then sexually abused her in his home in Herndon, Virginia. He had emailed an obscene picture of his victim to another person in another state, and through the use of this technique, it ultimately led to the rescue of the child from the individual's home. He has subsequently been sentenced to 19 years in prison.

As far as the efforts that we take to ensure, as you mentioned, that content not be collected, my former boss, Larry Thompson, the former Deputy Attorney General, issued a memorandum a little while back that was very explicit and went into detail instructing prosecutors in the field to minimize the possible collection of content; to refrain from using any content that was inadvertently collected; and to coordinate with Main Justice to ensure that we did not have people using it in an inconsistent or unintentionally irresponsible manner.

Senator FEINSTEIN. To help stop terrorism by disrupting terrorist financial networks, the act also includes a title, namely, Title III, which focuses on money laundering, and it provides for increased information sharing, which was a real concern that we had, because of the stovepipes that existed. The provisions in this title would allow suspicious activity reports received by Treasury to be shared with intelligence agencies, and also authorize the sharing of surveillance information between law enforcement and intelligence agencies.

I am really very concerned about this. With Al-Hazmi and Al-Midhar, I think the absence of that ability to share information resulted in them not being picked up before 9/11. So anything you could tell us about how suspicious activity reports are being shared with the FBI and whether this has actually aided FBI investigations would be useful and how it is being shared by the FBI with the rest of the intelligence community.

Mr. MCNULTY. I could speak, Senator, to the review of suspicious activity reports as an initiative within my office and other offices, I am sure. And it will not go directly to the heart of the sharing with FBI, but it is connected to that.

We have begun to very actively review those reports. Previously, they did not really get reviewed simply because of resources. There were so many being filed, but there were so few people in the position to be able to review. And now, we have just made a point of it to review them throughout the Eastern District of Virginia and to look at opportunities to either, because of the leads that we can see from the reports that would lead us to questions about large sums of cash, to follow up and to use other authorities like civil forfeiture authorities to deal with that.

That effort to review those reports is done in cooperation with the FBI, and the FBI field offices have agents working beside IRS agents and Assistant United States Attorneys in the review, so that information can be shared, and those leads, then, will get fed into the counterterrorism or the joint terrorism task forces and the counterintelligence agents.

Chairman HATCH. Senator, your time is up.

Senator FEINSTEIN. Could Mr. Fitzgerald just quickly—quickly—

Chairman HATCH. Sure.

Senator FEINSTEIN. —respond?

Chairman HATCH. Sure.

Mr. FITZGERALD. I cannot answer with the level of specificity you would like, but I can tell you that we formed recently, about a year ago, a money laundering asset forfeiture section where I put one of my top lawyers in charge of focusing on money and the trail and gathering information. We work with Customs now, ICE, in that area. We work with the Bureau. We work with DEA. We focus on bulk cash smuggling, which is also a provision that was in the PATRIOT Act, and we just brought aboard a retired IRS investigator to work as a financial analyst, and we are having them work together with a former terrorism expert who is now on staff.

As to the specific SAR sharing, I cannot give you the details. I could try to find that out, but we are definitely understanding that the movement of money and the laundering of money is key to this battle, and getting all the people together under sort of one program is part of that, and she has been sort of crafting a structure.

Chairman HATCH. Thank you.

Senator Kyl?

Senator KYL. Thank you very much. I was intrigued at a press conference last week, the Attorney General discussed the plea agreements that were reached with the members of the Portland terrorist cell that received quite a bit of publicity, and specifically, he mentioned the PATRIOT Act as assisting in the shutting down of that cell.

I suspect—Mr. Wray, this question is for you—but can you describe how that worked, how the PATRIOT Act assisted specifically in that particular case?

Mr. WRAY. Thank you, Senator Kyl. I would be happy to, because I think it is a true success story, and it is precisely the sort of victory in the field that I think illustrates the use of the Act.

One way in which it assisted is the way in which we have already heard so much about in a more general sense, which is the information sharing provisions. The information sharing between law enforcement and intelligence that the Act provided in that particular investigation allowed a really unprecedented level of coordination between the law enforcement criminal investigators and a parallel intelligence investigation.

One of the things that the PATRIOT Act helped us do, for example, was find and arrest one of the defendants, Ahmed Bilal, who was a fugitive. It also helped us to determine when was the precisely correct moment to take down the criminal investigation—that is, when to go overt, as we in the field tend to call it. One of the ways we were able to calibrate that was by monitoring the ongoing intelligence investigation, which we could now do. We did not

have the wall that Mr. Fitzgerald described as existing before the PATRIOT Act. So that was of tremendous value.

In addition, Section 220 of the PATRIOT Act, a different provision, which provides for nationwide search warrants of ISPs, or Internet service providers, was useful in that particular case because the Portland judge, who was the judge most familiar with the case, was able to issue the search warrants for the defendants' email accounts from providers in other districts, which dramatically sped up the investigation and reduced all sorts of unnecessary burdens on other prosecutors, agents and courts.

The last way is the way to which I alluded briefly in my opening remarks, which is that one of the defendants, in a conversation with an undercover FBI informant, complained that he was not getting the financial support he was looking for, because the PATRIOT Act was chilling people's willingness to send his organization money.

So for all of those reasons, we think the PATRIOT Act was very useful in that particular investigation.

Senator KYL. Thank you. Is that the fellow—he did not refer to the PATRIOT Act. He just said that law that Bush wrote. Is that the quotation that I have seen?

Mr. WRAY. That is right. His name is Jeffrey Battle, and he complained about that law that Bush wrote, which he said prevented people from giving him the support that he needed.

Senator KYL. Right; this was in a phone call, I guess, that was picked up between he and one of his cohorts; is that correct?

Mr. WRAY. It was with an FBI informant.

Senator KYL. Yes; well, that was good news.

Now, did you mention—was it Section 220 that you just referred to or 219 on the nationwide search?

Mr. WRAY. In this particular case, Section 220—

Senator KYL. Okay.

Mr. WRAY. —the one for—

Senator KYL. Okay; well, I wanted to also ask you about Section 219, which permits the issuance of nationwide search warrants in these terrorist investigations, and I wondered how you could describe the benefit to the issuance of a nationwide search warrant as opposed to going to the District judges where the property is located.

Mr. WRAY. In general, having a multidistrict criminal investigation, as many, maybe even most, terrorist investigations are, will require the execution of search warrants in districts in a number of locations. And in the pre-PATRIOT Act environment, it is not to say that we could not get search warrants, but in effect, you could have a situation where an investigation that was primarily grounded, for example, in Mr. McNulty's district, might require the execution of a search warrant in Mr. Fitzgerald's district. In the pre-PATRIOT Act environment, pre-Section 219, Mr. McNulty would have to have one of his lawyers hunt down somebody in Mr. Fitzgerald's office, get him up to speed on what the investigation was about, find an agent there unless the agent working in Mr. McNulty's district was going to fly all the way out to Chicago to do it, then go find a magistrate judge in Chicago, walk through the whole process with that judge, so you would have sort of just those two districts.

You would have twice as many prosecutors, twice as many agents, twice as many judges all to get a search warrant that, but for geography, could easily have been done out of the one district responsible for the matter. And so, Section 219 has been a tremendous help in that regard.

Senator KYL. Mr. Chairman, I just want to make an observation. I think of Paul Charleton, who I suspect all three of you know, the U.S. Attorney for Arizona, who has been before this Committee before, and I happen to know Mr. McNulty, and I have been very impressed with Mr. Fitzgerald. And it just strikes me that following on some of Senator Cornyn's comments that those who attempt to denigrate the PATRIOT Act and sometimes personalize it to Attorney General Ashcroft really need to be thinking about the service that these three gentlemen and people like the U.S. Attorney in Arizona, Paul Charleton, have provided, to their country in aid of the protection of our freedoms and helping to provide our safety.

I think we owe a debt of gratitude to these people and all of the folks that they work with for assiduously adhering to the law, upholding the rule of law, but helping us to maintain our freedom by going after truly bad people. And these sometimes rather flippant accusations and expressed concerns about the law that we have passed here almost unanimously and sometimes seemingly derogatory references to the Attorney General I think do not do justice to the hundreds and hundreds of people who work for or with the Attorney General who do their jobs every day, who serve the public with great distinction, and I am pleased that these three gentlemen could be before us today, because I think it puts a face to the people who are doing this job for us, and I want to express my appreciation to each of you and ask you to please pass that sentiment on, because I think we all share that sentiment here, to those who work with you, because sometimes, it seems kind of lonely. You seem like you are getting beat up. It is not your fault. You are trying to do your job, and you are doing it for all of us.

And I would like to have you convey that to your colleagues.

Thank you, Mr. Chairman.

Chairman HATCH. I second those remarks.

Senator Feingold?

Senator FEINGOLD. Mr. Chairman, first, I would like to make one clarification for the record. In his written testimony, Mr. Wray implied that this Committee passed the PATRIOT Act. There were, of course, discussions between the administration and some members of this Committee, especially the Chairman and the ranking member, but this Committee did not mark up and pass the legislation. The bill went straight to the floor only a few weeks after being sent up to us.

And I would just quickly respond a bit to what Senator Kyl just said, first agreeing with regard to my tremendous appreciation for your service to our country and the fact that you are working on the top priority, which is to stop people from committing terrorist acts against Americans.

But I do have to say, Mr. Chairman, that the flippant remarks did not begin with those criticizing the USA PATRIOT Act. It began with remarks of people like the Attorney General suggesting that anyone who questioned the act was somehow aiding the ter-

rorists. That is what started this kind of reaction in this country, and frankly, generated fear.

My goal here is to take this down a few notches. I am very struck by Mr. Wray's answer to the question: what aspects of the USA PATRIOT Act have been helpful? You cited three things: the information sharing, the Section 220 ISPs and the support for financial organizations, none of which have been at the core of the concerns that I have raised or groups around the country have raised. They may be down the list.

But what we have here is sort of two ships passing in the night, people suggesting concerns about the bill, and then, the reaction is, well, you know, those parts of the bill are not the ones that have really helped. And it strikes me that there really could be common ground, as has been suggested by two members of this Committee that I have joined with, Senator Craig and Senator Durbin, about fixing the things that are the most troubling to people. So somehow, we have got to get away from this USA PATRIOT Act is all good, or it is all bad, and get down to the facts and the actual situations where we can fix the bill, in my view. Having been the Senator that voted against it, I believe it is fixable, and it needs to be done.

Mr. Fitzgerald, in response to a question from Senator Hatch, you said it can be more difficult under the PATRIOT Act to get access to library records or credit card records. If you suspected credit card fraud, you said you can pull out a subpoena from your drawer. You do not need to go to a court. But I assume that you are referring to a grand jury subpoena, correct?

Mr. FITZGERALD. Yes.

Senator FEINGOLD. And the recipient in that case, of course, that means the recipient has the ability to challenge that subpoena before a judge and is not prevented from disclosing to others that he or she has received a subpoena, whereas, I think you would agree, under Section 215, a recipient is prohibited from even disclosing that he or she has received it, and a judge approves the subpoena request because a crime has not been committed. So no grand jury would have been convened.

Section 215 is used in FISA investigations, not criminal investigations. Was my statement there correct?

Mr. FITZGERALD. Yes, I would just qualify it slightly in that you can, in certain circumstances, in the right to financial privacy provision, tell some banks not to disclose the existence of a subpoena. So if you are looking for business records for a bank in the grand jury context, you can serve a subpoena, where, to my understanding, for certain offenses, the bank cannot disclose the existence of the subpoena to protect the investigation.

Senator FEINGOLD. But insofar as libraries are concerned, my statement was correct.

Mr. FITZGERALD. Yes.

Senator FEINGOLD. Mr. Wray, I would like to continue on Section 215 of the PATRIOT Act. Your written testimony discussed this provision in the context of library records, but, of course, it also applies to an FBI request for any records or tangible things, not just library records. It could include a request for medical records from doctors and hospitals, purchasing records from credit card compa-

nies or even membership lists from the NRA, the ACLU, social clubs or charitable organizations if the FBI alleged that the information was sought in connection with a terrorist investigation; is that not right? That is all that has to be done by the FBI?

Mr. WRAY. Under Section 215, in addition to all of the internal approval requirements, there would have to be a certification to the FISA judge either that the information requested was to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities.

In addition, the statute explicitly, although one could argue that this was not necessary, but it went an additional step and preserves First Amendment rights by expressly providing that the FBI cannot conduct investigations of United States persons solely on the basis of activities protected by the First Amendment.

Senator FEINGOLD. Solely on the basis of activities protected by the First Amendment.

Mr. WRAY. That is the language of the—

Senator FEINGOLD. Other than that, my statement of what kinds of things are potentially obtainable was correct, was it not?

Mr. WRAY. It does cover broad categories of documents, and that was one of the advantages of the provision.

Senator FEINGOLD. The administration recently disclosed, and you stated again in your testimony today, that Section 215 has not been used. But the concern that I have is that the provision, as currently written, presents the potential for being used in inappropriate ways. If the provision has not yet been used, what objection does the administration have to modifying the provision, as some of my colleagues and I have proposed, to protect the privacy and liberty of law-abiding Americans?

And, for example, where is the harm in requiring the FBI to put a little more work in its application for a subpoena to the court or to put it in prior—that they would have had to put in prior to the PATRIOT Act, especially where the benefit is, in my view, greater judicial oversight to protect against potential fishing expeditions and also, of course, to reassure the public that the privacy of law-abiding citizens is not going to be violated?

The administration says it has no interest in the reading habits or other aspects of the lives of ordinary Americans. If that is so, why can we not fix this provision, which you have not even used, in the modest way that we have suggested?

Mr. WRAY. Senator, I believe that the provision in question already requires FBI agents to go further than they would, for example, in coming to Mr. McNulty or Mr. Fitzgerald or myself for a grand jury subpoena, so there is a heightened level of obligation on the part of the agents in terms of the paperwork and the showing that would have to be made internally and also to satisfy a judge than would have to happen in a grand jury context.

The fact that the provision has not been used, I would submit, is a reflection—and this is true of a number of provisions—that we try to use these provisions sparingly, only in those instances where we feel that that is the only tool that we can use. But it is not hard for me to come up with, for example, based on the kinds of experi-

ences we go through every day, examples where it would be extremely valuable to us to have this provision kept intact.

For example, you could easily have—and this is a hypothetical based on the kinds of things that come up on a day-to-day basis at the FBI and the Justice Department and CIA and other places—you could have a foreign intelligence service that has a raid in a safe house overseas somewhere and, in the course of that raid, comes up with records that, for example, that might be rental car records or job applications or tenancy documents of some sort. It might even be a library book, for example, from the D.C. Library.

And it is not unusual for foreign intelligence services in situations like that to not want to declassify the information, not want, in sharing the information with our Government, to let us subject that information to the criminal investigation process so—

Senator FEINGOLD. What about the modifications that we have suggested to this Section 215 in my bill and the Craig-Durbin bill would prevent you from getting at that? I do not think there is any way in which the requirement of—some showing of relevance is basically what we are asking for. Obviously, in that scenario, you would have that. So I am asking again: what is it about the modifications that we have proposed that will not satisfy that kind of scenario, your concerns? That is what we need to get at here, not just have people say that, you know, the provision is all bad or all good, but how do we address your legitimate concerns while, at the same time, requiring what is, in fact, not required right now?

You have suggested that somehow, the judge has to review this and find some kind of a showing. The fact is that there is no showing required. All you have to do is assert that it is sought in connection with, and the judge is basically required to sign off. It is not a discretionary situation.

Mr. WRAY. I am sorry; I would be happy to take a look at the language that you have proposed, and I am sure the Department would be happy to get back to you on that. I do think it is worth noting that no one has identified any instance in which the provision has been abused, and, of course, we have already talked about the fact that it has not been used.

Senator FEINGOLD. It has not been used.

Mr. WRAY. That is right. Nor am I aware of any instance in which anyone has complained of abuse, for example, of a grand jury subpoena for the same sorts of records. And, of course, the showing there is far less than is required to—

Senator FEINGOLD. Well, we have already talked about the difference, and you have admitted the difference, between a grand jury situation—at least Mr. Fitzgerald did—and the lack of protections for the person in the other context, where they cannot discuss it.

Chairman HATCH. Your time is up.

Senator Schumer?

Senator SCHUMER. Thank you, Mr. Chairman, and I thank the witnesses for their patience.

As you know, Mr. Wray, I have told you in advance that I would be asking you questions along this level, and I know that Senator Kennedy touched on it a little bit, and I appreciate your answering them rather than just saying we do not know anything.

Now, just to reiterate: Senator Ashcroft—Attorney General Ashcroft has not recused himself; is that correct?

Mr. WRAY. I believe the Attorney General has said explicitly that he has kept open all options and, as the investigation develops, will continue to keep all options open.

Senator SCHUMER. But as of now has not recused himself.

Mr. WRAY. I am not aware of any decision to recuse himself.

Senator SCHUMER. Okay; now, you mentioned previously that he is being kept apprised of the role of the investigation, I think; those were your words. Who is apprising him of this?

Mr. WRAY. As the head of the Criminal Division, I am responsible for keeping both the Attorney General and the Deputy Attorney General, who I hope will soon be joining us from your home state—

Senator SCHUMER. He is a good man.

Mr. WRAY. —Mr. Comey, with whom I have had great experience, as have my colleagues on this panel. I look forward to working with him. But it is my responsibility to, on major investigations, of which this is, of course, one, to keep the leadership informed.

Senator SCHUMER. Right; so, first, you brief the Attorney General on what is happening. Are there others who talk to him as well?

Mr. WRAY. I certainly could not speak to everyone who speaks with the Attorney General. However, I am responsible for the division which is handling the investigation, and I report directly to the Attorney General.

Senator SCHUMER. Has Mr. Dion spoken, to your knowledge, at all to the Attorney General about this, either at his request or the Attorney General's request?

Mr. WRAY. I am not aware of any such conversations. Mr. Dion has been told by me, and I have relayed to him the message from the Attorney General, that this investigation is to be conducted fairly, impartially, aggressively, and professionally, consistent with all of the expertise and experience and track record that Mr. Dion has demonstrated over his career.

Senator SCHUMER. I would just simply like to know, and you can respond in writing, which is the custom of this Committee. I would ask you to tell me who has the Attorney General talked to about this investigation other than yourself, particularly Mr. Dion, anyone else engaged in the investigation. Could you get me that in writing, please?

Mr. WRAY. Well, I would be happy to take a look at your question. I want to be careful to maintain the confidentiality of deliberations within the Department, which is consistent with its practice.

Senator SCHUMER. I am not asking for the details. I am asking just for the structure, which I think we are perfectly entitled to do.

Mr. WRAY. I would be happy to walk you through the structure—

Senator SCHUMER. Right.

Mr. WRAY. —again, which is that Mr. Dion is the Chief of the Counterespionage—

Senator SCHUMER. I understand.

Mr. WRAY. —Section. He reports to Deputy Assistant Attorney General Bruce Swartz—

Senator SCHUMER. Swartz.

Mr. WRAY. —who is the deputy over that section and a few others. Both of them, then, report to me.

Senator SCHUMER. Right.

Mr. WRAY. And then, I report to the Deputy Attorney General and the Attorney General.

Senator SCHUMER. Let me ask you this: you keep the Attorney General apprised. Can you give us some—how detailed is it? How often does it occur?

Mr. WRAY. I do not have a really good way of quantifying that for you.

Senator SCHUMER. Do you talk to him every day about it? Every week?

Mr. WRAY. Certainly not every day.

Senator SCHUMER. Every week?

Mr. WRAY. Well, the investigation has only been Pending for a little while, but I would say again that I think he is kept apprised to the level consistent with other major investigations, and again—

Senator SCHUMER. Could you tell us what that means? Does that mean that he knows the names of witnesses being interrogated? How many witnesses are being interrogated? Whether there is grand jury? Could you answer those?

Mr. WRAY. I could not answer those.

Senator SCHUMER. Why not?

Mr. WRAY. I could only tell you that I think the Attorney General is apprised of the progress of the investigation sufficiently to fulfill his responsibilities. I would not want to speculate as to what is or is not in the Attorney General's head.

Senator SCHUMER. No, I did not ask that. You are the one briefing him. Do you mention specific names of witnesses who might be interviewed? Have you ever done that?

Mr. WRAY. Again, I think it would be better for me not to discuss the deliberations of the Department. I can say that this investigation is being conducted fairly, professionally, impartially, and aggressively, consistent with the manner in which I think you would expect and I think others would expect.

Senator SCHUMER. Mr. Wray, this is not a typical investigation, for the obvious reasons that we all know, and I am not asking you to tell me who. You should certainly not tell me, even if I should ask. But when I ask you does he get specific names of who is being interviewed and details of what those interviews brought about, I think we are entitled to that answer. In fact, the American people are entitled to that answer.

Can you again—I am going to ask you once again: can you tell me if, at any time in your conversations with him, you have given him names of people who have been interviewed?

Mr. WRAY. I think it is fair to say that in the course of my discussions, I have given him the levels of detail that would be consistent with any briefing on a major investigation, and that would, I believe, include names of individuals.

Senator SCHUMER. Okay; thank you. I appreciate that. And how about details or general thrust, not specific details, of what they say?

Mr. WRAY. Well, again, I think consistent—

Senator SCHUMER. I am not familiar with how an associate Attorney General for the Criminal Division briefs an Attorney General on these. I am not saying it is the same or different as any others. So, just, what level does he know? He knows the names of some people. Does he know that there have more than one interview? It went for a long period of time? Does he know whether they were cooperative? Whether this one looks like a good lead, and this one does not, those types of things?

Mr. WRAY. Again, I am not trying to be difficult, but I think it is hard for me to speak to what the Attorney General does and does not know.

Senator SCHUMER. I did not ask that. I asked you what you tell him.

Mr. WRAY. When I brief the Attorney General, I brief him with the level of sufficient detail for him to understand meaningfully what is going on in the investigation.

Senator SCHUMER. Okay; so, he knows the detail—he knows, not the details, but he knows, to quote you, meaningfully what is going on in the investigation?

Mr. WRAY. I think one way to think of this would be—

Senator SCHUMER. But that is correct, right?

Mr. WRAY. —I am sorry. In the chain of command, with each ascending level within the Justice Department's hierarchy, there is a gradually descending level of detail, so that you have Mr. Dion working on the investigation—

Senator SCHUMER. Sure.

Mr. WRAY. The level of command of mastery of the investigation, as it comes up from him to the next person, then, to me and then on up to the Attorney General, gradually declines with time, as one would expect.

Senator SCHUMER. Okay, well, I appreciate your letting me know that, and so, there is meaningful detail and names, and that does answer my basic question there.

I have another question, and this is do you know about—many of us have been concerned with some of the delays that they said, well, we are going to get some documents, et cetera, and then, got them later; do you know, were there communications between the White House and the Department of Justice about the leak before the official evidence preservation request was made?

Mr. WRAY. Senator, I—

Senator SCHUMER. Are you aware of any?

Mr. WRAY. I want to be careful here. It is very important to me, as I know it is to you, that this investigation be handled professionally and consistent with—as they say, by the books. And one of the ways in which we, as career prosecutors, handle investigations by the books is not to discuss the details, which is one of the things that you are asking about, of an active, ongoing investigation.

I can assure you that it has been made painfully clear to everyone involved that no punches are to be pulled in this investigation. Anybody who thinks that we are going to be pulling any punches in this investigation does not know the lawyers and the agents working on this investigation very well.

Senator SCHUMER. Okay; let me ask you, though; I am not asking, again, for, from what I have understood, it is sort of bad practice; it is not what a good prosecutor would do to sort of convey ahead of time we are going to ask for these documents and then ask for them. Usually, they sort of try to go wshht! and try to get everything that they can. I am not a prosecutor, so I have had to ask other people. I have never been.

And so, if the people who potentially were investigated knew ahead of time that their documents would be asked for, again, that is not professional practice as I understand it, certainly not good prosecutorial practice, and I think it is legitimate for me to ask: can you answer that question? Did any of the witnesses, potential witnesses or people who have become witnesses since, know that they were going to be asked for documents before they actually were?

Mr. WRAY. Again, I think I have to respectfully submit that the investigation is being handled, to my knowledge, in every respect professionally—

Senator SCHUMER. That does not answer my question.

Mr. WRAY. I would like to finish responding if I might. The prosecutors and agents working on this investigation have been handling it—in my estimation, based on my experience both as a prosecutor and as a defense attorney—fully consistently with all good judgment, expertise, professionalism, integrity and so forth. I am not aware of any instance in which things have been handled otherwise, and I believe that the American people can have full confidence that they are handling it in that fashion. I know I do.

Chairman HATCH. Senator, your time is up.

Senator SCHUMER. I would just make one comment, Mr. Chairman.

Chairman HATCH. Well—

Senator SCHUMER. First, I would ask unanimous consent that Mr. Wray be allowed to respond to some questions in writing.

Chairman HATCH. Well, of course. We will keep the record open.

Senator SCHUMER. And second, I would just say, at least to me, the fact that the Attorney General, who is, again, a close associate of the President's in many ways, knows the details or knows some of the people who have been called and the general thrust of what has been asked. I find that troubling, and right here and now, you can convey it to him—I will—I would urge that the Attorney General recuse himself. That will satisfy, I think, the American people.

Thank you, Mr. Chairman.

Chairman HATCH. Senator Durbin?

Senator DURBIN. Thank you, Mr. Chairman, and thanks to the witnesses before the Committee.

Mr. Wray, when the PATRIOT Act came before us, and the issue of wiretaps came up, a point was made, I think very effectively, that the wiretap law in the United States had been written at a time before cell phones and before a lot of other forms of telecommunication and that if we were going to be successful in using wiretaps to go after those who were responsible for 9/11 or those who would do similar things that we had to reform this law and bring it up to date.

I thought that was a very compelling argument and was one of the explanations I gave to people who asked me why I voted for the PATRIOT Act. It strikes me, though, that we have to not only make certain that our law reflects new technology but also to do everything we can to make certain that there is no abuse of the power of the Government to wiretap; specifically, that innocent people would not have their conversations wiretapped.

In that light, can you tell me why, when it comes to these roving wiretaps, you believe that it is unreasonable to ask the Government to identify the target of the wiretap or the place to be wiretapped?

Mr. WRAY. Senator, in the connection with roving wiretaps, the people who are the subjects of those sorts of investigative tools are people who, by definition, are those with whom we have had the most trouble tracking and intercepting. And therefore, the Government has had considerable concerns about making sure that the details of and the applications of the technique in question are kept as confidential as possible in order not to jeopardize the investigations.

Senator DURBIN. So let us get down to the bottom line. If you are going to wiretap someone, if you are going to tap their phone, you do not call them in advance and say incidentally, your phone is going to be tapped. That would defeat the whole purpose. So the target of the wiretap is certainly kept in the dark if this is going to be successful.

Why is it unreasonable for the Government to disclose to the court when asking for a roving wiretap the name of the person that they want to tap?

Mr. WRAY. I would have to look at the particular situation that you are describing. It is my experience that roving wiretaps have consistently been handled effectively in investigations; that they have been used fairly sparingly; and that they have not been abused.

Senator DURBIN. Well, I would just say this: the bill that we have introduced, Senator Craig and myself, a very unlikely duo for legislation on Capitol Hill, this is one of the provisions, and it is beyond me to understand why the Government should not say to the court Durbin is the one we want to wiretap. Now, I do not know if it is going to be his cell phone or his home phone or his office phone, but we are going after Durbin.

Now, you are not going to tell him that, but the court ought to know that. Currently, the roving wiretap does not require that disclosure, that Durbin is the person. And all we are saying as part of our SAFE Act and revision of the PATRIOT Act is that that is not an unreasonable thing to do to make certain that in your quest to get information about Durbin, you do not pick up Schumer and Feingold and all of the others on the Democratic side.

So the point I am making here is I do not think this is an unreasonable thing to do. The point made by Senator Feingold, I think, is equally valid. When we are talking about subpoenaing business records or records from libraries or book stores, what we are asking for the Government to do is perhaps to provide some specificity to the court so as to avoid subpoenaing documents of innocent people. Should that not be one of our goals here, not only to give you the

tools of prosecution but to always measure them against the rights and liberties of innocent people that may be infringed if the Government goes too far?

Mr. WRAY. Senator, I certainly agree that our efforts in protecting the lives and liberties of Americans should be always done fully within the bounds of the Constitution. I understand that you and Senator Craig have proposed legislation on the so-called John Doe roving wiretaps that you are reforming to, and I gather that the Department is in the process of formulating a response.

Senator DURBIN. I sent a copy of it to Mr. Fitzgerald, too, so that he could see what we were up to, because I announced this in the City of Chicago, and I would like to go to a question to Mr. Fitzgerald.

You made a point and a very valid point about the difficulty you had in prosecuting cases when there was one camp called intelligence and one camp that was dealing with the prosecution through the FBI, domestic law and the like. It is a very important point, and I am glad that, although the PATRIOT Act may have addressed this, whatever was holding up this line of conversation and dialogue has finally changed for the better.

But I want to ask you a question: we heard from the GAO, and this was the subject of a hearing by Senator Cornyn of Texas, that nine different agencies still develop and maintain a dozen terrorist watch lists, including overlapping and different data and inconsistent procedures and policies on sharing.

Now, the law that created the Department of Homeland Security required the Department to consolidate these watch lists, and the Bush administration has promised that it would happen, and it has not. So when we talk about the wall between intelligence and the ordinary prosecution of crime in America, there are walls that still exist, creations of the bureaucracy of this administration. Would you concede that point?

Mr. FITZGERALD. Well, I do not know when the bureaucracy got created. There has been bureaucracy created for a long time. So I do not want to get into the political—

Senator DURBIN. Inherited by this administration, then.

Mr. FITZGERALD. And I do not want to do one of these that is not my job, but my friend Mike Garcia over at Homeland Security and his colleagues have to deal with the issues there. I think that the difference is, all I know is in going about doing the business of being a prosecutor, what the PATRIOT Act did for us was tear down the wall where we could not communicate.

Senator DURBIN. I do not want to push you into an area that may not be your area of understanding and expertise.

Mr. FITZGERALD. And I recognize that there is lots of work to be done and lots of areas in making sure that we coordinate—

Senator DURBIN. Progress has been made. Tom Ridge is a great appointment. I think Bob Mueller is doing a fine job. There is no doubt in my mind about that. But the interoperability of computers and the sharing of information on terrorist lists, there is still a wall, and that wall can be broken down, and it does not take a law, a new law, to have it happen. It can happen within the administration, and it is too slow in coming.

Mr. Wray, my last question to you is on this criminal leak involving Ambassador Wilson's wife. Have you been party to any conversations with the Attorney General and discussed the necessity or the possibility of his recusing himself from this case?

Mr. WRAY. Senator, I respectfully cannot discuss the substance or details of my deliberations with the Attorney General. I can tell you that the Attorney General has said, I believe publicly, that he has kept all options open and will continue to keep all options open, but that in the meantime, he has directed that this investigation be handled thoroughly, professionally, and completely. It is an active, ongoing investigation. And I will say that having seen and known the prosecutors and agents working on this matter—the lead prosecutor has 30 years' experience in this area and the lead agent, who has about the same number of years—that you would be inspired by their professionalism and work ethic and integrity.

Senator DURBIN. Mr. Wray, we are all students of and creatures of the law, and we are familiar with two terms: impropriety and appearance of impropriety, and I think what we are dealing with here, whether the people on the case are the very best professionals that the Government could possibly have involved is just a question, a lingering question, as to whether the Attorney General is too close to the people who are being subjected to this investigation. That is the sole reason for asking for an independent prosecutor, not questioning Mr. Dion, Mr. Schwartz, yourself or anybody involved in it but the fact that there is an appearance which lingers over this. There are statements that have been made by some to diminish this.

Can I ask you: do you consider this criminal leak to be of a serious nature?

Mr. WRAY. Absolutely, Senator. I consider any leak of classified national security information to be a very serious matter and nowhere more so than when we are talking about the identities of the men and women of our intelligence community. I think that is the spirit with which everyone in this matter, from top down, has been approaching this matter.

I will say that when it comes to the issues you are raising about appearance, that I would hope that the American people could have the confidence that I have in the people working on this investigation. I will also say that it is difficult for me to discuss the kinds of issues you are raising, because it necessarily is based on assumptions about who the targets and subjects of the investigation are. That is the direction in which you would then be making judgments about how the matter should be handled.

Senator DURBIN. My thanks to the panel and thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator.

I want to compliment this panel. You have sat there and answered all of the questions and have helped us all to understand even more how important the work is that you are doing and, frankly, how important the PATRIOT Act is in helping you to get the work done for the people of America to protect us.

There are so many false statements being made against the PATRIOT Act, and they are generally done by the two extremes: from the far left to the far right. And it is disgusting to us who have

worked so hard to enact that Act. And the media just grabs those radical statements as though they are fact, but I think you have helped to clear away the brush to a degree here today, to a large degree, and frankly, I think one of the most telling statements is that the PATRIOT Act has been upheld in every court of law that it has appeared in so far and with good reason: had we had the PATRIOT Act, we may never have had, have suffered 9/11, because we would have had the tools to maybe catch these people.

Now, that does not mean it is perfect and that we will not have terrorist acts in the future, but I will tell you one thing: at least you will have some tools that anybody with brains, I think, would conclude are important for law enforcement to have in order to protect this Nation. And I personally resent some of the misconstructions and false statements and intellectual babbling that goes on about the PATRIOT Act, and I think you folks, being on the front lines have helped us to understand that better than any group that has appeared before this Committee since we began discussing the PATRIOT Act.

And a lot of people fail to recognize that the PATRIOT Act passed 98 to 1 in the United States Senate and virtually unanimously in the House. So we want to make sure you have the tools to protect our Nation. We want to make sure you have the tools to go after these criminals and these terrorists, and we certainly want to bring the fight against terrorism, the tools against terrorism, up to the level and dignity of the fight against violent crime or even pornography and child molestation.

Those are important areas of the criminal law. Why would we not elevate the tools for law enforcement with regard to terrorism to that level? It just makes common sense. But the laws were not there when 9/11 happened, and I particularly feel badly about it, because when we put the Hatch-Dole Anti-Terrorism Effective Death Penalty through in 1996, it was very disappointing to me that some on the far left and the far right prevented us from giving you some of these tools that might very well have protected us on 9/11 and saved upwards of 3,000 lives.

So your testimony here today is very important. Now, we are going to keep the record open for written questions that must be submitted within 7 days, and you will have 30 days in which to respond to those questions. Now, I have agreed that if, there are further matters arise that we can extend that seven-day period for asking questions, but basically, we should be able to ask all of the questions that need to be asked in the next 7 days, and you will have 30 days to answer those questions.

I want to thank all three of you. You are heroes to me and heroes to this country, and we appreciate the good, hard work that you are doing.

And with that, we will recess until further notice.

[Whereupon, at 1:23 p.m., the Committee adjourned.]

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

QUESTIONS AND ANSWERS

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 22, 2004

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Enclosed please find responses to questions posed to Mr. Christopher Wray, Assistant Attorney General, Criminal Division, following Mr. Wray's appearance before the Committee on October 21, 2003. The subject of the hearing was "Protecting Our National Security From Terrorist Attacks."

As you know, we only recently became aware that Senator Leahy also had a number of questions following the October 21, 2003, hearing. Those questions were forwarded to the Department separately. We are currently working on completing answers to Senator Leahy's questions. We hope to have responses sent to the Committee soon.

We hope this information is helpful to you. If we may be of additional assistance in connection with this or any other matter, 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

QUESTIONS FOR THE RECORD

CHRISTOPHER WRAY
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

OCTOBER 21, 2003

Senator Biden: Administrative Subpoenas

1. **Please cite for me instances where your terrorism investigations have been thwarted due to an inability to secure a subpoena from a grand jury in a timely fashion.**

I am unable to provide the details of those instances in which the absence of administrative subpoena authority has hindered anti-terrorism and national security investigations. However, the following hypothetical situations, which could well arise, illustrate the need for this investigative tool when time is of the essence. In the first scenario, anti-terrorism investigators learn that members of an Al Qaeda cell recently stayed at a particular hotel. They want to know how the cell members paid for their rooms, in order to discover what credit cards they may have used. When investigators ask the hotel manager to produce the payment records voluntarily, the manager declines to do so, explaining that company policy prohibits him from revealing such information about customers without legal process. If investigators had the authority to issue an administrative subpoena, the hotel manager could disclose the records about the Al Qaeda cell immediately without fear of legal liability. In this situation, where the speed and success of the investigation may be matters of life and death, this disclosure would immediately provide investigators with crucial information—such as the location of the terrorists and the nature of their purchases—with which to disrupt and prevent terrorist activity.

In the second hypothetical situation, anti-terrorism investigators learn on a Saturday morning that members of an Al Qaeda cell have bought bomb-making materials from a chemical company. They want to obtain records relating to the purchase that may reveal what chemicals the terrorists bought, as well as delivery records that might reveal the terrorists' location. The investigators might seek quickly to contact an Assistant United States Attorney, who might immediately obtain a grand jury subpoena for the records. However, the third party who holds the records could lawfully refuse to furnish them until the subpoena's "return date," which must be on a day the grand jury is sitting. Because the grand jury is not scheduled to meet again until Monday morning, investigators may not be able to obtain the information for two days—during which time the Al Qaeda cell may execute its plot. If investigators had the authority to issue an administrative subpoena, which can set a very short or immediate response deadline for information,

they may be able to obtain the records immediately and neutralize the cell.

Administrative subpoenas are now used in a wide range of criminal investigative contexts, including health care fraud, sexual abuse of children, false claims against the United States, and threats against the President and others under Secret Service protection. Because of the benefits that administrative subpoenas provide in fast-moving investigations, they may be more necessary in terrorism cases than in any other type of investigation. Without administrative subpoena authority, FBI agents investigating terrorist threats will continue to face delays in obtaining potentially life-saving information whenever the holder of that information does not provide it voluntarily. Granting FBI agents the use of this tool would speed those terrorism investigations in which subpoena recipients are not inclined to contest the subpoena in court and are willing to comply. Avoiding delays in these situations would allow agents to track and disrupt terrorist activity more effectively, and improve the safety and security of all Americans.

2. **Please describe for me the processes that will be available under the Administration's proposal to subpoena-recipients to contest a received administrative subpoena.**

The FBI could not unilaterally enforce an administrative subpoena issued in a terrorism investigation. As with any other type of subpoena, the recipient of an administrative subpoena issued in a terrorism investigation would be able to challenge that subpoena by filing a motion to quash in the United States District Court for the district in which that person or entity does business or resides. If the court denied the motion to quash, the subpoena recipient could still refuse to comply. The government would then be required to seek another court order compelling compliance with the subpoena.

3. **Please provide legislative language, along with explanatory materials, detailing the administrative subpoena statutory changes sought by the Administration.**

The Administration supports the language pertaining to administrative subpoenas contained in H.R. 3037, the Antiterrorism Tools Enhancement Act of 2003, which has been introduced in the House of Representatives by Representative Feeney of Florida. A copy of the bill is attached.

Senator Biden: Enemy Combatants

4. **I am fully aware of the Administration's justification that its action is a necessary exercise of the President's authority as commander-in-chief to provide for national security – but how do judicial review and mere access to counsel (both fundamental rights typically afforded U.S. citizens held in U.S. custody) undermine our national defense? What role, if any, do you believe these safeguards (judicial review and access to counsel) play in inspiring confidence in our civilian system of justice and promoting government accountability?**

I believe that the right to and access to counsel are critical components of our civilian criminal justice system. This system has an extremely important role to play in the struggle against global terrorism, as shown by the successful prosecutions brought by the Department of Justice.

But in certain cases, after careful consideration of a host of factors, the President has deemed it necessary to defend the Nation by detaining individuals as enemy combatants. One of the critical justifications for the ability to detain enemy combatants is intelligence gathering. Accordingly, where individuals have associated themselves with terrorist forces in armed conflict with the United States, detention as an enemy combatant allows immediate, ongoing, and uninterrupted interrogations for intelligence that are critical to protecting our citizens and armed forces.

Giving enemy combatants immediate access to counsel as of right threatens national security by interfering with ongoing efforts of the military to gather and evaluate intelligence about the enemy, its assets, its plans, and its supporters, and to prevent additional harm to the United States. As the Department of Defense has explained in declarations filed in the *Padilla* and *Hamdi* litigation, effective interrogation of captured enemy combatants requires achieving an atmosphere of trust and dependency between the subject and his interrogators. Interposing counsel into the relationship would thwart development of the requisite trust and dependency, compromising the military's ability to obtain vital intelligence. In addition, access by counsel potentially enables detained enemy combatants to pass concealed messages to the enemy about military detention facilities, the security at such facilities, or other military operations—something that members of Al Qaeda are trained to do.

With respect to U.S. citizens detained as enemy combatants, we have recognized their right to habeas corpus review to challenge the legal basis for their detention. In addition, under Department of Defense policy, U.S. citizens detained as enemy combatants in the United States will be allowed access to counsel after the Department of Defense has: (1) determined that such access will not compromise national security; and (2) completed intelligence collection from that enemy combatant or determined that such access will not interfere with intelligence collection from that enemy combatant. Pursuant to this policy, the Department of Defense has allowed both Yaser Esam Hamdi and Jose Padilla access to counsel, subject to appropriate security restrictions.

5. **It has been reported that – during the investigation of the six individuals in Lackawanna, New York, who have pled guilty to charges of providing material support to al Qaeda – the Defense Department pressed to have the suspects declared enemy combatants, on the rationale that the government would not have to reveal information from its intelligence investigation. Generally speaking, what factors or criteria inform the decision to designate an individual as an enemy combatant?**

The decision whether to designate an individual as an enemy combatant (a decision that rests in the first instance with the Department of Defense) is influenced by a host of factors, including but not limited to: whether he engaged in hostile and war-like acts, including conduct in preparation for acts of international terrorism; whether he is part of or associated with a terrorist organization with which the U.S. is in armed conflict; whether he possesses intelligence that would aid efforts to prevent terrorist attacks on the United States, its citizens, armed forces, or other government personnel; whether his detention is necessary to prevent him from aiding terrorist efforts to attack the United States, its citizens, armed forces, or other government personnel; the extent of his ties to terrorists and terrorist organizations; whether there is a need to incapacitate him immediately; whether he represents a continuing, present, and grave danger to the national security of the United States; and whether evidence concerning his activity is of such a nature that it could not be used in a criminal trial without compromising important intelligence sources and methods. Taking into account factors such as these, the final determination is the one that provides the best course for securing all the interests of the United States.

6. **Some reports have suggested that the prospect of "enemy combatant" status has so frightened some defendants that they quickly pled guilty to terrorism charges and accepted prison terms, when faced with the threat of being tossed into a secret military prison without trial – where they could languish indefinitely without access to courts or lawyers. How do you respond to these suggestions regarding the coercive effect of threatened designation as an enemy combatant? In your view, is it appropriate to use the uncertain plight of an enemy combatant to compel pleas?**

Department of Justice policy does not allow the use of enemy combatant status as leverage in plea negotiations. On the contrary, it has been made clear to Department prosecutors that enemy combatant status may not be raised to obtain a plea. In our experience, however, defendants' attorneys sometimes raise the issue themselves, usually seeking assurances that their clients will not be treated as enemy combatants. When defense counsel seek such assurances, it is necessary and appropriate to discuss and address enemy combatant status.

With respect to the Lackawanna defendants that you mentioned above, all of the defendants pleaded guilty in open court and stated that they were entering their pleas voluntarily. Each of them, in open court and counseled by their attorneys, attested to the fact that no coercion or threats had been used to induce a guilty plea.

Senator Biden: Inspector General's Report on 9/11 Detainees

7. **Given the mismatch between the number of individuals detained and the number of those determined to have any link to terrorism, is it your belief that the strategy of mass round-ups and detentions is, at the very least, an ineffective law enforcement tool to track terrorists? Would it not be a better and more efficient use of law enforcement resources to identify targets based on actual investigative work and leads?**

As an initial matter, as the Attorney General and other Department of Justice officials have discussed, the fact that an illegal alien who had been legally detained in connection with the September 11 investigation was not prosecuted or publicly linked to terrorism by the FBI does not mean that law enforcement had no concerns or evidence regarding such individual's connection with terrorism. Likewise, the fact that an alien was deported rather than prosecuted does not mean that he had no knowledge of, or connection to, terrorism. In certain cases, evidence of an alien's knowledge of, or connection to, terrorist activity may not be sufficient to prove a terrorism crime beyond a reasonable doubt, or proving a criminal offense may require the disclosure of sensitive sources or classified information. In situations like these, the best alternative from a national security and law enforcement perspective is simply to remove the alien from the United States and do our best to ensure that he does not return.

Furthermore, the September 11 investigation did not adopt a "strategy of mass round-ups." To the contrary, all of the individuals detained in the course of that investigation were legally detained based on specific leads and investigative work.

Finally, it is my understanding that the Department is actively working to implement appropriate recommendations from the Inspector General's report with respect to terrorism investigations. Several information-sharing entities have been established, including the Foreign Terrorist Tracking Task Force, the Terrorist Threat Information Center, and the Terrorist Screening Center, all of which will expedite the investigative process in the event of another large-scale attack. Also, I understand that the FBI has established investigative priorities and is discussing with the Department of Homeland Security (DHS) the terms of a memorandum of understanding that would govern the detention of aliens on immigration charges who are of interest to the FBI. In fact, the creation of DHS has changed the way that such a situation will be handled in the future. DHS will make initial decisions whether to seek to detain illegal aliens during the course of an investigation into their possible terrorist ties. The Department of Justice and the FBI will continue to provide information for DHS to use in that process.

Senator Kennedy: Anti-Terrorism Legislation

1. **Which party was in control of each House of Congress in 1996 when the Anti-Terrorism Bill was being considered?**

2. **In April of 1996, when Senator Biden tried to strengthen the bill by restoring certain provisions of what I called "the strong bipartisan legislation passed by the Senate" which had been stripped out in Conference, which party moved to kill Senator Biden's efforts?**

3. **What was the vote, by party, to kill each of Senator Biden's motions seeking to strengthen the bill?**

4. **How did each of the Senators now on the Judiciary Committee vote on the motions to kill the Biden motions to recommit in order to strengthen the bill?**

5. **Did anyone from either party make any effort to add a provision to the conference bill to change the FBI's rules on communications between those working on intelligence matters and those working on criminal cases?**

6. **Was the denial of meaningful habeas corpus review to state death row inmates in the 1996 law a feature which Mr. Fitzgerald or anyone else in any U.S. Attorney's office believed would make a significant contribution to the anti-terrorism effort?**

Answer to Questions 1 - 6

For the most part, your questions illustrate the shortcomings in the structure and tools provided to the law enforcement and intelligence communities prior to the passage of the USA PATRIOT Act. I cannot emphasize enough how vital the Act has been to the Justice Department's efforts in the investigation and prosecution of terrorists, and in the protection of the American people from future terrorist attacks. Those of us on the front lines of the war against terrorism are very grateful that you recognized the value of the tools provided by the Act and therefore voted in its favor together with an overwhelming bipartisan majority of your colleagues.

Senator Kennedy: White House Leak and Intimidation Investigation

7. **If you yourself make a determination that someone in the normal reporting chain has an actual conflict of interest or an appearance of conflict of interest, or that the sharing of information regarding a sensitive investigation with someone in the normal chain might detract from the public's trust in the Department or from the public's faith in the integrity and effectiveness of the investigation, would you make that determination known to the person involved?**

8. **Under which of those circumstances would you decline to allow such a person to receive sensitive information about the investigation in question?**

9. **Would it matter whether that person is above or below you in the chain of command?**

10. **If the person were above you in the chain of command, and insisted on being allowed to receive the sensitive information, what would you do?**

11. **At what point do you think you would have an ethical obligation to report the situation to and seek the guidance of:**
    - **the Deputy Attorney General?**
    - **the Inspector General of the Department?**
    - **the Office of Professional Responsibility?**
    - **the Bar ethics committee in the jurisdiction in which the person in question is admitted to the bar?**
    - **the Bar ethics committee in the jurisdiction in which you are admitted to the bar?**

12. **At what point would you feel ethically compelled to resign rather than provide information to a person who you believed was legally or ethically disqualified from receiving it?**

Answer to Questions 7 - 12

It would not be appropriate for me to comment in the abstract on the decisions that I might make during the course of an investigation. But I will say that it is difficult for me to imagine a Department of Justice official insisting on receiving sensitive information in the situations you describe. I have great respect for my colleagues in the Department; they are men and women of character who share my commitment to earning and preserving the public trust.

This shared commitment is well illustrated by the Attorney General's recent decision to recuse himself and his office staff from further involvement in the investigation of the unauthorized disclosure of a CIA officer's identity. The Attorney General did so out of an abundance of caution and agreed that it was appropriate to appoint a special counsel to

oversee this investigation in order to avoid any appearance of a conflict of interest and to ensure that the American people maintain the utmost confidence in the ongoing investigation. The Attorney General, along with every official in the Department, believes that the unauthorized disclosure of classified information is a very serious matter, and that this investigation, like all others, should continue to be handled aggressively, thoroughly, and professionally. I am certain that U.S. Attorney Patrick Fitzgerald, the special counsel appointed by the Deputy Attorney General, will continue the professional work done to date. A career prosecutor of absolute integrity and impeccable judgment, he will do what the team has done to date—follow the facts wherever they lead.

13. **Have you in fact undertaken to make such a determination with respect to the appropriateness of Mr. Ashcroft's receipt of information on the White House leak/intimidation investigation?**

14. **If not, why not?**

15. **If so, with whom did you consult on the issue?**
    - **What was your determination on the issue?**
    - **Have you informed the Attorney General of your determination?**
    - **What was his response?**
    - **To the extent your determination required you, in your opinion, to cease or restrict the provision of information to the Attorney General, have you done so?**

Answer to Questions 13 - 15

I am reluctant to discuss the details of a pending investigation. As I described above, the Attorney General has recused himself and his office staff from further involvement in this matter. Based on his review of the totality of the circumstances and all of the evidence developed to date, he decided to step aside in an abundance of caution to avoid any appearance of a conflict of interest. The briefings that the Attorney General received up until that date on the investigation's progress were entirely appropriate. First, until he recused himself, the Attorney General, as the senior law enforcement officer for the United States, had responsibility for the investigation. Second, even with recusal a possibility, the Attorney General had to learn sufficient facts about the case in order to make a thoughtful and reasoned decision to recuse himself.

The Deputy Attorney General, who became the acting attorney general for purposes of this case, then appointed U.S. Attorney Patrick Fitzgerald as special counsel to oversee the investigation. Rather than supervise the investigation himself in consultation with me, the Deputy Attorney General placed responsibility for the investigation with someone who is not in regular contact with national security officials here in Washington. This allows the Deputy Attorney General and me to focus on the Department's top priority of fighting terrorism. By appointing Mr. Fitzgerald as special counsel, the Deputy Attorney

General has also made sure that the investigation will continue to be conducted in a manner consistent with the impartiality, expertise, and integrity that Mr. Fitzgerald has shown throughout his long career.

Senator Feingold

1. **In the government's motion to dismiss the case challenging the use of section 215 of the PATRIOT Act, *Muslim Community Association of Ann Arbor* v. *Ashcroft*, currently pending in the U.S. District Court for the Eastern District of Michigan, the government alleges that a section 215 order can be challenged before the Foreign Intelligence Surveillance Act (FISA) court. (Mot. To Dismiss at 21, n. 8).**

   a) **Please identify what statutory authority exists for this proposition.**
   b) **Are there any materials, policies, or procedures that exist that confirm or support this statement? If so, please provide copies of these materials, policies, or procedures.**

This matter is still pending in district court. While the litigation is ongoing, it would be inappropriate for me to comment beyond what the Government has already said in the case. I note that the Government's position is explained at some length in the Government's reply brief and in the transcript of the oral argument. In the Government's reply brief on the motion to dismiss, the Government explained that "when Congress conferred jurisdiction on the court to issue an order requiring production of documents, it explicitly authorized that court to determine whether the order complies with the statute (50 U.S.C. § 1861(c)(1)) and implicitly authorized the court to ensure that its order is constitutional." Reply Br. at 15-16. The reply brief provides citations to an opinion of the FIS Court (*In re Sealed Case*, 310 F.3d 717, 737 (FIS Ct. of Rev. 2002)) and the legislative history of the Patriot Act as demonstrating that the FIS Court has authority to ensure that its orders are constitutional. Reply Br. at 15-16.

In addition, the Government's reply brief and the transcript of the oral argument explain at least two mechanisms for the recipient of an order under Section 215 to obtain review of that order by the FIS Court. *First*, the FIS Court could hear a pre-compliance motion to quash or modify the Section 215 order. As the Government stated at oral argument, "There is not a single word in the Patriot Act, Section 215, that purports to block any recipient from bringing an appropriate motion before producing the records before the Foreign Intelligence Surveillance Court. Not a single word." Oral Arg. Tr. 7. As the Government explained, absent congressional preclusion of a judicial forum to address constitutional objections to a Section 215 order, the FIS Court should be presumed to be available for this purpose. *Id.*

Also, as the Government explained in the pending litigation, the recipient of a Section 215 order could obtain review by the FIS Court through a contempt proceeding. The Government's reply brief explains:

> [N]othing in Section 215 authorizes the FIS Court to impose any sanction for contempt without affording the subpoenaed party notice and an opportunity to be heard. The FIS Court, like all courts, undoubtedly has inherent power to punish for contempt the disobedience of its orders. *Chambers v. NASCO, Inc.*, 501 U.S.

> 32, 44 (1991); *Young v. United States ex rel. Vuitton Et Fils*, 481 U.S. 787, 795 (1987). However, a court "must exercise caution in invoking its inherent power, and it must comply with the mandates of due process . . . ." *First Bank of Marietta v. Hartford Underwriters Insurance Co.*, 307 F.3d 501, 511 (6th Cir. 2002) (*quoting Chambers*, 501 U.S. at 50). In criminal contempt proceedings, defendants must "be advised of charges, have a reasonable opportunity to respond to them, and be permitted the assistance of counsel and the right to call witnesses." *Young*, 481 U.S. at 798-99. A civil contemner is entitled to "proper notice and an impartial hearing with an opportunity to present a defense." *National Labor Relations Board v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 589 (6th Cir. 1987).
>
> Even if the FIS Court does not rule on a pre-production challenge to a Section 215 order, if the recipient of the order claims that it "is unduly burdensome or otherwise unlawful, he may refuse to comply and litigate those questions in the event that contempt or similar proceedings are brought against him." *United States v. Ryan*, 402 U.S. 530, 532 (1971). "[T]he procedure described in Ryan seems an eminently reasonable method to allow precompliance review." *Maness v. Meyers*, 419 U.S. 449, 460 (1975).

Government's Reply Br. at 15-16.

Senator Schumer

1. **You testified that you regularly brief Attorney General Ashcroft on the CIA leak investigation and provide enough details "for him to understand meaningfully what's going on in the investigation," including the identities of Department interviewees.**

   Your regular briefings with Attorney General Ashcroft appear to be inconsistent with his typical briefing practices, which have been described as "hands-off."

   On October 13, the Legal Times reported that "[u]nlike other attorneys general who held daily or weekly meetings with the heads of DOJ units and agencies, Ashcroft only rarely sits down face-to-face with members of the department's senior management," and that "most matters are filtered through longtime Chief of Staff David Ayres and Deputy Chief of Staff David Israelite."

   Please explain why the briefing practices are apparently different for the CIA leak investigation, particularly given the heightened concerns of political influence and repeated requests for the Attorney General's recusal in the matter?

   I can say that the Attorney General, like everyone else in the Department of Justice, considers the unauthorized disclosure of classified information to be a very serious matter, and that everyone involved in this investigation is giving it the resources and the attention that any such major investigation requires. I can also say that it is my impression, based on my experience over the past couple of years, that virtually all of the Department's senior management has significant contact and interaction with the Attorney General in the course of fulfilling their duties.

   I am unable to speak to all of the many briefings from senior management or others in the Department that the Attorney General receives in the course of fulfilling his responsibilities. Of course, since the Attorney General has recused himself from this investigation, he has no longer been briefed on its progress.

2. **Please disclose details regarding the structure of this investigation. Who is in the decision-making chain and what are their roles? Who is being briefed and generally what they are being briefed regarding [sic]? Who within the Department of Justice is communicating (whether directly or indirectly) with those in the decision-making chain? Who is communicating with White House officials regarding the investigation?**

   Upon the Attorney General's recusal from this matter, the Deputy Attorney General appointed U.S. Attorney Patrick Fitzgerald as special counsel and delegated to him all of the approval authorities necessary to conduct an independent investigation. He has the power and authority to make those prosecutive judgments that he deems appropriate, without having to seek the approval of the Deputy Attorney General or anyone else at the

Department of Justice. Mr. Fitzgerald alone will decide how to staff this matter to ensure that the progress made to date is continued; how to continue the investigation; when and how to communicate with officials of other pertinent department and agencies of the federal government, including the White House, during the course of the investigation; and what prosecutive decisions to make. The Deputy Attorney General and I expect that Mr. Fitzgerald will consult with us only should he deem it necessary to the conduct of the investigation.

3. **What protections have been put in place to ensure that no one with an actual conflict of interest or the appearance of a conflict of interest influences the investigation? When were those protections put in place? If those protections have been put in place regarding specific individuals, please identify them.**

The fact that the investigation has been conducted from the beginning by career agents and prosecutors has ensured that it is being conducted aggressively, thoroughly, and professionally. The appointment of U.S. Attorney Patrick Fitzgerald as special counsel on December 30, 2003, ensures that this will continue to be the case. Given the dedication and integrity that Mr. Fitzgerald has shown throughout his long career, I am certain that he would not stand for an investigation under his leadership to be influenced by an individual with a conflict of interest, real or apparent.

4. **Has the Attorney General communicated directly with anyone, other than yourself, who is actively involved in the leak investigation, including but not limited to John Dion and the special agent in charge of the investigation? Has the Attorney General communicated indirectly with anyone who is actively involved in the investigation? Please describe in as much detail as possible the general subject matter of those communications.**

I am unable to say who has and who has not spoken with the Attorney General. I am unaware of any direct conversations on this topic between the Attorney General and Mr. Dion. I can say that Mr. Dion has been told by others in no uncertain terms of the Attorney General's belief that this investigation is to be conducted aggressively, impartially, and professionally—in short, in a manner consistent with Mr. Dion's exemplary career.

5. **You testified that the leak investigation is being handled "aggressively" and "by the books." In general, in aggressive investigations being run by the book:**

   a. **Do prosecutors wait four days from opening an investigation to request that documents obviously relevant to the investigation be preserved?**

   b. **Absent compelling extenuating circumstances, do prosecutors accede to requests from general counsels for overnight delays in disseminating preservation directives to employees who might possess documents relevant to the investigation?**

c. Do prosecutors telegraph in the newspaper their intent to seek documents from individuals who may be subjects or targets of an investigation?

d. Do prosecutors wait weeks to empanel a grand jury?

These are very difficult questions to answer in the abstract because every investigation is unique. Any particular decision as to how best to conduct an investigation would require careful consideration of many different factors and circumstances. I can assure you, however, that it is the practice of the career agents and prosecutors who have been handling this case, and the practice of Mr. Fitzgerald himself, to investigate every case aggressively and to follow all relevant facts and leads.

6. **Has a grand jury been empaneled in the leak investigation case? If so, when was it empaneled and when did the first witness testify before it? As of the date of your reply, how many different witnesses have testified before the grand jury in this case?**

I am unable to provide such details of a pending investigation.

7. **On October 29, the New York Times reported that agents working on the leak investigation have been required by DOJ to sign special non-disclosure agreements, separate and apart from the non-disclosure agreements they are required to sign as a condition of employment. I support your efforts to protecting against improper leaks from this investigation. However, I am told that agents are almost never asked to sign separate non-disclosure agreements, even in sensitive spy investigations.**

Please describe how routine it is to require all agents working on a case to sign separate non-disclosure agreements (e.g., in how many investigations over the last year have the agents on a case been required to sign separate non-disclosure agreements?). If this is not a routine practice, why have separate non-disclosure agreements been required in this case, but not in other matters where unauthorized disclosures could be even more damaging to national security?

FBI Director Robert Mueller is better positioned to answer questions regarding agents' routine practices in investigations. But neither of us can discuss the details of an ongoing investigation.

8. **On October 29, the New York Times also reported that Michael Mason, the director of the FBI's Washington, DC, office, was removed from the leak investigation and precluded from receiving information about it. Why was Mr. Mason, who reportedly supervises agents on the case and is reportedly one of the FBI's top agents, removed from the case?**

Again, the active, ongoing status of this investigation prevents me from discussing such details publicly.

I

108TH CONGRESS
1ST SESSION

H. R. 3037

To strengthen antiterrorism investigative tools, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 9, 2003

Mr. FEENEY introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To strengthen antiterrorism investigative tools, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Antiterrorism Tools
5 Enhancement Act of 2003".

6 **SEC. 2. NATIONWIDE SEARCH WARRANTS IN TERRORISM**
7 **INVESTIGATIONS.**

8 Rule 41(b)(3) of the Federal Rules of Criminal Pro-
9 cedure is amended to read as follows:

10 "(3) a magistrate judge—in an investigation of
11 (A) a Federal crime of terrorism (as defined in 18

1 U.S.C. 2332b(g)(g)); or (B) an offense under 18
2 U.S.C. 1001 or 1505 relating to information or pur-
3 ported information concerning a Federal crime of
4 terrorism (as defined in 18 U.S.C. 2332b(g)(5))—
5 having authority in any district in which activities
6 related to the Federal crime of terrorism or offense
7 may have occurred, may issue a warrant for a per-
8 son or property within or outside that district.".

9 **SEC. 3. ADMINISTRATIVE SUBPOENAS IN TERRORISM IN-**
10 **VESTIGATIONS.**

11 (a) IN GENERAL.—Chapter 113B of title 18, United
12 States Code, is amended by inserting after section 2332f
13 the following:

14 **"§ 2332g. Administrative subpoenas in terrorism in-**
15 **vestigations**

16 "(a) AUTHORIZATION OF USE.—In any investigation
17 concerning a Federal crime of terrorism (as defined in sec-
18 tion 2332b(g)(5)), the Attorney General may subpoena
19 witnesses, compel the attendance and testimony of wit-
20 nesses, and require the production of any records (includ-
21 ing books, papers, documents, electronic data, and other
22 tangible things that constitute or contain evidence) that
23 he finds relevant or material to the investigation. A sub-
24 poena under this section shall describe the records or
25 items required to be produced and prescribe a return date

1 within a reasonable period of time within which the
2 records or items can be assembled and made available.
3 The attendance of witnesses and the production of records
4 may be required from any place in any State or in any
5 territory or other place subject to the jurisdiction of the
6 United States at any designated place of hearing; except
7 that a witness shall not be required to appear at any hear-
8 ing more than 500 miles distant from the place where he
9 was served with a subpoena. Witnesses summoned under
10 this section shall be paid the same fees and mileage that
11 are paid to witnesses in the courts of the United States.
12 "(b) SERVICE.—A subpoena issued under this section
13 may be served by any person designated in the subpoena
14 as the agent of service. Service upon a natural person may
15 be made by personal delivery of the subpoena to him or
16 by certified mail with return receipt requested. Service
17 may be made upon a domestic or foreign corporation or
18 upon a partnership or other unincorporated association
19 that is subject to suit under a common name, by delivering
20 the subpoena to an officer, to a managing or general
21 agent, or to any other agent authorized by appointment
22 or by law to receive service of process. The affidavit of
23 the person serving the subpoena entered by him on a true
24 copy thereof shall be sufficient proof of service.

1 "(c) ENFORCEMENT.—In the case of the contumacy
2 by, or refusal to obey a subpoena issued to, any person,
3 the Attorney General may invoke the aid of any court of
4 the United States within the jurisdiction of which the in-
5 vestigation is carried on or the subpoenaed person resides,
6 carries on business, or may be found, to compel compli-
7 ance with the subpoena. The court may issue an order re-
8 quiring the subpoenaed person, in accordance with the
9 subpoena, to appear, to produce records, or to give testi-
10 mony touching the matter under investigation. Any failure
11 to obey the order of the court may be punished by the
12 court as contempt thereof. Any process under this sub-
13 section may be served in any judicial district in which the
14 person may be found.

15 "(d)(1) NONDISCLOSURE REQUIREMENT.—If the At-
16 torney General certifies that otherwise there may result
17 a danger to the national security, no person shall disclose
18 to any other person that a subpoena was received or
19 records were provided pursuant to this section, other than
20 to (A) those persons to whom such disclosure is necessary
21 in order to comply with the subpoena, (B) an attorney to
22 obtain legal advice with respect to testimony or the pro-
23 duction of records in response to the subpoena, or (C)
24 other persons as permitted by the Attorney General. The
25 subpoena, or an officer, employee, or agency of the United

1 States in writing, shall notify the person to whom the sub-
2 poena is directed of such nondisclosure requirement. Any
3 person who receives a disclosure under this subsection
4 shall be subject to the same prohibition of disclosure.

5 "(2) ENFORCEMENT OF NONDISCLOSURE REQUIRE-
6 MENT.—Whoever knowingly violates subsection (d)(1) of
7 this section shall be imprisoned for not more than one
8 year, and if the violation is committed with the intent to
9 obstruct an investigation or judicial proceeding, shall be
10 imprisoned for not more than five years.

11 "(3) TERMINATION OF NONDISCLOSURE REQUIRE-
12 MENT.—When the Attorney General concludes that a non-
13 disclosure requirement no longer is justified by a danger
14 to the national security, an officer, employee, or agency
15 of the United States shall notify the relevant person that
16 the prohibition of disclosure is no longer applicable.

17 "(e) JUDICIAL REVIEW.—At any time before the re-
18 turn date specified in the summons, the person or entity
19 summoned may, in the United States district court for the
20 district in which that person or entity does business or
21 resides, petition for an order modifying or setting aside
22 the summons. Any such court may modify or set aside
23 a nondisclosure requirement imposed under subsection (d)
24 at the request of a person to whom a subpoena has been
25 directed, unless there is reason to believe that the non-

1 disclosure requirement is justified because otherwise there
2 may result a danger to the national security. In all pro-
3 ceedings under this subsection, the court shall review the
4 government's submission, which may include classified in-
5 formation, ex parte and in camera.

6 "(f) IMMUNITY FROM CIVIL LIABILITY.—Any per-
7 son, including officers, agents, and employees, who in good
8 faith produce the records or items requested in a subpoena
9 shall not be liable in any court of any State or the United
10 States to any customer or other person for such produc-
11 tion or for nondisclosure of that production to the cus-
12 tomer or other person.

13 "(g) GUIDELINES.—The Attorney General shall issue
14 guidelines to ensure the effective implementation of this
15 section.".

16 (b) AMENDMENT TO TABLE OF SECTIONS.—The
17 table of sections at the beginning of chapter 113B of title
18 18, United States Code, is amended by inserting after the
19 item relating to section 2332f the following new item:

"2332g. Administrative subpoenas in terrorism investigations.".

○

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

December 22, 2004

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Enclosed please find responses and (related materials) to questions posed by Senator Leahy to the Department's witnesses following their appearances at a hearing before the Committee on October 21, 2003. The subject of the hearing was "Protecting Our National Security from Terrorist Attacks: A Review of Criminal Terrorism Investigations and Prosecutions." We regret the delay in our responses; however, we did not receive the questions until approximately five months after the hearing took place (*i.e.*, in late March 2004).

We hope that you will find this information helpful. Please feel free to call upon us if we may be of additional assistance in connection with this or any other matter.

Sincerely,

William E. Moschella
Assistant Attorney General

Enclosures

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

Hearing Before the Senate Judiciary Committee
"Protecting Our National Security From Terrorist Attacks:
A Review of Criminal Terrorism Investigations and Prosecutions."

October 21, 2003

QUESTIONS BY SENATOR PATRICK LEAHY
FOR ASSISTANT ATTORNEY GENERAL CHRISTOPHER WRAY

1. What involvement, if any, did the Attorney General have in the preparation of your testimony for the October 21 hearing?

RESPONSE: The testimony was prepared the way Department's testimony has been prepared for many years. Draft testimony is reviewed by various offices within the Department to ensure that it represents the views of the entire Department and the Administration.

2. Attorney General Ashcroft last appeared before this Committee on March 4, 2003, nearly eight months ago. When can the Committee expect to receive his responses to the written questions submitted by Members following that hearing?

RESPONSE: On December 18, 2003, the Department forwarded to the Committee responses to the majority of questions posed to the Attorney General. The Department responded to the remaining questions in a June 7, 2004, transmittal to the Committee.

3. During the October 21 hearing, Senator Hatch twice referred to the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. 104-132), stating that he had "tried to get a number of these provisions [*i.e.*, provisions that are currently in the PATRIOT Act] into law then" but that he was "stopped then by the far Left and the far Right complaining about American civil liberties." He further stated, "had we had those provisions ... we might very well have indicted and caught these terrorists on 9/11."

(A) Please identify any provisions of the Antiterrorism and Effective Death Penalty Act, as originally introduced in the Senate (as S.735), that were not enacted in the 104th Congress, but were later specifically enacted by the USA PATRIOT Act.

RESPONSE: Section 515 of the original version of AEDPA (S. 735) would have amended 18 U.S.C. § 2516 to expand the list of wiretap predicates to include a number of new crimes, including some terrorism-related crimes. Some of these terrorism-related crimes—specifically, 18 U.S.C. §§ 2332, 2332a, 2332b, and 2339A—were not added as wiretap predicates in the 104th Congress. However, these offenses, along with others, finally did become wiretap predicates in section 201 of the USA PATRIOT Act. However, it may be best to simply seek clarification from the Chairman regarding the quoted statements.

(B) With respect to any such provisions, please assess whether its passage in 1996 might have enabled law enforcement to thwart the 9/11 attacks.

RESPONSE: It is impossible to assess whether any one particular provision of the USA PATRIOT Act, by itself, could have enabled law enforcement and intelligence authorities to thwart the attacks of September 11. As the scope of the 9/11 Commission's work demonstrates, a broad array of factors affects the Government's capacity to detect, disrupt, and prevent acts of terrorism. Members of the law enforcement and intelligence communities require a correspondingly broad set of tools in order to flexibly and aggressively confront terrorists and their supporters. In a world where our enemies' determination does not flag and their sophistication grows, removing any one of these tools from our agents' investigative arsenal dangerously hinders their ability to protect the American people from terrorist attacks.

Toward that end, I believe we can all agree that there were shortcomings in the structure and tools provided to the law enforcement and intelligence communities prior to the passage of the USA PATRIOT Act. I cannot emphasize enough how vital the Act has been to the Justice Department's efforts in the investigation and prosecution of terrorists, and in the protection of the American people from future terrorist attacks. Those of us on the front lines of the war against terrorism are very grateful that you recognized the value of the tools provided by the Act and therefore voted in its favor together with an overwhelming bipartisan majority of your colleagues.

4. This week's *Newsweek* magazine features an article by Daniel Klaidman and Michael Isikoff entitled "Lost in Translation: The Feds listen in on terrorists every day. Too often they can't understand a word they hear." According to this article, "Today, more than two years after the 9/11 attacks, the FBI is still woefully short of translators."

(A) I authored a provision of the PATRIOT Act (section 205) that was designed to expedite the hiring of translators by the FBI. In response to my inquiry as to how that provision was being implemented, the Department advised (on July 17, 2003): "To date, the FBI's success in recruiting, vetting, and hiring linguists has eliminated the need to implement the provisions set forth in section 205 of the Act." Please explain the inconsistency between the Department's position on July 17 and its position three months later, on October 14, when Director Mueller announced that more translators were needed.

RESPONSE: By letter dated May 6, 2004, the Department has responded to this inquiry. For your convenience, we have enclosed a copy of our May 6, 2004, communication.

(B) How many translators has the FBI employed since September 11, 2001? Detail the language each translator is qualified to translate.

RESPONSE: By letter dated May 6, 2004, the Department has responded to this inquiry. For your convenience, we have enclosed a copy of our May 6, 2004, communication.

(C) According to the *Newsweek* article, "The bureau's slow progress [in hiring translators] is not for lack of money. Rather, the FBI's understandable but obsessive concern with security, its sometimes cumbersome bureaucracy and, critics say, the remnants of its nativist culture make it a difficult place for Muslims and foreign-born linguists to get jobs and work." Do you agree that the delay in hiring translators is "not for lack of money," and if so, how do you account for it?

RESPONSE: By letter dated May 6, 2004, the Department has responded to this inquiry. For your convenience, we have enclosed a copy of our May 6, 2004, communication.

(D) According to the *Newsweek* article, "FBI Director Robert Mueller has declared that he wants a 12-hour rule: all significant electronic intercepts of suspected terrorist conversations must be translated within 12 hours." Yet "every week ... hundreds of hours of tapes from wiretaps and bugs pile up in secure lockers, waiting, sometimes for months on end, to be deciphered." Please estimate the number of hours of talk by suspected terrorists that are going untranslated (i) for more than 12 hours, (ii) for more than 48 hours, (iii) for more than one week, and (iv) for more than one month.

RESPONSE: By letter dated May 6, 2004, the Department has responded to this inquiry. For your convenience, we have enclosed a copy of our May 6, 2004, communication.

5. 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 PATRIOT Act to obtain records from libraries -- or from anyone else, for that matter. 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." At the October 21 hearing, you confirmed that the FBI can compel the production of "certain library records" using NSLs, but that you were "not aware of" its having done so.

(A) Please be more specific: Has the FBI served any NSLs on libraries since September 11, 2001 – yes or no – and if yes, on how many occasions?

RESPONSE: The FBI has advised that such information about the use of National Security Letters (NSLs) is classified. The Bureau can provide the Committee with this information under separate and classified cover.

(B) Given your testimony on October 21 regarding NSLs, can we assume that information regarding requests made under 18 U.S.C. §2709(b) is 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: According to the FBI, information regarding the use of NSLs remains classified unless and until the FBI determines otherwise.

6. 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.

(A) 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?

RESPONSE: The Department has issued no guidance specifically tailored 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. But historically, terrorists and spies *have* used libraries to plan and carry out activities that threaten our national security. We should not allow libraries to become safe havens for terrorist or clandestine activities. As the hindsight analysis of the 9/11 Commission has shown, we cannot afford to leave gaps in the abilities of the law enforcement and intelligence communities to discover the information required to prevent terrorist attacks and protect the American people.

(B) 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: Please see response to 6A above.

7. In December 2002, amid press reports that the Justice Department was classifying cases as "terrorism" cases when they were not, in fact, terrorism-related, the House Committee on Government Reform asked the General Accounting Office ("GAO") to do a study. Specifically, the GAO was asked to determine whether the claimed "number of terrorist arrests and convictions are accurate, and if the cases labeled as terrorist cases meet any generally accepted definition of terrorism." The GAO issued a report on February 19, 2003, confirming that there were substantial classification problems, and calling for better management oversight and internal controls to ensure accuracy of terrorism-related statistics.

Recent data obtained by the Transactional Records Access Clearinghouse ("TRAC") from the Department of Justice suggests that the Department is still overstating the number of "terrorism" cases it is bringing. According to this data, in fiscal year 2003, there were 616 defendants convicted in cases classified as "terrorism" cases; of those 616 defendants, only 236 were sentenced to prison terms, with the median prison sentence being only <u>two months</u>. When I brought this data to your attention at the hearing, you stated that the Department

"frequently" brought lesser, non-terrorism charges against suspected terrorists (in your words, "somebody about whom there is intelligence linking them to terrorist organizations") in order to protect national security and other classified information that could otherwise be jeopardized through the criminal discovery process.

(A) Since September 11, 2001, just how "frequently" has the judgment been made to charge a lesser offense than a terrorism offense despite intelligence linking the defendant to a terrorist organization? What is the internal procedure and/or approval process for determining how such cases should be charged?

RESPONSE: We do not keep records on this specific issue, so we cannot say with precision how many criminal cases against suspected terrorists with links to terrorism have been brought charging non-terrorism offenses to protect against disclosure of national security and other classified information. Proposed international terrorism charges must be discussed with the Criminal Division's Counterterrorism Section and approved by the Criminal Division prior to charging. In the discussion process, the evidence is evaluated and various potential charges considered. During this process, issues as to limitations on the use of certain evidence and national security and classified information are fully explored, often with input from the FBI and other relevant members of the Intelligence Community. Such limitations may make that evidence unavailable for use at trial. The unavailability of evidence affects whether a potential charge is readily provable and ultimately bears on whether terrorism charges are brought or other disruption approaches, including non-terrorism charges, are pursued. The final approach pursued is reached by discussion and consultations between the relevant U.S. Attorney's Office, the Criminal Division, and other pertinent Department components.

(B) How do these charging decisions comport with the Attorney General's recent memorandum to all federal prosecutors stating the "policy of the Department of Justice that, in all federal criminal cases, federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case." (National security and the release of foreign intelligence information are not listed as an exception to this general duty).

RESPONSE: All charging decisions in terrorism cases must comport with the Attorney General's memorandum requiring that prosecutors charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case. Although there may be instances in which, in order to disrupt or prevent a potential terrorist act, charges in a terrorism case may be brought earlier rather than later, the prosecutor would still bring the most serious, readily provable offense or offenses that are supported by the facts at that time. In addition, "readily provable" means provable at trial or court. If there is intelligence in an investigation that is credible or reliable, but a decision is made not to bring a criminal prosecution because national security interests would prevent that evidence from being presented in court or at trial, then the charge would not be considered a "readily provable" offense.

The fact that many terrorism investigations result in less serious charges does not mean that lesser offenses are being charged in cases in which readily provable evidence exists to prosecute a greater charge.

Post-9/11, it is the mission of the Department of Justice to deter, detect, and disrupt terrorist activities. Proactive prosecution of terrorism-related targets on less serious charges is often an effective method of deterring and disrupting potential terrorist planning and support activities. Moreover, pleas to these less serious charges often result in defendants who cooperate and provide information to the Government—information that can lead to the detection of other terrorism-related activity.

8. Your written testimony reflected that, since the 9/11 attacks, 284 defendants have been charged as a result of terrorism investigations, of whom 152 have been convicted or pled guilty. As outlined above, these numbers differ significantly from the TRAC analysis based on Department data for fiscal year 2003. TRAC has suggested that the data you presented was likely a subset of "international terrorism" cases rather than all terrorism cases, using Department of Justice program descriptions. If that is correct, then TRAC calculates the median sentence for the 152 convictions you referenced as about 4 months.

(A) What data sets are you using for capturing the number of terrorism charges and convictions since September 11, 2001?

RESPONSE: The cases referenced in my testimony reflected those cases identified by the Criminal Division as terrorism or anti-terrorism cases since September 11, 2001. These cases include certain investigations conducted by Joint Terrorism Task Force (JTTF) agents and any other cases known to the Criminal Division in which there is evidence that an individual was engaged in terrorist activity or associated with terrorists or foreign terrorist organizations. 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.

It should be noted that the Criminal Division tracks a subset of cases that are reported through the case management system of the United States Attorney's Offices (USAO). 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 in cases where the defendant is reasonably linked to terrorist activity. Of the matters tracked by the Criminal Division, since September 11, 361 individuals have been charged with criminal offenses as a result of international terrorism investigations. Of these defendants, 192 have been convicted or have pleaded guilty.

These figures include 84 defendants who have been charged since September 11 with terrorism offenses—specifically, violations of the material support statutes (18 U.S.C. §§ 2339A and 2339B) and the International Emergency Economic Powers Act (IEEPA, 50 U.S.C. § 1701 *et seq.*). These cases, brought in 18 different judicial districts across the country, represent a striking increase over the number of material support prosecutions brought previously—only five defendants were charged with material support offenses before January 2000, and twelve more were charged before the PATRIOT Act was enacted.

(B) Please provide a detailed listing of the 284 defendants you referred to in your statement. For those who have been convicted or pled guilty, please indicate the offense of conviction and the sentence.

RESPONSE: The listing you request is enclosed. It does not include information that is presently classified, under seal, or nonpublic.

(C) What were the average and median sentences imposed in the 284 cases you referenced in your statement?

RESPONSE: The Department does not maintain average and median sentences because these figures can be misleading. In the 284 cases referenced in my statement, the average sentence imposed was 191 months (approximately 16 years), in part because one defendant was sentenced to a total of 155 years in prison. The median sentence imposed was six months, due in part to the fact that a number of defendants were convicted of offenses that do not carry lengthy sentences. Also, these figures exclude the life sentence imposed on Richard Reid. Sentence information for each defendant is included on the enclosed list.

I note that the fact that a defendant was not charged with and convicted of a terrorism offense, or publicly linked to terrorism by the FBI, does not mean that law enforcement had no concerns or evidence regarding that individual's connection with terrorism. Likewise, the fact that an alien was deported rather than prosecuted does not mean that he had no knowledge of, or connection to, terrorism. In certain cases, evidence of a defendant's knowledge of, or connection to, terrorist activity may not be sufficient to prove a terrorism crime beyond a reasonable doubt, or proving a criminal offense may require the disclosure of sensitive sources or classified information. In situations like these, the best alternative from a national security and law enforcement perspective is to charge the defendant under other applicable criminal statutes, or—if the defendant is an alien eligible for removal—to remove him from the United States and do our best to ensure that he does not return. While these alternatives do not yield sentences as lengthy as those imposed upon defendants convicted of terrorism offenses, they help the Department achieve its top priority: the detection, prevention, and disruption of terrorist activity.

(D) What efforts have been or are being made to improve the accuracy of the Department's case statistics?

RESPONSE: I am told that, before September 11, 2001, the Executive Office for United States Attorneys (EOUSA) had only two terrorism-related case classification codes—International Terrorism and Domestic Terrorism. These codes were established in FY 1995. Reflecting the new reality after September 11, EOUSA added codes for Terrorism-Related Hoaxes and Terrorist Financing, as well as several codes for Anti-Terrorism (such as Identify Theft, Immigration, and Violent Crime) to capture activity intended to prevent or disrupt potential or actual terrorist threats where the offense conduct would not fall within an existing code.

We are now using a broad range of prosecutions to disrupt activities that could facilitate or enable future terrorist acts. To ensure that our statistics capture all data on anti-terrorism cases, EOUSA, working with the Department's Criminal Division, on August 7, 2002, sent a memorandum to all U.S. Attorneys directing that appropriate cases pending and closed in Fiscal Year 2002 be reclassified if needed to reflect the new case classification codes. Under this directive, all Terrorism/Anti-Terrorism cases in Fiscal Year 2002 should have been re-sorted according to the new codes. With the transition to a new coding scheme so close to the end of the fiscal year, some U.S. Attorneys' offices did not reclassify already-closed cases.

Accurate statistics are a high priority, and EOUSA will continue to take every reasonable step to ensure that proper reclassification is completed and that future data entries are complete and accurate. EOUSA concurs with the recommendation of the General Accounting Office (GAO) to oversee and validate the accuracy of case classification and conviction data submitted by the U.S. Attorneys' offices. It is important to note, however, that a process does exist for the review of U.S. Attorney case management system data and that the "misclassifications" identified by GAO are the result of late notice to the United States Attorneys' offices of Terrorism and Anti-Terrorism code changes and insufficient time for offices to make the changes.

Each district is responsible for inputting the most up-to-date information into the Case Management System and is required to certify to the accuracy of the data twice a year. Although the statistics obtained through the Case Management System rely exclusively on each district's timely and accurate input, USAO supervisors and Assistant U.S. Attorneys (AUSAs) are reminded of the importance of providing accurate information, and AUSAs are evaluated as part of their yearly evaluations on their input to the Case Management System.

On April 9, 2003, EOUSA sent a directive to the U.S. Attorneys asking them to review all Terrorism and Anti-Terrorism matters to ensure that the most appropriate category code is assigned. Of course, the U.S. Attorneys exercise judgment in classifying individual cases based on the circumstances of each case. The EOUSA directive re-emphasized the critical role of the U.S. Attorneys in providing the Department with accurate and timely caseload data. The U.S. Attorneys are required to inform EOUSA that

they have completed this review process. Please be assured that EOUSA remains committed and will continue to work to ensure that the U.S. Attorneys' caseload data is as accurate as possible.

9. TRAC has served as a valuable resource by providing critical statistical analysis in the criminal justice area. Yet, since 2000, the Department has steadfastly refused to provide TRAC with the lead charge and program category information if a matter has been referred by law enforcement but had not been closed (by declination or otherwise) or resulted in charges being filed in court (by indictment, information, etc.). Prior to 2000, this same data had been released to researchers for years. Importantly, when the lead charge and program category data is released, the identity of the business or individual named in the referral is withheld so that there are no confidentiality issues. Moreover, after studies using the "program category" information raised questions about the accuracy of the Department's statistics, the Department announced in July 2002 that it would no longer disclose the program category codes associated with such matters to researchers, even though this information is central to understanding what investigative agencies are actually doing. Without this data and the codes, TRAC states that it is not possible to do a valid statistical analysis of what types of cases are referred from law enforcement agencies to the United States Attorneys. Why is the Department so reluctant to allow experienced researchers to analyze data that is critical to understanding resource allocation and other pressing policy issues in the criminal justice system?

RESPONSE: On October 29, 2002, the Department advised TRAC that it would withhold a limited amount of "program category" data in the Department's future production of its case management databases under the Freedom of Information Act ("FOIA"). We have determined that the continued release of "program category" files from records of ongoing criminal investigations in the Executive Office for United States Attorneys (EOUSA) Central System reasonably could be expected to interfere with the Department's law enforcement efforts, particularly in the area of anti-terrorism, and could endanger individuals' lives and physical safety. The information in the "program category" field, in combination with other information in the records, could enable criminal suspects to determine the existence, scope, and direction of investigations, and could endanger the safety of potential witnesses.

On December 6, 2002, TRAC filed a lawsuit in the District Court for the District of Columbia challenging the validity of the Department's exemption claim under the FOIA. Motions for summary judgment in two consolidated TRAC cases are now pending before District Judge Paul Friedman of the U.S. District Court for the District of Columbia. *Long* v. *Department of Justice*, No. 00-CV-211 PFJ, and *Long and Burnham* v. *Department of Justice*, No. 00-CV-2467 PLF. The motions relate to "program category" data. Because this matter is currently in litigation, we are unable to comment or provide additional information except as it exists in the public record.

The Department continues to release documents to TRAC each month, withholding only those portions that are exempt from disclosure under FOIA, such as information that

could invade personal privacy or interfere with ongoing law enforcement efforts. The Department continues to release to TRAC the "program category" information for records of all civil cases and for criminal cases that have proceeded beyond the investigative stage or for which criminal prosecution has been declined. Moreover, EOUSA periodically releases aggregate data in the Annual Statistical Report, including the number of cases in each program category, which allows for analysis of the agency priorities to which you refer.

10. 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. 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 "represent 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, it should be noted that 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, 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.

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, 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. If the court denies the motion to quash, the subpoena recipient could still refuse to comply. In this case, FBI agents could not unilaterally enforce the subpoena; rather, the Government would be required to seek another court order compelling compliance with the subpoena.

(B) Given 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: There are two key distinctions between section 215 of the PATRIOT Act and the Administration's proposal to extend administrative subpoena authorities into terrorism investigations. To begin with, while section 215 allows investigators to obtain court orders for access to business records and other tangible things in foreign intelligence investigations to protect against international terrorism or clandestine intelligence activities, the Administration's proposal would allow for the use of administrative subpoenas in criminal investigations involving federal crimes of terrorism. Section 215 of the PATRIOT Act and the Administration's administrative subpoena proposal thus relate to different types of investigations; the former can be used in intelligence investigations under FISA while the latter, if enacted, would be used in criminal investigations. For this reason, section 215 and the Administration's administrative subpoena proposal are not duplicative, and the existence of section 215 does not call into question the need for administrative subpoena authorities in terrorism investigations.

Additionally, investigators under section 215 of the PATRIOT Act are required to obtain a court order for the production of business records and other tangible items. Administrative subpoenas, on the other hand, may be issued by investigators without prior judicial involvement, though the recipient of an administrative subpoena may challenge the subpoena by filing a motion to quash in a United States district court. In many circumstances, therefore, the use of an administrative subpoena would be a much quicker way for investigators to obtain information critical to a terrorism investigation than would the use of a court order under section 215 of the PATRIOT Act. And, in terrorism investigations, where prevention is the most important objective, every minute counts.

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 such as health-care fraud. And if investigators are able to use an administrative subpoena to catch a corrupt doctor in a health-care fraud case, they should also be able to use an administrative subpoena to catch a terrorist.

(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 or records, such as communications transaction records, financial reports, and credit information, through the use of National Security Letters.

11. In your testimony on October 21, you stated that "Congress, itself, embedded a number of procedural safeguards in the PATRIOT Act including the fact -- and I can't emphasize this enough -- that almost everything the department does under the act is reviewed by an independent federal judge." Would you agree that there are a number of provisions in PATRIOT Act that do not require review by an independent federal judge? Would the Department support legislation that imposed such a check on any PATRIOT Act provision that does not currently contain one?

RESPONSE: While many, if not most, of the provisions of the PATRIOT Act require judicial approval, it is true that a number of provisions do not. However, requiring judicial review of the use of this limited subset of provisions would defeat their very purpose. The more difficult and time-consuming it is for investigators to use these provisions, the less likely it is that investigators will be able to obtain crucial information in critical investigations that may save the lives of innocent Americans.

One provision that fulfills the urgent need for streamlined processes in terrorism investigations is section 212, which allows communications providers to disclose records about their customers in emergency situations. Before the PATRIOT Act was enacted, if an Internet service provider (ISP) learned that a customer was about to commit a terrorist attack, and notified law enforcement, it could be subject to civil lawsuits—even if the disclosure saved lives. Section 212 allows communications providers to turn over information voluntarily in emergencies without fear of civil liability. Now, providers are permitted—but not required—to give law enforcement information in emergencies involving a risk of death or serious injury.

Communications providers have used this new authority to disclose vital information to law enforcement in a number of important investigations, including a bomb

threat against a high school. An anonymous person posted on an Internet message board a bomb death threat that specifically named a faculty member and several students. The message board's owner initially resisted giving law enforcement any information about the suspect for fear that he could be sued. Once agents explained section 212, the owner turned over evidence that led to the timely arrest of the individual responsible for the bomb threat. The message board's owner later revealed that he had been worried for the safety of the students and teachers for several days, and expressed relief that the PATRIOT Act permitted him to help.

Section 212 was also used in the investigation of the murder of journalist Daniel Pearl to obtain information that proved critical to identifying some of the perpetrators. On January 23, 2002, conspirators in Pakistan abducted Pearl, the *Wall Street Journal*'s South Asia Bureau Chief, and e-mailed various demands to media outlets. Accompanying these demands were photographs of Pearl in captivity, one of which depicted him in shackles with a gun pointed at his head.

After the first ransom message was received on a Saturday night, the Department of Justice used Section 212 to request emergency disclosures of relevant information from an ISP. One of the reasons it was necessary to use the emergency provisions of Section 212 was that, because the case was centered halfway around the world in Pakistan, information often arrived in the U.S. in the middle of the night, making it extremely difficult to get judicial process on short notice.

After the kidnappers killed and decapitated Daniel Pearl, Pakistani authorities found and arrested Ahmad Omar Saeed Sheikh (a/k/a Sheikh Omar), based in part on information obtained through PATRIOT Act authorities. Subsequently, a federal grand jury indicted Sheikh Omar for hostage taking and conspiracy to commit hostage-taking resulting in death. Both counts allege violations of 18 U.S.C. § 1203, for which the penalty is life imprisonment or death. Sheikh Omar is now in Pakistan, where he was tried and convicted on related charges. His convictions are currently on appeal.

These examples illustrate the importance of obtaining information quickly in terrorism investigations and the effectiveness of Section 212 in the hands of front-line investigators. Requiring judicial approval before allowing an ISP to voluntarily disclose communications in a life-threatening emergency would defeat the purpose of the provision by delaying time-sensitive disclosures.

12. In August 2002, a privacy consulting firm known as the Privacy Council, in conjunction with the *Boston Globe*, conducted a survey of corporate attorneys, privacy officers, airlines, hotel chains, travel agencies, car-rental companies, and other travel-related firms. The survey reflected that since 9/11, the FBI has increasingly requested and received employee personnel records from employers without a subpoena or warrant, and that such records were being voluntarily turned over to Federal investigators.

(A) Are Federal investigators routinely seeking voluntarily compliance with document requests that might otherwise be protected under privacy laws?

RESPONSE: According to the FBI, investigators routinely seek voluntary assistance from all sources likely to have helpful information. This includes those who have had contact with subjects of investigations and those who may be able to demonstrate activities or locations through documents such as employment records.

Privacy laws, such as the federal Privacy Act, do not apply to all documents or to all circumstances in which those documents may be provided to others. For example, the federal Privacy Act generally only applies to federal agencies (as defined at 5 U.S.C. § 552(f)(1)) and contains or permits a number of exemptions. While state privacy laws may provide additional protections, these will vary according to the jurisdiction and, like the federal law, typically do not and should not prevent voluntary assistance under all circumstances.

(B) Under what authority is the FBI obtaining data from employers regarding personnel records?

RESPONSE: FBI investigations are conducted pursuant to 28 U.S.C. § 533, 28 C.F.R. § 0.85, and other laws, regulations, and Attorney General Guidelines. The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations authorize the FBI to conduct certain investigative activities based on several levels of predication, including responding to leads and acting pursuant to preliminary inquiries or full investigations. In choosing which investigative technique to use, the Guidelines direct the FBI to consider the intrusiveness of the technique, including its potential effects on individuals' privacy and their reputations. For this reason, the Guidelines restrict interviewing a potential subject's employer or co-worker (unless the interviewee was the complainant) to circumstances where the FBI is acting pursuant to a full investigation, which is based on facts or circumstances that reasonably indicate that a federal crime has been, is being, or will be committed.

If an employer does not provide employment information voluntarily, it may be obtained through subpoena, judicially authorized search warrant, or other legally authorized means. The FBI has the authority to issue administrative subpoenas pursuant to child sex exploitation investigations (18 U.S.C. § 3486) and controlled substance investigations (21 U.S.C. § 876). The authority under section 3486 is extremely narrow and would not include the acquisition of employment records. While the authority under section 876 would permit the acquisition of employment records when relevant to drug investigations, this is not routine because such information is seldom relevant to drug investigations.

(C) How is the collected data being handled at the FBI?

RESPONSE: Internal FBI policy provides guidance regarding the proper procedures for the acquisition, storage, retrieval, and return of evidentiary materials, including records and other documents. Access to these materials is limited to those FBI and DOJ personnel with a need to know, and they are not disseminated to third parties except as permitted by law. When the retention of documentary evidence is no longer required, it is returned to its rightful owner or disposed of as otherwise appropriate.

13. In section 412 of the PATRIOT Act, Congress authorized the detention without charge of non-citizens, formally designated by the Attorney General as terrorist suspects, for up to seven days. After seven days, the law requires the government either to charge the aliens or release them. Prior to the enactment of the PATRIOT Act, on September 20, 2001, the Department issued an internal regulation permitting Justice officials to detain persons without charge for an unspecified period of time in "an emergency or other extraordinary circumstance."

Section 412 of the PATRIOT Act was negotiated with full knowledge of this regulation, and was intended to put a limit on the duration for which aliens – even those suspected of terrorism – could be held without charge. Despite its passage, however, aliens have been held for periods extending well beyond seven days without charge, under the regulation that predated the PATRIOT ACT.

(A) The Department was ordered in the PATRIOT Act to report to Congress every six months on its use of section 412. To my knowledge, we received only one report, after the first six months. The Department stated in that report that it had not used its new authority under section 412. How many times since we received that report, if ever, has the Department used the authority it requested under Section 412?

RESPONSE: The Department of Justice has never used this authority.

(B) How can the Administration continue to rely on its preexisting regulation, and detain individuals without charge for weeks or months, when Congress created a statutory option to detain individuals suspected of terrorist activity but limited that detention to seven days?

RESPONSE: Prior to the 2001 regulatory amendments referenced in your question, 8 C.F.R. § 287.3(d) provided that, "[u]nless voluntary departure has been granted . . ., a determination will be made within 24 hours of the arrest whether the alien will be continued in custody or released on bond or recognizance." 62 Fed. Reg. 10390 (Mar. 6, 1997). Shortly after the September 11 attacks, the regulation was amended to expand the determination period to 48 hours. 8 C.F.R. § 287.3(d). The amendment also provided an exception "in the event of an emergency or other extraordinary circumstances in which case a determination will be made within an additional reasonable period of time." *Id.* Statutory authority for this regulation is found in various provisions of the Immigration

and Nationality Act (INA), 8 U.S.C. §§ 1103, 1182, 1225, 1226, 1251, and 1357. *See* 66 Fed. Reg. 48334 (Sept. 20, 2001).

In promulgating the amended regulation, the Attorney General noted that "the [Immigration and Naturalization] Service may often require this additional time in order to establish an alien's true identity; to check domestic, foreign, or international databases and records systems for relevant information regarding the alien; and to liaise with appropriate law enforcement agencies in the United States and abroad." 66 Fed. Reg. 48334. The Department of Homeland Security recently issued guidelines for decisions to detain an individual beyond the standard 48-hour period.

Section 412 of the USA PATRIOT Act, codified at 8 U.S.C. § 1226a, amended the INA by granting the Attorney General the authority to detain an alien for up to seven days after certifying that the alien is a danger to the national security. This authority was granted in addition to the detention authority already possessed by the Attorney General and the Secretary of Homeland Security. Nothing in section 1226a purports to limit the Attorney General's pre-existing authority to detain aliens under other sections of the INA. Indeed, section 1226a expressly provides that its terms do not apply to any other provision of the INA. 8 U.S.C. § 1226a(c) ("The provisions of this section shall not be applicable to any other provision of this Act."). Thus, the 48-hour standard of 8 C.F.R. § 287.3(d) was not expanded to a seven-day standard after Congress enacted section 1226a.

The Executive Branch must preserve flexibility in dealing with emergencies and extraordinary circumstances. One can readily imagine circumstances where a national emergency results in a massive influx of cases requiring large amounts of information to be shared among government agencies and examined with reference to the detained suspects. In those circumstances, the Government will no doubt use its best efforts to process the cases in accordance with the standard 48-hour policy, as it did in the aftermath of September 11th. But it will also need flexibility to protect the nation from aliens who present a danger to the United States. In any event, when an emergency or other extraordinary circumstance requires the detention of an alien for longer than 48 hours, a court with habeas jurisdiction may be asked to review whether the detention is "reasonable" under 8 C.F.R. § 287.3(d). In its review, the court will likely consider the nature of the "emergency or other extraordinary circumstances" that required an extension of the 48-hour period, as well as the Government's need to process terrorism suspects in a safe and orderly fashion. The detained alien might ask the court to refer to the seven-day period described in section 1226a in determining the reasonableness of the detention.

14. On June 18 of this year, former Attorney General Dick Thornburgh testified before the House Appropriations Committee about a report he prepared for the National Academy of Public Administration on FBI reorganization. He stated, "The FBI can't connect all the dots if it doesn't have all the dots in the first place," adding: "[W]e just don't know how much information is being shared, for example, between the FBI and the National Security

Agency, the Defense Intelligence Agency, and other community components -- *though we can be reasonably assured it [is] not everything."* What specifically is the Department doing to ensure that the FBI works with all law enforcement and intelligence partners in terrorism matters? How is the Department responding to the specific concerns raised by the Thornburgh report?

RESPONSE: As a general matter, the Department agrees that the sharing of information among and between agencies is very important. *See, e.g.,* Presidential Executive Order, "Strengthening the Sharing of Terrorism Information to Protect Americans (August 27, 2004); *see also,* the "National Criminal Intelligence Sharing Plan" (Office of Justice Programs, U.S. Department of Justice (October 2003).) Copies of these documents are enclosed.

With respect to the FBI, specifically, the Bureau has made significant progress toward improving its coordination with, and sharing of information among, its law enforcement and intelligence community partners. For example:

- **the number of state and local law enforcement representatives on Joint Terrorism Task Forces has grown from 143 before 9/11 to 826; the number of other federal agency representatives on JTTFs has grown from 155 to 746;**

- **the FBI is a key partner in several new joint agency enterprises, including the National Counterterrorism Center (NCTC), the Terrorist Screening Center (TSC), and the Terrorist Explosive Device Analytical Center (TEDAC);**

- **since FY 2003, the FBI has distributed nearly 2,500 intelligence information reports; prepared nearly 460 intelligence articles and bulletins; issued 114 intelligence bulletins to state and local law enforcement authorities; prepared 78 in-depth assessments and 13 special event threat assessments; and issued two national counterterrorism threat assessments; and**

- **the FBI is pursuing a variety of information sharing initiatives that promote better sharing and exchange with state and local law enforcement partners.**

The FBI serves as the Nation's domestic intelligence bridge between state and local law enforcement agencies, the Intelligence Community, and international partners. Director Mueller values the observations and recommendations put forward by external advisory groups, such as NAPA and the Markle Foundation. While advisory in nature, the comments and observations of these groups often become valuable inputs and points of view during internal FBI policy debates and organizational decision-making. Director Mueller intends to continue consulting with such groups and considering their observations and recommendations as he transforms the FBI into a threat-based, intelligence-driven investigative agency.

The background of the NAPA report may assist in understanding the circumstances

under which its recommendations are made and the context in which the FBI reviews these recommendations. Over the past two years, at the request of Chairman Frank Wolf, Subcommittee on the Departments of Commerce, Justice, and State, House Appropriations Committee, the National Academy of Public Administration has been reviewing and reporting on the FBI's reorganization. The NAPA reports prepared and issued to the Committee in June 2002 and June 2003 were based on a series of unclassified briefings to NAPA staff and panelists.

NAPA reports its findings and makes suggestions to the Committee, which has the discretion to act upon those findings and recommendations as it deems appropriate in the context of the Department's annual appropriations bill and report. The NAPA views and comments are often included among the multiple inputs and points of view expressed during policy and organizational discussions and decision-making.

Subsequent to the June 2003 hearings and testimony, the Appropriations Subcommittee asked NAPA to continue its review and report back to the Committee on four areas: (1) progress in establishing the Counterterrorism Division, (2) progress in developing the Office of Intelligence, (3) the status of implementing the recommendations of the Webster Commission and RAND reports on security, and (4) the geographic structure of FBI field offices. Based on this request, the FBI has, once again, entered into a contract with NAPA to perform the requested study.

15. The Director of the COPS Office, Carl Peed, recently stated at a forum on the role of local law enforcement in homeland security that "community policing today is more important than ever." I could not agree more with Director Peed on that, but in every budget request the President sends to Congress we see attempts to dramatically reduce or eliminate altogether COPS Program funding and Byrne and Local Law Enforcement Block grants. These are funds police departments need to carry out their day-to-day duties on which the public relies: to put officers on the streets, to purchase crime-fighting technologies, and to combat violent crime and serious offenders and enforce drug laws. Police officers across the country also lack protective gear to safely secure a site following an attack with weapons of mass destruction, but the Administration has stranded the Bulletproof Vests Partnership grants funding at $25 million, or at half its authorization level.

When the budgets of criminal justice programs are threatened, slashed or eliminated, police chiefs, sheriffs and I get terribly worried. I wholly support and have led efforts to increase homeland security grants to State and local first responders for equipment, training and exercises. I also believe that our police agencies, fire departments and EMS providers remain underfunded by tens of billions of dollars and unprepared for major terrorist attacks.

Please explain why – when now more than ever we need officers on our streets who will carry out their everyday criminal justice duties as well as watch for potential terrorist activities – the Justice Department continues to request that Congress reduce or eliminate funds for programs that will let our police officers do their job to fight crime.

RESPONSE: The Administration has kept firm in its commitment to provide funding to state and local governments for terrorism preparedness programs by proposing $3.6 billion in funding for these programs in 2005. Of this total, $500 million will be spent on state and local law enforcement counterterrorism training and equipment.

As federal funding for state and local governments has been reprioritized to fund terrorism preparedness efforts, the Justice Department's state and local funding has been directed to address the most pressing crime problems faced by communities. The Department's 2005 budget contains over $2 billion in other grants assistance to state and local governments, including: $191 million to strengthen communities through programs providing services such as drug treatment and mentoring; $154 million to combat violence, including enhancements to grant funding provided under Project Safe Neighborhoods; $238.1 million for law enforcement technology, including funding to continue and enhance the Administration's DNA initiative; and $55 million to support drug enforcement, including funding to continue and expand the Southwest Border Drug Prosecution Program.

16. In the Sattar prosecution in New York, the district judge recently dismissed portions of the indictment under the "material support to terrorist organizations" statute, 18 U.S.C. §2339B, as being unconstitutionally vague. The judge found that mere membership in a terrorist organization could not constitutionally be prohibited without a requirement that the Government prove the defendant's specific intent to further the terrorist organization's unlawful ends.

(A) Are there legislative proposals being discussed within the Department to address the court's opinion in the Sattar case? If so, please describe them in detail.

RESPONSE: Please see response to 16B below.

(B) Are Federal prosecutors being provided with adequate guidance for making charging decisions in "material support" cases? Please provide a copy of any written guidelines.

RESPONSE: In *United States* v. *Sattar*, 272 F. Supp. 2d 348 (S.D.N.Y. 2003), a district court dismissed for vagueness a charge brought under 18 U.S.C. § 2339B that defendants Lynne Stewart and Mohammed Yousry provided "communications equipment" and "personnel" to the Islamic Group (IG), a designated Foreign Terrorist Organization (FTO). The defendants are associates of Sheikh Omar Abdel Rahman, the IG leader who is serving a life sentence plus 65 years for his role in terrorist activity, including the 1993 bombing of the World Trade Center. Stewart, an attorney, has represented Sheikh Rahman since his 1995 trial and conviction, and Yousry was the Arabic interpreter for Stewart and Rahman. They are charged with working in concert with Sheikh Rahman, in violation of a special administrative measure restricting his communication with third parties, to convey messages from Rahman to other IG members.

The *Sattar* court held that the statute was unconstitutionally vague insofar as the prohibition against providing "communications equipment" failed to place the defendants on notice that using their own communications equipment in furtherance of an FTO's goals constituted criminal conduct. 272 F. Supp. 2d at 358. The court also held that the statute's prohibition against providing "personnel" was unconstitutionally vague as applied to the defendants' transmission of communications on behalf of the IG. *Id.* at 359-61.

However, in considering the application of the term "personnel," the court distinguished the defendants' activities from "hard core" conduct, such as providing oneself as a soldier in the army of an FTO or otherwise working under an FTO's direction and control. *See id.* at 359 (distinguishing *United States* v. *Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002)). The court also declined to facially invalidate the statute's prohibitions against providing "personnel" and "communications equipment" to an FTO, agreeing with the Government that the prohibitions are not overbroad. *Id.* at 362.

The *Sattar* court did not, as your question suggests, hold that "mere membership [in a terrorist organization] could not constitutionally be prohibited without a requirement that the Government prove the defendants' specific intent to further the FTO's unlawful ends." *Id.* at 359. Instead, in rejecting the argument that section 2339B violates First Amendment associational rights, the *Sattar* court recognized that "[t]he statute does not interfere with [a defendant's] First Amendment rights because the material support restriction 'is not aimed at interfering with the expressive component of [the defendant's] conduct but at stopping aid to terrorist groups.' " *Id.* at 368.

Last November, a grand jury returned a superseding indictment that charged Stewart and Yousry with violating 18 U.S.C. § 2339A by providing, and conspiring to provide, material support or resources to terrorists in the form of "personnel." (Both material support statutes, 18 U.S.C. § 2339A and § 2339B, apply the definition of "material support" found in 18 U.S.C. § 2332A(b).) On April 19, 2004, the district court issued an opinion and order denying the defendants' motion to dismiss the superseding indictment and rejecting their arguments that section 2339A is unconstitutionally vague as applied to their conduct. The court ruled that section 2339A supported the charge that Stewart and Yousry "provided" Sheikh Rahman as "personnel" by making him available to the IG. A copy of the district court opinion is enclosed.

Specific guidance for federal prosecutors handling international terrorism matters exists in two provisions of the U.S. Attorney's Manual: section 9-2.136 ("Investigative and Prosecutive Policy for International Terrorism Matters") and section 9-91.100 ("Proscribed Material Support or Resources to Designated Foreign Terrorist Organizations Under 18 U.S.C. § 2339B"). Copies of these provisions are enclosed. The Department has also issued further detailed guidance to federal prosecutors that addresses issues relating to the application of 18 U.S.C. § 2339A and § 2339B in the wake of *Sattar* and other decisions. We do not release such internal policy documents outside of law enforcement personnel.

Finally, we note that the recently-enacted "Intelligence Reform and Terrorism Prevention Act of 2004" includes a number of provisions that strengthen and improve the material support statutes.

17. The December 22, 2003 deadline for victims to file a claim with the September 11th Victim Compensation Fund is rapidly approaching. Many eligible victims have yet to file a claim with the fund. They have told support groups that they still cannot face the emotional pain of preparing a claim. In a survey conducted recently by victims' organizations, 87 percent of the 356 victims who responded expressed support for extending the December 22 deadline by one year. I have introduced a bill, S.1602, to do just that. What is the position of the Administration on S.1602, which would ensure that all eligible victims who want a chance to file with the September 11th Fund will have adequate time to do so?

RESPONSE: By letter dated June 7, 2004, the Department responded to this inquiry. For your convenience, we have enclosed a copy of this communication.

18. Two years have passed since America was terrorized by a series of anthrax-laden letters sent to a series of news media outlets and two elected officials – Senator Daschle and myself. Nearly two dozen innocent victims were infected with either cutaneous or inhalation anthrax, and five people were killed. The perpetrator or perpetrators of this crime remain at large and the federal government has taken no action to compensate or provide for these individuals, many of whom still suffer to this day. After two years of patiently waiting for action, victims of these attacks have begun to file lawsuits seeking compensation.

On October 16, 2003, Senator Daschle and I introduced S.1740, the Anthrax Victims Fund Fairness Act, to make the victims of bioterrorism eligible for compensation under the same guidelines as the September 11th Victim Compensation Fund. This legislation would give the victims of the anthrax attacks a dignified way to be compensated for their harm and filing a claim would preclude other civil remedies. What position does the Administration take on this legislation?

RESPONSE: By letter dated June 7, 2004, the Department has responded to this inquiry. For your convenience, we have enclosed a copy of this communication.

19. At a Judiciary Committee hearing earlier this year, FBI Director Mueller acknowledged his support for abolishing the so-called "14 day rule," which limits the amount of time that certain senior FBI executives may be suspended. This is one of the reforms proposed in the Grassley-Leahy FBI Reform Act, S.1440. Does the Department also support this common-sense reform? What position does the Department take on the other reforms proposed in S.1440?

RESPONSE: On October 1, 2004, the Department transmitted its views on S. 1440 to the Committee. We have enclosed a copy of our views letter for your reference.

20. A recent *Washington Post* op-ed stated that the Justice Department held "legislative seminars" in Washington last year to help other countries draft and strengthen anti-terrorism laws along the lines of the PATRIOT Act, and that representatives from 36 countries attended. Justice Department attorneys reportedly traveled to a number of countries for the same purpose. (A) What countries participated in these seminars? (B) Please provide the Committee with any materials that were prepared for these seminars.

RESPONSE: In 2002, the Department of State provided funding to the Department of Justice to organize two series of legislative seminars. The first series, entitled "The Financial Underpinnings of Terrorism," was designed to assist countries in complying with their international obligation under U.N. Security Council Resolution 1373, which requires all states to criminalize the provision of funds or material support for terrorists and terrorist organizations. Drawing on U.S. Government experience, the seminars focused on identifying, investigating, and prosecuting terrorist financing. Department of Justice presentations emphasized the need for judicial review, checks and balances, and respect for human rights. An initial week-long session for senior policy officials was followed by a two-week session for investigators, judges and prosecutors. Seminar experts included federal prosecutors, representatives from the FBI, Customs, and the IRS, and U.N. officials. Officials from the Philippines (August 2001 and March 2002) and Turkey (June and October 2002) participated in separate bilateral programs held in Washington, D.C. A third seminar for officials from Argentina, Brazil, Panama, Paraguay, and Venezuela was held in December 2002 in Asuncion, Paraguay. The Criminal Division's Office of Prosecutorial Development, Assistance, and Training (OPDAT) also organized a day-long roundtable on this topic in September 2002 for the Saudi Arabian delegation, which was in Washington, D.C. for the World Bank/IMF meetings.

The second series of seminars funded by the Department of State, entitled "Building the Legal Infrastructure to Counter Terrorism," was broader in scope than the series described above. Through this series, the Department of Justice assisted states in complying with obligations to criminalize terrorist acts under twelve international treaties and several U.N. Security Council resolutions. From June 2002 to March 2003, officials from forty-nine countries in the eight regions listed below participated in the seminars. As noted in the seminar materials appended, the seminars addressed trends in international terrorism, international conventions and agreements, basic investigative tools needed to combat terrorism, methods of financing terrorism, extradition and mutual legal assistance, border security and immigration, export controls, weapons of mass destruction, model legislation, and regional cooperation and intelligence sharing. Again, Department of Justice representatives emphasized adherence to the rule of law, the prevention of abuse of power through judicial review, and respect for human rights. Speakers included federal prosecutors, officials from federal agencies, and U.N. representatives. During the seminars, each regional group developed, with the speakers' assistance, legislative action plans to strengthen their counterterrorism infrastructure and capacity. All seminars were held in Washington, D.C., except the last seminar listed below which was held in Gabarone,

Botswana, in connection with a Southern Africa Development Community (SADC) meeting.

One set of materials provided at each series of seminars is appended.

Regional: Tajikistan, Kazakhstan, Uzbekistan, Kyrgyzstan, Pakistan (June 2002)
Regional: Morocco, Egypt, Jordan and United Arab Emirates (UAE) (June 2002)
Regional: Russia, Turkey, Cyprus, Azerbaijan, Armenia, and Georgia (July 2002)
Regional: Indonesia, Laos, Malaysia, Philippines, and Thailand (July 2002)
Regional: Nepal, Bangladesh, India, the Maldives, and Sri Lanka (September 2002)
Regional: Peru, Guatemala, Paraguay, Guyana, Chile, and El Salvador (September 2002)
Regional: South Africa, Kenya, Cote d'Ivoire, Sierra Leone, and Djibouti (October 2002)
Regional: South Africa, Botswana, Lesotho, Swaziland, Namibia, Mozambique, Mauritius, Zambia, Malawi, Angola, Democratic Republic of Congo, Tanzania, and Kenya (March 2003)

21. The Bureau of Justice Statistics reported in September that in 2002, 136,000 individuals lied on the criminal background check form used to purchase a firearm. A FOIA (Freedom of Information Act) request submitted by Americans for Gun Safety to the Department shows that only 578 were prosecuted for "lie and buy." In 2000, under the last full year of the Clinton Administration, 151,000 individuals lied on the criminal background check form used to purchase a firearm. The same FOIA request shows that 501 were prosecuted that year for "lie and buy." The statistics from one administration to the next are not encouraging. Under AG Ashcroft, 99.6% of those who committed the crime of "lie and buy" were not prosecuted as compared to 99.7% under AG Reno. So, I will not accuse the current leadership at Justice of looking the other way to a greater extent than its predecessors. Nonetheless, these statistics are completely unacceptable. Why is the Department failing to enforce the gun laws on the books?

RESPONSE: As an initial matter, it is important to note that, as a result of these individuals' lies on ATF 4473 forms, the overwhelming majority of the 136,000 individuals whom you reference above were prevented from illegally buying firearms from federally licensed firearms dealers. In short, the system worked: individuals who were ineligible to possess firearms were in fact denied firearms by the National Instant Background Check System (NICS). Moreover, in the small number of cases in which NICS was able to obtain information about purchasers' prohibited status only after the sale, NICS referred the case to the Bureau of Alcohol, Tobacco, Firearms and Explosives for retrieval of the firearm.

As for the statistics on which you focus, in FY 2003, federal prosecutors charged over 500 defendants with false statement violations in connection with firearms transactions under 18 U.S.C. § 922(a)(6). They also charged over 300 defendants with false statement violations in connection with firearms transactions under 18 U.S.C. § 924(a)(1)(A)—an 80 percent increase over the number of such charges in FY 2000.

However, these figures alone do not tell the entire story. The Department of Justice targets criminal conduct, not the use of a particular statutory subsection. For example, if a gun buyer who succeeds in purchasing a firearm by lying on the criminal background check form is also a convicted felon, he may be prosecuted under 18 U.S.C. § 922(g)(1) and face the more severe penalties prescribed by that statute. Focusing exclusively on the statistics that pertain to one particular statutory subsection simply does not tell the whole story. As the following set of statistics demonstrates, this Administration is vigorously enforcing the Nation's gun laws and making our neighborhoods safer places to live and work.

Under Project Safe Neighborhoods, the Department of Justice has prosecuted a record number of gun crime cases. Since FY 2000, the number of federal gun crime prosecutions has increased by 68%, and the number of defendants prosecuted has increased nearly 62%. Last fiscal year, federal prosecutors filed over 10,500 federal firearms cases against more than 13,000 offenders. Defendants in these cases are being taken off the streets and placed behind bars, where they cannot re-offend. In FY 2003, approximately 72% of these offenders were sentenced to over three years in prison for convictions on firearms charges or other offenses, and 93% of these offenders faced some time in prison. Thanks in part to these efforts, approximately 130,000 fewer Americans were victims of gun crime in 2001-2002 than in 1999-2000.

22. According to the 2002 Annual Report to Congress describing the activities and operations of the Public Integrity Section, Criminal Division, a significant part of their case load comes from recusals by U.S. Attorney's Offices and local authorities because, in part, "public corruption cases tend to raise unique problems of public perception that are generally absent in more routine criminal cases." Of the cases summarized in the 2002 Report, please (A) identify those that were the result of a recusal and (B) explain the specific reasons therefore.

RESPONSE: (A)

United States v. Bedell. **The U.S. Attorney's Office (USAO) determined that its participation in the case would have presented an appearance of a conflict of interest. This explanation is applicable to the cases noted below, as well.**

United States v. Marquez and Pagan.

United States v. Pace.

United States v. Aguilar and Ocampo; United States v. Nunez.

United States v. Bailey.

United States v. Yolanda Davis.

United States v. Davis and Perez-Davis.

United States v. Lindsay.

United States v. Menyweather.

United States v. Profera, Haritatos-Semko, and Semko.

United States v. Punka.

United States v. Tatum.

United States v. Barron; United States v. Cuanda-Munoz; United States v. Diaz and Hernandez; United States v. Jenkins; United States v. Torrez.

United States v. Diaz and Pippins; United States v. Gillis, McDuffie, Stallworth, and Stuckey.

United States v. Woodward and Jordan.

RESPONSE: (B) All of the above cases were handled by the Criminal Division's Public Integrity Section as a result of determinations by USAOs that, under the circumstances, their participation would present actual or apparent conflicts of interest. Such circumstances exist, for example, when a USAO employee's participation in an official capacity would "have a direct and predictable effect" on his or her financial interests, 5 C.F.R. 2635.402, or would "create an appearance that the employee's official duties were performed in a biased or less than impartial manner. U.S. Attorney's Manual sec. 1-4320(F).

Such an appearance can arise in a variety of circumstances, including: personal or professional relationships between defendants and USAO personnel; the potential appearance of USAO personnel as witnesses; and matters involving local election contests. Of course, the Public Integrity Section also handles matters in which the USAO is recused because of an actual conflict of interest, such as those cases that name USAO personnel as defendants.

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

RESPONSE: As you noted, section 218 of the PATRIOT Act expressly permitted the full coordination between law enforcement and intelligence that is vital to protecting the

nation's security. Moreover, section 504 specifically permits intelligence investigators to consult with Federal law enforcement officers to coordinate efforts to investigate or protect against threats from foreign powers and their agents. On March 6, 2002, the Department issued guidelines that authorized—indeed required—coordination between intelligence and law enforcement. These revised procedures were approved in full 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.

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.

24. Section 802 of the PATRIOT Act defines "domestic terrorism" as any activity 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? (B) What policy directives, memorandums, or directives have been issued or training provided regarding the scope of this section?

RESPONSE: (A) Section 802, codified in 18 U.S.C. § 2331(5), provides the definition of domestic terrorism, yet it is not used in any substantive offense in current Federal law. The definition may be referenced by Rule 41(b)(3) of the Federal Rules of Criminal Procedure, which allows magistrates in matters related to international or domestic terrorism to issue search warrants for persons or property located in another district. The Department is unaware of whether magistrates have exercised this authority. The provision may also be referenced by 28 U.S.C. §530 relating to the Attorney General's authority to make payments for rewards to combat domestic terrorism or international terrorism. See also 18 U.S.C. § 3077(1) ("act of terrorism" means an act of domestic or international terrorism as defined in section 2331). In addition, the term is used in a forfeiture provision found in 18 U.S.C. § 981(a)(1)(G) relating to the assets of individuals, entities, or organizations engaged in planning or perpetrating any act of domestic or international terrorism against US

citizens or residents. Neither the reward authority nor the forfeiture provision has been invoked.

(B) The Department has not issued any formal policy directives or memorandums 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.

QUESTIONS BY SENATOR PATRICK LEAHY FOR US ATTORNEY PATRICK FITZGERALD:

1. Last week, the Chicago City Council approved a resolution condemning the PATRIOT Act for casting a pall on the civil rights of minorities. Chicago became the largest city in the United States to criticize the Patriot Act, joining cities such as Minneapolis, Detroit, Baltimore, Philadelphia and San Francisco. There are now more than 190 communities nationwide that have passed anti-PATRIOT Act laws.

You yourself have spoken to a number of public interest and community groups regarding the PATRIOT Act, presumably in response to the Attorney General's August 14, 2003 memorandum instructing all U.S. Attorneys to assist in his PATRIOT Act promotional tour.

I am concerned about the cost to the American taxpayers of government officials spending large amounts of travel time and man-hours to make political statements on behalf of the PATRIOT Act. Together with the Ranking Member of the House Judiciary Committee, I have asked the Government Accounting Office to do an audit of the Attorney General's tour.

(A) Please estimate the number of times that you and attorneys in your office participated in speaking engagements on the PATRIOT Act after receiving the Attorney General's memorandum.

RESPONSE: Please see the answer to 1(B) below.

(B) Is it true that the travel and other related costs associated with the PATRIOT Act speeches are being paid out of a fund allocated for litigation-related expenses in the various U.S. Attorney's Offices?

RESPONSE: While it is true that I have spoken a number of times about the Patriot Act, I had been speaking about the Patriot Act, and civil liberties issues more generally, long before the Attorney General memorandum you reference. Prior to the memorandum dated August 14, 2003, I had spoken on more than a dozen occasions concerning civil liberties in the age of terrorism, and the Patriot Act was often a key focus. Following the August 2003 memorandum, I spoke on approximately a half dozen occasions personally about terrorism, civil liberties and the Patriot Act. (Several of those commitments were made prior to the August 2003 memorandum.) My staff has also spoken at such forums. The frequency of speaking has correlated to the frequency of invitations. As to the expenses, most of the appearances have been at night with minimal expenses as I have driven to them (or my staff has driven to them). What little reimbursement that has been requested in connection with speeches regarding the Patriot Act has been made from funds appropriated to the United States Attorneys that are used to support our mission. I have traveled out of state to discuss terrorism with the Attorney General and appear at a Terrorism Roundtable (which was not focused exclusively on the Patriot Act in

particular) and I also attended an ABA panel on terrorism and civil liberties during the ABA Convention in Washington, D.C. Moreover, as you know, I traveled to appear before the Senate Judiciary Committee to testify about the Patriot Act.

Finally, we note that that the Department's Inspector General has sent a letter, dated October 22, 2004, to Congressman John Conyers regarding this issue. In the letter, the Inspector General stated that "[n]either the Anti-Lobbying Act nor the appropriations provision prohibited the Attorney General and U.S. Attorneys from making public speeches conveying DOJ's views regarding the merits of the Patriot Act and discussing the DOJ's use of the law's provisions."

2. There has been a great deal of controversy associated with your office's indictment and prosecution of the Benevolence International Foundation ("BIF"), an Islamic charity, and its director Enaam Arnaout. According to press releases issued by the Department last year, Arnaout was initially charged with perjury, but those charges were dismissed as legally insufficient. Thereafter, your office filed a number of charging instruments alleging, *inter alia*, that BIF supported terrorists who tried to obtain nuclear weapons for Osama bin Laden and plotted to assassinate the Pope; that BIF's links to bin Laden went back decades; that BIF moved sizable amounts of cash for bin Laden's al Qaeda terrorist network during the 1990's; that al Qaeda has used BIF for logistical support; and that Arnaout has a relationship with bin Laden and many of his key associates.

On the morning trial was to begin, Arnaout entered a guilty plea to a charge of racketeering fraud conspiracy committed in the operation of BIF. The facts submitted in a written plea agreement, and the Government's evidentiary proffer during the plea hearing, contain no mention of terrorism or violence; rather, they specify that the fraud consisted of Arnaout's undisclosed use of a portion of BIF's funds, raised for humanitarian purposes only, to provide aid to militia in Bosnia and Chechnya. As part of the plea agreement, the Government agreed to dismiss what appear to be the more serious charges against Arnaout relating to money laundering and providing support to terrorist groups.

At sentencing, the Government argued that Arnaout should be classified as a terrorist, but the district judge—a Reagan appointee--did not agree. According to the judge, the record did not reflect that Arnaout attempted, participated in, or conspired to commit any act of terrorism. She sentenced Arnaout to eleven years – well below the twenty-year sentence that your office advocated.

(A) According to a recent Department of Justice memorandum, "It is the policy of the Department of Justice that, in all federal criminal cases, federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case, except as authorized by an Assistant Attorney General, United States Attorney, or designated supervisory attorney .... The most serious offense or offenses are those that generate the most substantial sentence under the Sentencing Guidelines, unless a mandatory minimum sentence or count requiring a consecutive sentence would generate a longer sentence." Did your

office's plea agreement in the Arnaout case comply with this new Department policy? Please explain.

RESPONSE: Please see the answer to 2(C) below.

(B) At Arnaout's sentencing, the government contended that Arnaout had not been forthcoming about his ties to al Qaeda. If that is so, why didn't your office press to be relieved of its obligations under the plea agreement?

RESPONSE: Please see the answer to 2(C) below.

(C) BIF was originally named in the charging documents in this case, but was not part of the plea agreement or the second superseding indictment. What is the status of BIF?

RESPONSE: Regarding the Arnaout case, the Government filed charges against Arnaout that included in the final indictment a racketeering conspiracy charge (20 year maximum penalty), a conspiracy to provide material support (5 year penalty) and other charges. The Government did accept a plea to the racketeering count (which had the highest statutory penalty) and left to resolve at sentencing whether the defendant should receive the sentencing enhancement. That plea was consistent with the "Ashcroft memorandum" which authorized prosecutors to determine which charges are "readily provable." The trial judge declined to rule prior to trial whether certain key evidence would be admitted and had the trial judge excluded the evidence during the trial, the Government would not to be able to appeal. The statement in your question that "the Government's evidentiary proffer during the plea hearing contain[s] no mention of terrorism or violence" is simply incorrect. At the sentencing proceeding and in filings submitted prior to and in connection with that sentencing, we proffered evidence seized from the offices of Benevolence that included: minutes of the meeting where al Qaeda was founded; an internal memorandum indicating that the Benevolence charity followed al Qaeda when it moved to the Sudan; evidence that Arnaout misrepresented a key member of the al Qaeda network to be a director of Benevolence to aid him in travel in 1998 to Bosnia; evidence that the director of Benevolence's branch in Chechnya was a military commander of al Qaeda and documentary evidence showing that Arnaout and Benevolence provided supplies to military groups in Bosnia and Chechnya.

Declining to follow the only United States Circuit Court of Appeals opinion on point, the judge held that the terrorism enhancement could not be applied because the count of conviction was a racketeering conviction, a holding that the Government is appealing. While the Government did not believe Arnaout was forthcoming about his ties to al Qaeda, the Government did not see benefit in revoking the plea agreement which might allow Arnaout to seek to undo his conviction. The Government sought the strongest sentence it could seek; received less than it sought (but far more than defendant Arnaout

argued for); and decided to appeal the sentence. Having obtained a racketeering conviction, the Government saw no benefit in surrendering it.

As far as the corporate entity, BIF, it ceased to exist after the indictment. Because the only practical effect from pursuing BIF was to cause further funds to be disbursed to defense counsel representing a non functioning entity, the Government did not proceed on the charges any further as to the corporate entity. BIF no longer exists.

3. In your testimony and in a recent op-ed, you explained that when you were working on the Osama bin Laden criminal investigation as a line prosecutor in 1996, you could not talk to "FBI agents across the street assigned to a parallel intelligence investigation of Osama bin Laden and Al Qaeda," but that the PATRIOT Act fixed that. In fact, I proposed the so-called "coordination" language in section 503 of the USA PATRIOT Act, to allow intelligence officers to consult with law enforcement officers to investigate or protect against terrorist attacks. There has never been disagreement about fostering information-sharing so that our agencies can effectively fulfill their missions; where national security is concerned, intelligence and law enforcement officers should, indeed must, talk.

During negotiations on the PATRIOT Act, the Administration pushed for unfettered, uncontrolled dissemination of sensitive, traditionally secret, information that can be obtained by a federal grand jury -- from financial data, to hearsay testimony, to personnel records, to confidential medical data. I fought to require court approval for dissemination of grand jury information to intelligence and national security officers. This would have permitted prosecutors to share, when necessary, with other agencies of government, relevant information obtained in the course of a grand jury investigation, but would also have imposed a critical judicial check. Can you explain why court approval for dissemination of grand jury information to intelligence and national security officers would not permit prosecutors to share such information?

RESPONSE: A requirement of court approval for the sharing of grand jury information might diminish such sharing in two respects: (1) in exigent circumstances, the delay in seeking court approval (which may require presentation to a court of a transcript which may not always be practicable on short notice given the vagaries of a grand jury reporters' schedule) could result in a delay in the sharing of any time-sensitive information; and (2) the practical cost in terms of time to prepare materials and applications for court permission might lead in real world circumstances to prosecutors not sharing information that appears marginally useful, when the information may in fact be more useful than the prosecutor apprehends. AUSAs routinely make decisions about with whom to share grand jury information for law enforcement purposes without prior court approval and can be trusted to share appropriate information with the intelligence community in the same manner. Moreover, under section 203(c), AUSAs must provide notice of the dissemination of grand jury information, which allows courts to supervise such dissemination.

QUESTIONS BY SENATOR PATRICK LEAHY FOR U.S. ATTORNEY PAUL MCNULTY

1. Your office charged Zacarias Moussaoui with involvement in the 9/11 terrorist attacks, but refused to comply with court orders to allow him access to possible defense witnesses, consistent with fundamental principles of due process. Judge Brinkema has in turn refused to let you pursue the death penalty in this case or offer 9/11-related evidence, but has left intact other al-Qaeda conspiracy charges that could send Moussaoui away for life. According to recent press reports, you have been sharply critical of the judge's decision not to dismiss the case entirely. Wouldn't it be better to at least send Moussaoui away for life than to advocate dismissal of the charges altogether?

RESPONSE: Although we certainly agree that life imprisonment for Moussaoui, if convicted, would be a better outcome than dismissal of the charges, at the time of Judge Brinkema's decision in August 2003, we agreed with the defense request to dismiss the charges to ensure prompt appellate review of the important underlying issue involving national security. The Fourth Circuit's ruling of June 26, 2003, held that the Government must endure a sanction before the Court would address the national security issue on the merits. United States v. Moussaoui, 333 F.3d 509 (4th Cir. 2003) ("The order of the district court will not become final unless and until the Government refuses to comply and the district court imposes a sanction."); see also United States v. Moussaoui, 336 F.3d 279 (4th Cir. 2003 (denying petition for rehearing *en banc).* Therefore, in response to the 4th Circuit's ruling and the district court's previous rulings on the underlying national security issue (which we strongly disagreed with), we agreed with the defense request to dismiss the charges to ensure prompt appellate review.

The Fourth Circuit's appellate review is now complete. On September 13, 2004, the Fourth Circuit issued its opinion in the Moussaoui case, upholding our core position that, although the defense has a Sixth Amendment right to compel testimony in this case from particular detainees captured and held abroad, national security concerns mandate that any such right can be fulfilled by using written summaries of statements from such detainees instead of their testimony. On October 13, 2004, the Fourth Circuit denied Moussaoui's motion for a rehearing *en banc.* Thus, our strategy to seek the quickest possible appellate review, and our position that national security can be preserved while still meeting a terrorism defendant's constitutional rights, have been vindicated.

2. There has been speculation that the Administration may declare Zacarias Moussaoui to be an "enemy combatant" and remove him from the civilian courts to the military system.

(A) As the U.S. Attorney handling the Moussaoui case, are you aware of any plans to remove Moussaoui from the civilian courts?

RESPONSE: No.

(B) If Moussaoui is tried in Federal court, victims of the 9/11 tragedy would presumably enjoy a number of procedural rights, including the right to attend the trial and, in the event of a conviction, present victim impact testimony at sentencing. What would happen to these rights if Moussaoui were tried instead before a military tribunal?

RESPONSE: The military would be in a better position to answer this question. I am not familiar with either existing or proposed procedures for military tribunals. However, I believe the Department of Defense has made public some information that can be reviewed at http://www.dod.gov/news/Aug2003/d20030812factsheet.pdf.

3. Many of the high-profile terrorism cases since the 9/11 attacks have landed, one way or another, within the jurisdiction of the Fourth Circuit Court of Appeals. These cases include—

- **Zacarias Moussaoui,** a Frenchman who was first detained on immigration charges in Minnesota, then held in New York as a material witness, and then charged in the Eastern District of Virginia;

- **John Walker Lindh**, a U.S. citizen who was caught fighting with the Taliban and brought back to face charges in the Eastern District of Virginia;

- **Yaser Hamdi**, a U.S. citizen who was arrested during the fighting in Afghanistan, and who is now being held as an "enemy combatant" in a naval brig in Virginia;

- **Jose Padilla**, a U.S. citizen who ware arrested at Chicago's O'Hare Airport on a material witness warrant issued by a court in the Southern District of New York, then designated as an "enemy combatant" and transferred to a brig in South Carolina; and

- **Ali al-Marri**, a Qatari student initially charged in the Central District of Illinois, then designated as an "enemy combatant" and transferred to a brig in South Carolina.

The Fourth Circuit is widely viewed as the most conservative court of appeals in the Nation. Is the government engaging in forum shopping by selectively maneuvering to bring as many terrorism cases as possible within that court's jurisdiction? Do you believe that such forum shopping is appropriate?

RESPONSE: On September 11, 2001, 125 people located in the Pentagon and 64 passengers on Flight 77 were murdered in the Eastern District of Virginia. These murders conferred venue upon the Eastern District of Virginia to prosecute Moussaoui and other terrorists connected to that conspiracy. In regard to the Lindh case, as in the other prosecutions, the choice of venue was made on the basis of all the facts and circumstances, including the location of the witnesses and relevant agencies, the proximity of victims or their families, the experience and expertise of the prosecutors and judges in the type of prosecution in question, the speed of the docket, and other factors.

SUBMISSIONS FOR THE RECORD

U.S. Senate Committee on the Judiciary

Protecting Our National Security from Terrorist Attacks:
A Review of Criminal Terrorism Investigations and Prosecutions

Statement of U.S. Senator John Cornyn

Tuseday, October 21, 2003, 10 a.m.
Dirksen Senate Office Building Room 226

I want to congratulate the Chairman and the ranking member for working together to convene these important hearings, and I want to congratulate the Administration for its efforts to make this country safer and more secure against terrorism.

I was not a member of this great body when the September 11 attacks occurred, or when bipartisan majorities of the Congress overwhelmingly approved the USA PATRIOT Act several weeks later – by votes of 98-1 in the Senate, and 357-66 in the House.

I have reviewed the record, however, and I have taken note of the numerous Senators, on both sides of the aisle, who praised that Act for strengthening our law enforcement and intelligence tools to fight terrorism, while respecting and preserving civil liberties.

I am also aware that there have been voices of dissent, critical of both the Act, and of Congress for approving legislation that, in their view, deprives individuals of their civil liberties.

Thank goodness we live in a country where dissent and free speech are matters of constitutional right. I have long been a champion of open government, because I firmly believe that only through free speech and open government can we be sure that our liberties are secure, even in time of war.

There indeed have been wartime deprivations of civil liberties in the past. The internment of Japanese-American citizens during World War II; censorship of the press during World War I – these things happened.

Indeed, this has been an issue from the earliest days of our nation's history, with the Alien and Sedition Acts of 1798, four laws enacted in the wake of hostile actions of the French Revolutionary government on the seas and in the councils of diplomacy, including the infamous XYZ Affair.

So I strongly believe that it is important to monitor our government, to ensure that civil liberties are always adequately protected, even as we take great steps to secure ourselves against terrorism, and to stop our enemies who would do us great harm.

It is because I worry about civil liberties, that I also worry about hysterical claims about civil liberties. Every false claim of a civil rights violation discredits every true claim of a civil rights violation, and that hurts us all.

I look forward to hearing today's expert testimony, and to learning whether the USA PATRIOT Act actually save lives and protects Americans from terrorist attack, without harming basic civil liberties – as I believe, and as bipartisan majorities of the 107th Congress believed, that the Act does.

Statements by U.S. Senators about civil liberties and the USA PATRIOT Act

- Senator Baucus (D-MT): "I believe the bill we passed today balances the needs of protecting the country from terrorism and protecting our rights as citizens of this great country." (Senator Baucus, Press Release, October 25, 2001)

- Senator Schumer (D-NY): "If there is one key word that underscores this bill, it is 'balance.' . . . The balance between the need to update our laws given the new challenges and the need to maintain our basic freedoms which distinguish us from our enemies is real." (Senator Schumer, Congressional Record, October 25, 2001)

- Senator Schumer (D-NY): "[T]he scourge of terrorism is going to be with us for a while. Law enforcement has a lot of catching up to do. There is no question about it. In this bill, at least, we give them fair and adequate tools that do not infringe on our freedoms but, at the same time, allows them to catch up a lot more quickly." (Senator Schumer, Congressional Record, October 25, 2001)

- Senator Levin (D-MI): "[T]he antiterrorism bill [Patriot Act] which the Senate is about to pass reflects the sentiments the American people have expressed since the events of September 11 – that we must act swiftly and strongly to defend our country without sacrificing our most cherished values. The Senate antiterrorism legislation meets that test. It responds to these dangerous times by giving law enforcement agencies important new tools to use in combating terrorism without denigrating the principles of due process and fairness embedded in our Constitution." (Senator Levin, Congressional Record, October 25, 2001)

- Senator Daschle (D-SD): "This reflects the balance between protection of civil liberties and privacy with the need for greater law enforcement." (Leon Bruneau, "U.S. Senate Passes Anti-Terror Bill, Sends It to Bush for Signature," Agence France-Presse, October 25, 2001)

- Senator Biden (D-DE): "The agreement reached has satisfied me that these provisions will not upset the balance between strong law enforcement and protection of our valued civil liberties." (Senator Biden, Congressional Record, October 25, 2001)

- Senator Feinstein (D-CA): "As we look back at that massive, terrible incident on September 11, we try to ascertain whether our Government had the tools necessary to ferret out the intelligence that could have, perhaps, avoided those events. The only answer all of us could come up with, after having briefing after briefing, is we did not have those tools. This bill aims to change that. This bill is a bill whose time has come. This bill is a necessary bill. And I, as a Senator from California, am happy to support it." (Senator Feinstein, Congressional Record, October 25, 2001)

- Senator Specter (R-PA): "[I]t is important that law enforcement have appropriate tools at their disposal to combat terrorists. In the United States that means careful legislation which is in accordance with our constitutional rights and our civil liberties.

I believe Congress has responded appropriately in this matter with due deliberation . . . and now have a good product." (Senator Specter, Congressional Record, October 25, 2001)

UNITED STATES SENATOR • OHIO

Mike DeWine

FOR IMMEDIATE RELEASE
OCTOBER 21, 2003

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Statement of U.S. Senator Mike DeWine (R-OH) before the Senate Judiciary hearing, "Protecting our National Security from Terrorist Attacks: A Review of Criminal Terrorism Investigations and Prosecutions":

Mr. Chairman, thank you for holding this important hearing. I think we all agree that terrorism is today one of the most important issues facing us as a society, and that we need to be vigilant and aggressive in combating terrorism wherever we find it. The Patriot Act has been one of our primary weapons in this battle, and it is the responsibility of this committee to continue to engage in oversight of the Patriot Act as we continue to improve and refine our approach to combating terrorism.

For example, as we all know, there has been a great deal of debate about the Government's use of the PATRIOT Act, but not enough discussion of the fact that the Government's use of the PATRIOT Act had been (1) more restrained than the Constitution requires and (2) less invasive than what we actually do in many other areas of law enforcement – such as, for example, the use of administrative subpoenas in narcotics investigations. I think it's important that we discuss with our witnesses today the big-picture issues raised by the Patriot Act as well as the more specific questions raised by administrative subpoenas. This will allow us to evaluate how to best fight terrorism while maintaining, of course, the very important civil liberties that we all value so highly.

Finally, we must keep in mind that a great deal of our fight against terrorism is happening at the state and local level. It is at the local level, out on the streets, where our first responders operate, and where we must provide the best intelligence, best technology, best communications, and best training. It is crucial that our anti-terrorism laws help promote excellence at the local level, and I look forward to discussing that with our distinguished panel today.

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News From:

U.S. Senator
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Statement of U.S. Senator Russ Feingold
At the Senate Judiciary Committee Hearing on "Protecting Our National Security from Terrorist Attacks: A Review of Criminal Terrorism Investigations and Prosecutions"

October 21, 2003

Mr. Chairman, thank you for agreeing to hold a series of oversight hearings on the Administration's counter-terrorism efforts.

My first priority, and I strongly believe Congress's first priority, in a post-September 11th America is to fight terrorism. Today, the Committee will hear the Administration's perspective on its counter-terrorism initiatives. I am eager to hear what the Administration has to say. I also look forward to our next hearing, when we will hear from experts outside the Administration who believe that our government can do a better job fighting terrorism without sacrificing the values that make us the greatest democracy on earth. I understand that hearing will be held on November 5th. I commend the chairman and ranking member for their collaboration in arranging these hearings.

Mr. Chairman, I think we must be mindful that while there have been important successes in the war on terrorism, there are legitimate concerns about whether some of the Administration's conduct has been fair, just, and effective.

According to the Justice Department's own Inspector General, many of the over 750 men who were rounded up and detained on immigration violations in the aftermath of September 11th were haphazardly and indiscriminately labeled as terror suspects. But none were ever charged with a terrorism offense, and some were treated in an inexcusably harsh and unfair manner. I remember very well that those of us who raised questions about the treatment of these detainees at the time were accused of "aiding the terrorists." Now the Inspector General has vindicated our concerns, but two years too late to help those whose rights were violated.

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In addition, three men – two of whom are U.S. citizens – have been designated "enemy combatants" and are currently detained by the military here in the U.S. They are locked up, with no access to attorneys or family, and no guarantee that they will ever be charged or have their day in court. This treatment raises questions that go to the very core of the Bill of Rights.

Then there's the PATRIOT Act. As I made clear during the debate on the bill two years ago, I supported 90% of it. But the bill went too far in some respects. I'm very pleased that there is growing bipartisan support, including some of our colleagues from both sides of the aisle on this Committee, to modify the law to ensure that it is consistent with the Constitution and not subject to abuse.

Thank you again, Mr. Chairman. I look forward to hearing from our witnesses today and to the entire series of oversight hearings

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STATEMENT OF
PATRICK J. FITZGERALD
UNITED STATES ATTORNEY
NORTHERN DISTRICT OF ILLINOIS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

OCTOBER 21, 2003

INTRODUCTION

Mr. Chairman, members of the Committee, thank you for asking us here today. I very much look forward to this opportunity to discuss with you the efforts of the United States Attorney's Offices in the investigation and prosecution of terrorists, and particularly how those efforts have changed since the passage of the post-9/11 anti-terrorism tools.

You have heard my colleague Chris Wray describe "the wall" that was perceived to separate criminal and intelligence investigators that ended with passage of the Patriot Act. The end of "the wall" was long overdue and was the single greatest change that could be made to protect our country. As a prosecutor who has worked on terrorism matters for nine years now, I thank you on behalf of federal prosecutors, FBI agents and the public for that long overdue change to make America safe.

It is nearly impossible to comprehend the bizarre and dangerous implications that "the wall" caused without reviewing a few examples. While most of the investigations conducted when the wall was in place remain secret, a few matters have become public. I was on a prosecution team in New York that began a criminal investigation of Usama Bin Laden in early 1996. The team – prosecutors and FBI agents assigned to the criminal case – had access to a number of sources. We could talk to citizens. We could talk to local police officers. We could

talk to other U.S. Government agencies. We could talk to foreign police officers. Even foreign intelligence personnel. And foreign citizens. And we did all those things as often as we could. We could even talk to al Qaeda members – and we did. We actually called several members and associates of al Qaeda to testify before a grand jury in New York. And we even debriefed al Qaeda members overseas who agreed to become cooperating witnesses.

But there was one group of people we were not permitted to talk to. Who? The FBI agents across the street from us in lower Manhattan assigned to a parallel intelligence investigation of Usama Bin Laden and al Qaeda. We could not learn what information they had gathered. That was "the wall." A rule that a federal court has since agreed was fundamentally flawed – and dangerous.

Let me review some examples of how the wall played out. On August 1998, al Qaeda struck at the American embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, nearly simultaneously killing 224 people. The team of FBI agents and prosecutors, which had obtained a sealed indictment of Bin Laden two months earlier, deployed to East Africa and almost immediately learned of al Qaeda's involvement and arrested two bombers in Nairobi. One month later, in September 1998, a man named Ali Mohamed was questioned before a federal grand jury in Manhattan. Ali Mohamed, a California resident, had become a United States citizen in 1989 after serving in the United States Army from 1986. Ali Mohamed lied in that grand jury proceeding and left the courthouse to go to his hotel, followed by FBI agents, but not under arrest. He had imminent plans to fly to Egypt. It was believed at the time that Mohamed lied and that he was involved with the al Qaeda network but Mohamed had not by then been tied to the bombings. The decision had to be made at that moment whether to charge Mohamed with

false statements. If not, Mohamed would leave the country. That difficult decision had to be made without knowing or reviewing the intelligence information on the other side of the "wall." It was ultimately decided to arrest Mohamed that night in his hotel room. As described below, the team got lucky but we never should have had to rely on luck. The prosecution team later obtained access to the intelligence information, including documents obtained from an earlier search of Mohamed's home by the intelligence team on the other side of "the wall." Those documents included direct written communications with al Qaeda members and a library of al Qaeda training materials that would have made the decision far less difficult. (We could only obtain that access after the arrest with the specific permission of the Attorney General of the United States, based upon the fact that we had obligations to provide the defendant with discovery materials and because the intelligence investigation of Mohamed had effectively ended.) The criminal case gathered additional evidence through further investigation. Mohamed later pleaded guilty in federal court admitting that he was a top trainer to the leadership of al Qaeda and Egyptian Islamic Jihad, and that he had participated in the surveillance of a number of overseas American targets, including the American embassy in Nairobi, Kenya, and had later shown the sketches of that embassy to Bin Laden himself. Mohamed admitted he had trained some of the persons in New York who had been responsible for the 1993 World Trade Center bombing. Mohamed stated that had he not been arrested on that day in September 1998, he had intended to travel to Afghanistan to rejoin Usama Bin Laden. Thus, while the right decision to arrest was made partly in the dark, the "wall" could easily have caused a different decision that September evening that would have allowed a key player in the al Qaeda network to escape justice for the embassy bombing in Kenya and rejoin Usama Bin Laden in a cave in Afghanistan,

instead of going to federal prison.

What is ironic is that this is an example of where the wall came into play where both criminal and intelligence investigations existed. In many other cases, the wall prevented criminal cases from being opened or pursued at all. In 1993, after the World Trade Center bombing, conspirators, including Sheik Omar Abdel Rahman, planned to bomb the Holland and Lincoln tunnels, the FBI building, the United Nations and the George Washington Bridge. Prosecutors were in the dark about the details of the plot until very late in the day for fear that earlier prosecutorial involvement would breach the wall. During the investigation of the Millenium attacks, criminal prosecutors were forced to observe the wall, while other U.S. government agencies dealt with al Qaeda-directed attacks, both overseas and, to some extent, on our soil. Criminal prosecutors received information only in part and with lag time so as not to breach the wall. The persons who determined what could be shared with the prosecutors were on the other side of the wall, making their best guess as to what would be helpful. This is no way to defend our country from imminent attack. Moreover, the above examples occurred in New York where the working relationship between prosecutors and agents in the field was strong. In many other areas in the country, the wall was so high that criminal agents and prosecutors simply had no idea what intelligence investigators were doing, and often even who they were.

When I hear – as I do almost daily – from opponents of the Patriot Act that the law was passed in haste and ought simply be repealed, I think back to the days when we required prosecutors and agents to make decisions about national security – life and death – while only looking at half the cards in their hand and know that the change came a decade too late, not a moment too soon.

Prior to the Patriot Act, there was also concern with the prosecutor's uncertain ability to share grand jury testimony affecting national security with the intelligence community. In 1997, Wadih el Hage, a key member of the al Qaeda cell in Nairobi, Kenya, was of important intelligence interest to the United States. He thereafter departed Kenya en route to Dallas, Texas, in September 1997, changing flights in New York City. At that point, el Hage was subpoenaed from the airport to a federal grand jury in Manhattan where he was questioned about Bin Laden, al Qaeda and his associates in Kenya, including among others his close associate "Harun." El Hage chose to lie repeatedly to the grand jury, but even in his lies he provided some information of potential use to the intelligence community – including potential leads as to the location of his confederate Harun and the location of Harun's files in Kenya. Unfortunately, as el Hage left the grand jury room, we knew that we could not then prove el Hage's lies in court. And we also knew that we would not be permitted to share the grand jury information with the intelligence community. We could not, however, responsibly withhold information of intelligence value. Fortunately, we found a way to address the problem that in most other cases would not work. Upon request, el Hage voluntarily agreed to be debriefed by an FBI agent outside of the grand jury when it was explained that the FBI agent was not allowed in the grand jury but was also interested in what el Hage wanted to say. El Hage then repeated the essence of what he told the grand jury to the FBI agent, including his purported leads on the location of Harun and his files. The FBI then lawfully shared that information with the intelligence community. In essence, we solved the problem only by obtaining the consent of a since convicted terrorist. We do not want to have to rely on the consent of al Qaeda terrorists to address the gaps in our national security.

In August 1998, the American Embassy was bombed in Nairobi, Kenya. Investigation in Kenya quickly determined that Harun (who had left the country after the search of el Hage's home in 1997, correctly fearing that American officials were looking for him and returned much later) was responsible for the bombing. Harun's missing files were uncovered in the investigation, stored at a charity office in Nairobi. (Harun is a fugitive today and an important al Qaeda operative.) The point here is that, had el Hage provided truthful information about the al Qaeda cell in Kenya a year before the embassy attacks, we would not have been permitted to share that grand jury material had the team not used the FBI interview to work around the problem. This example should not be written off as "no harm, no foul": we should not have to wait for people to die with no explanation than that interpretations of the law blocked the sharing of specific information that provably would have saved those lives before acting. The Patriot Act addressed that problem of separating the dots from those charged with connecting them.

These concrete examples demonstrate that the need to tear down -- and keep down -- the wall between criminal and intelligence investigations was real and compelling and not abstract. I can tell you that the change makes a huge difference in the way we approach national security today. Today, as United States Attorney in Chicago, the prosecutors in my office enjoy a good working relationship with the FBI agents in Chicago. We are aware of the intelligence investigations they do and they are aware of our criminal cases and we coordinate to make sure that the law is followed and that all information is shared appropriately. In simple terms, we are making sure that if people who pose a threat to our country *can* be arrested, my office knows about it. Then, together with the FBI, we decide what, if any, national security sources and methods will be exposed by a prosecution and make an informed decision whether it is in the

interest of our country's national security to proceed. It sounds simple and logical. It is. But it was not that way before the Patriot Act. I understand that this new way of approaching terrorism matters is the norm elsewhere in the country as well, as my colleague Mr. McNulty can attest.

I know that my colleague Mr. McNulty described the comprehensive efforts to fight terrorism being followed in the Eastern District of Virginia. I can assure the committee that the men and women of the Northern District of Illinois are equally engaged in the fight against terrorism with our colleagues from the law enforcement agencies. In brief, we are investigating and prosecuting national security matters that touch directly on terrorism, terrorism financing and espionage, and we are directing significant resources to passport and visa fraud, money laundering, smuggling and export matters where criminal violators utilize gaps in our nation's security that could and likely are being exploited by terrorists. I will not discuss matters currently in litigation before the court, nor, obviously, those not yet public, but I can assure the committee that I am proud of the effort the Northern District is making in coordination with law enforcement, specifically the Joint Terrorist Task Force led by the FBI, to make use of the information now available because of the end of the wall. I can also assure the committee that we are mindful of the Constitution as we go about doing our part in the effort to keep our country and its values safe.

From my work with the Terrorism Subcommittee of the Attorney General's Advisory Committee, I can also tell you that my colleagues around the country, in districts large and small, understand that fighting terrorism is their number one priority and are equally engaged in that fight. My colleague Mr. Wray has already provided you with other examples of the work being done in the field.

CLOSING

Mr. Chairman, I thank you for inviting us here and giving us the opportunity to explain in concrete terms how the Patriot Act has changed the way we fight terrorism. I would also like to thank this Committee for its continued leadership and support. I also wish to assure this Committee that the men and women of the Northern District of Illinois appreciate the Constitution and the values it represents as we go about out work. With your support we will continue to make great strides in keeping both our country and our constitution safe.

I will be happy to respond to any questions you may have.

News Release

JUDICIARY COMMITTEE

United States Senate • Senator Orrin Hatch, Chairman

October 21, 2003 Contact: Margarita Tapia, 202/224-5225

Statement of Chairman Orrin G. Hatch
Before the United States Senate Committee on the Judiciary
Hearing on

"PROTECTING OUR NATIONAL SECURITY FROM TERRORIST ATTACKS: A REVIEW OF CRIMINAL TERRORISM INVESTIGATIONS AND PROSECUTIONS"

Good morning. I want to welcome everyone to the first in a series of Judiciary Committee hearings that Senator Leahy and I are organizing to examine the adequacy of the federal laws designed to protect the American public against acts of terrorism on U.S. soil.

The first responsibility of government is to protect its citizens. The Judiciary Committee has a special responsibility to see that our Nation's laws and law enforcement network is up to the challenging task of thwarting terrorist attacks.

I want to thank my colleague, Senator Leahy, for his cooperation and support in planning these important hearings. We are committed to working together to ensure that the Committee examines a number of important issues relating to our country's war on terrorism.

As we announced several weeks ago, the Committee's inquiry will focus on the adequacy of federal laws to help prevent and respond to acts of terrorism against the United States; whether additional tools, reporting obligations and oversight may be needed; and the implications to security, privacy, and civil liberties of current laws and any new proposals.

We have tentatively scheduled our next hearing for November 5th. That hearing will focus on how civil liberties have been affected by counter-terrorism activities. While we must act decisively to identify, stop, and punish potential terrorists, we must be vigilant to respect traditional American civil rights and liberties.

Over the recess, Senator Leahy and I may conduct field hearings to examine issues of local and national concern relating to the war on terrorism. When we return next year, we expect to schedule additional hearings. Senator Leahy and I welcome any suggestions from other Members on topics that should be addressed, and information that the Committee may need to conduct its inquiry.

Let me also state that, as part of this oversight inquiry, Senator Leahy and I plan to invite relevant witnesses to appear before the Committee to address important issues, including Attorney General Ashcroft, FBI Director Mueller, Department of Homeland Security Secretary Ridge and other appropriate officials. The Administration has told me that it welcomes these hearings and will cooperate fully with the Committee's inquiry.

At the outset, I want to emphasize that I am committed to conducting a rigorous examination of these important issues. These hearings, in my view, can best serve the public by fairly and objectively assessing the key law enforcement issues related to curtailing acts of domestic terrorism.

We have all read or heard about claims being made by various interest groups concerning how well, or how poorly, the federal government has conducted its domestic counter-terrorism program. This Committee's inquiry will attempt to cut through the rhetoric, confusion, and distortion to get to the facts necessary to find out if we are protecting our citizens' lives and their liberties.

I am sure that everyone on this Committee shares a common goal – to protect our country from additional terrorist attacks. We are all committed to this goal, and must do so with due regard for fundamental freedoms and the security of our people. Our Committee has a historical tradition of joining together to examine, debate, and resolve important national issues. We are once again faced with an important task, which will have a profound impact on our country's security and cherished freedoms.

Two years ago, our country faced an unprecedented challenge. We suffered a devastating attack on our shores which resulted in the murder of over 3000 of our fellow Americans. The President, Congress, and our Nation rose to the challenge and worked together to ensure that we could prevail in the war against terrorism. Here in Congress we passed the PATRIOT Act and other laws in order to provide the tools, information and resources necessary to defeat the terrorist enemy.

While we have accomplished much, there is much more to be done. The threat of harm to our country remains; it is evolving and committed fanatics continue to threaten our way of life.

Today's hearing will focus on the existing legal authorities used by the government to investigate and prosecute terrorists for criminal offenses. I look forward to hearing how the existing authorities, some of which were enacted as part of the PATRIOT Act, facilitate criminal investigators' and prosecutors' ability to track down, arrest and prosecute terrorists around the world.

I want to turn it over to Senator Leahy for his opening statement. After that, I will ask each member of the Committee to make a short -- two minute -- opening statement if they so desire.

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from the office of

Senator Edward M. Kennedy

of Massachusetts

FOR IMMEDIATE RELEASE
October 21, 2003

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OPENING STATEMENT OF SENATOR EDWARD M. KENNEDY AT THE JUDICIARY COMMITTEE HEARING ON DEPARTMENT OF JUSTICE OVERSIGHT

Rarely in recent years have the activities of the Justice Department been so often at the forefront of public discussion, so controversial, and in so much need of close scrutiny by Congress.

Particularly in times of threats to national security, Congress has a special obligation to prevent excessive restrictions on the individual freedoms that are the essence of democracy and that symbolize our country to the world.

Two years ago, in the attacks on September 11th, we learned that the oceans can no longer protect us from the terrorism that has plagued other nations. We learned that our law enforcement agencies and our intelligence agencies were not adequately organized, trained or prepared to identify terrorists and prevent them from striking.

We learned, especially from the report of the Senate and House Intelligence Committees, of the serious problems in analyzing information, and sharing it between agencies at the federal, state and local levels, and even between federal agencies.

As the FBI Director told the committees, no one can say whether the tragedy of 9/11 could have been prevented if those problems had been corrected before 9/11. But 9/11 was certainly a wake-up call to these agencies. They were on notice that, whatever the reasons for their failure to connect the many "dots" which their separate activities had uncovered before the terrorist attacks, they needed to change their ways.

We still do not know whether the basic nuts-and-bolts improvements that might have prevented 9/11 have been made. We do know that by the end of the first year after 9/11, there had not been enough improvements to prevent the sniper attacks here in the capital area, even though there were many dots that should have been connected. The witnesses today have little to say on that key issue.

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Instead, like the Attorney General, they insist on defending extreme measures which may well threaten basic freedoms more than they prevent acts of terrorism.

Only the Attorney General can supply adequate answers to our questions, and I regret that he is not here to do so. He has not reported to the committee since early March. Yet he has had time to barnstorm the country in an exercise that is far more a public relations, not a law enforcement, exercise. We need better answers to a few basic questions.

- Why should we sacrifice liberty, in hopes of greater safety, until the Department has addressed the nuts-and-bolts problems in law enforcement and intelligence identified by the Joint Intelligence Committees?

- How can the Department ask for intrusive new federal anti-terror powers, when basic law enforcement procedures are not up to date? For example, two years after 9/11, we know that 15 states still lack the readily available modern fingerprint technology which could quickly have connected the dots and helped prevent the fatal shootings by the D.C. snipers?

- What will the Department at the Administration do in response to the impressive report of the Department's own Inspector General, and the unprecedented complaints by the International Red Cross, about the continued detention, without any due process, of so many hundreds of citizens and non-citizens?

- Was the attempted intimidation of a dissenting diplomat by leaking his wife's covert CIA role a careless act by a free-lancing White House aide, or a shameful symptom of an Administration bent on punishing its domestic "enemies"?

- Finally, how can the Department of Justice say with a straight face that it's necessary to ride roughshod over the basic constitutional principles of the First, Fourth, Fifth, and Sixth Amendments in order to meet the needs of law enforcement, and then insist that a Second Amendment "right" to bear arms prevails over the obvious need of law enforcement to keep guns out of the hands of criminals and terrorists?

It's not hard to imagine why the Attorney General is so reluctant to testify here himself. In the meantime, we intend to do our best to obtain answers to these questions in this and future hearings, and beginning with the answers of our witnesses today.

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U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

Statement of Senator Patrick Leahy,
Ranking Member, Senate Committee on the Judiciary
Hearing on Protecting Our National Security from Terrorist Attacks:
A Review of Criminal Terrorism Investigations and Prosecutions
October 21, 2003

Today's hearing is the first in a series of oversight hearings to review America's progress in the fight against terrorism. Chairman Hatch and I envision these hearings as a bipartisan effort to review the effectiveness of our anti-terrorism laws; to evaluate the Administration's proposals for additional law enforcement authority; and to assess the impact of these measures on Americans' privacy and civil liberties.

I expect the Attorney General to participate in these hearings, and I am disappointed that we will not be hearing from him today. Unlike other senior Administration officials who regularly participate in oversight hearings, Attorney General Ashcroft has appeared before this Committee only once this year, and then only for a short time. This is a curious omission given his recent acknowledgment, in a letter to me, that regular and vigorous oversight by Congress provides an important assurance that investigations are conducted in accordance with the law and the Constitution.

I understand that the Attorney General is a busy man, but he has found time to travel the country to make other appearances, most specifically in leading a nationwide public relations campaign attempting to blunt criticism of the USA PATRIOT Act. Surely he can spare a few hours of his time for the Senate and for this oversight Committee. I know that Members on both sides have questions for him. When I chaired this Committee we made every effort to accommodate his busy schedule, and I am confident that Senator Hatch would do the same.

One of the focal points for this series of hearings will be the PATRIOT Act, which Congress passed two years ago this month, in the wake of the 9/11 attacks. Since its passage, the PATRIOT Act has raised concerns with citizens around the country and across the political spectrum. To date, anti-PATRIOT resolutions have been passed by more than 190 communities in 34 states.

Recently, the Justice Department dismissed the many local government resolutions condemning the PATRIOT Act by saying: "[H]alf are either in cities in Vermont, very small population, or in college towns in California. It's in a lot of the usual enclaves where you might see nuclear free zones, or they probably passed resolutions against the war in Iraq."

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It is unfortunate that the Justice Department felt it appropriate to ridicule these grass-roots efforts to participate in an important national dialogue. The opportunity to engage in public discourse is one of the essential rights of Americans, and I am proud that Vermont towns are among those dedicated to thinking about and acting on these important issues. More importantly, the concerns expressed in my home state are being echoed by Americans in all 50 states. These communities represent millions upon millions of Americans, not just a few liberty-and-privacy-conscious Vermonters, as the Justice Department has insinuated. Impugning Vermonters, dedicated librarians and United States Senators for asking questions and raising concerns does not advance the debate or instill public confidence in the Ashcroft Justice Department's use of the vast powers it wields. In fact, it achieves the opposite.

In a democracy there will always be an inherent tension between government power and privacy rights, and the threat of terrorism has magnified that tension. When you overlay that with excessive government secrecy, and the lack of cooperation and accountability that have characterized the approach taken by this Administration in its dealings with the Congress and the public, you further compound the tension and the risks to our free society. First, undue secrecy undermines the system's built-in checks and balances. And over time it corrodes the public's faith that their government is not crossing the line and treading on the rights and freedoms of the American people.

While we have another two years before some of the powers we granted in the PATRIOT Act expire, it is not too soon for this Committee to take a hard look at how those powers are being used: What is working, what is not, and what can we do better?

The PATRIOT Act has become the most visible target of public concerns about governmental overreaching, but those concerns extend even further, as will these hearings. The next hearing in this series will address a broad array of civil liberties issues, including issues relating to the 9/11 detentions that the DOJ Inspector General raised in his excellent report earlier this year. Later hearings will examine other issues raised by the fight against terrorism, which I hope will include the treatment of so-called "unlawful combatants," information-sharing with our State and local partners, and the pressing needs of our first responders.

Instead of the Attorney General, we will hear today from the recent nominee to head the Criminal Division and two U.S. Attorneys. This hearing has been in the works for some time, and the witnesses were selected by Senator Hatch more than two weeks ago, yet we still did not receive their testimony in a timely fashion. I do not blame the witnesses, who I assume are busy on substantive matters. But I am disappointed in the Administration's lackadaisical approach to these oversight matters. When the Attorney General did not timely submit his testimony for a hearing of the House Judiciary Committee in May 2002, Chairman Sensenbrenner cancelled that hearing.

I thank our Chairman for allowing all Senators to make a short opening statement, and suggest that he then proceed immediately to questions so that we can use the time we have today most effectively. That will also give us all time to read and consider the late-

arriving testimony of the Administration representatives in due course, and to follow up as appropriate.

I hope today's hearing sheds some light on how the Administration is conducting the fight against terrorism. Let me briefly highlight just a few of the many areas that I hope our witnesses will cover.

First, I believe we need an explanation regarding the FBI's recruitment of language translators. I authored a provision in the PATRIOT Act to expedite the hiring of translators to support the FBI's counterterrorism operations. In July of this year -- in response to an oversight question that I had posed in July 2002 -- the Department informed me my provision had proven unnecessary and was never implemented. But just last week, the FBI announced that it needed to recruit more translators. I want to hear from our witnesses why the PATRIOT provision was not used, and why the Department has made such inconsistent statements about the need for translators.

Second, I am concerned that the Department of Justice may be exaggerating its success in fighting terrorism, by classifying cases as "terrorism" related even when they have little or nothing to do with terrorism. According to the Transactional Records Access Clearinghouse ("TRAC") at Syracuse University, in fiscal year 2003, of 616 defendants convicted in cases that the Department classified as "terrorism" cases, only 236 were sentenced to prison terms, with the median prison sentence being only *two months*. Two months is a very short sentence for any kind of terrorist act, which suggests that something else is really involved in these so-called "terrorism" cases. In addition, I understand that once people started focusing on this data, the Department of Justice decided not to make it publicly available anymore. That is not the way to engender confidence or understanding. Rather, it is a foolproof way to generate suspicion and distrust.

Third, I would like to hear about the progress in prosecuting Zacarias Moussaoui. I want to better understand why the Department sought to dismiss all charges against this admitted terrorist, and why it so sharply criticized the Federal judge who instead imposed lesser sanctions for the Administration's refusal to follow the law and abide by court rulings.

Finally, there are areas where bipartisan scrutiny has already led to several bills that I would hope our witnesses today support:

- We should consider the Grassley-Leahy-Specter "Domestic Surveillance Oversight Act." This bill does not in any way diminish the government's powers, but instead ensures the ability of the Congress and the public to monitor the government's use of surveillance and other investigative tools.

- Senators Craig, Sununu, Durbin, Reid and I are cosponsoring the "PATRIOT Oversight Restoration Act," a bill that would simply expand the PATRIOT Act's

existing sunset provision to cover a number of additional provisions that focus on privacy issues, law enforcement powers and information-gathering tools.

- We should consider the "FBI Reform Act," which Senator Grassley and I introduced in July. There are several focused reforms in the bill, one of which Director Mueller acknowledged support for during his last appearance before the Committee on July 23.

- We should strengthen the reserves of our first responders, who are critical partners of the FBI in the terrorism fight. The "First Responders Partnership Grant Act," which I introduced at the outset of this Congressional session, would expand the Federal money available to our State and local partners by between $4 billion and $5 billion a year, so that they could fund overtime and pay for equipment, training and facility expenses to support first responders.

Others, such as Senator Durbin, Senator Craig and Senator Feingold, have additional legislative proposals as well.

I look forward to further discussion of these items, and to hearing from our witnesses here today and from the Attorney General in the near future.

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STATEMENT OF
PAUL J. McNULTY
UNITED STATES ATTORNEY
EASTERN DISTRICT OF VIRGINIA

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

PRESENTED ON

OCTOBER 21, 2003

Mr. Chairman and Members of the Committee: As the United States Attorney for the Eastern District of Virginia, I am privileged to serve the public and to lead a talented staff in a district on the front lines of the domestic war against terrorism. It is also my privilege to appear before you today to discuss the important anti-terrorism initiatives my office has undertaken. This is obviously an extremely important topic, and I commend you, Mr. Chairman, for holding this hearing.

I. Introduction

Attorney General Ashcroft has directed every U.S. Attorney to be pro-active and comprehensive in this effort. In EDVA, we have developed a detailed strategic plan for carrying out our anti-terrorism responsibilities.

Shortly after I became U.S. Attorney, we established six strategic objectives and dozens of specific cases, projects and initiatives for accomplishing our objectives. The six objectives are:

1. Identifying terrorist threats through the use of available federal law enforcement tools;
2. Discovering and eliminating material support to terrorists, particularly financial support;
3. Restoring the integrity of our identification, financial, and immigration systems by prosecuting

identity document fraud, immigration fraud, and financial crimes;

4. Protecting the critical infrastructure in EDVA. (Ensuring the security of airports, ports, power plants, electronic communications and data.)

5. Prosecuting those suspected of supporting, planning, or executing terrorist acts, such as Zacarias Moussaoui.

6. Protecting our national security information and sensitive technology.

To assist in the pursuit of these objectives, I established a Terrorism and National Security Unit in EDVA with more than a dozen AUSAs. These experienced prosecutors are bringing strategic prosecutions designed, not only to bring wrongdoers to justice, but also to disrupt and hinder the ability of terrorists to gain a foothold here in the United States. The focus of the new Terrorism and National Security Unit is on making it more difficult for terrorists to operate in the United States, thereby preventing any future attacks.

II. Prosecuting Terrorists and Those Who Support Terrorists

The Senate voted to confirm my nomination as U.S. Attorney on September 14, 2001 – just 3 days after the September 11 attacks against our country. Needless to say, I joined the office at a time when everyone was in high gear. Along with our colleagues in the Southern District of New York and the Criminal Division, we began sorting through the evidence and putting together what had happened. Eventually, we brought charges against Zacarias Moussaoui in connection with the al-Qaeda attack on the United States. The *Moussaoui* case is on-going, and, if we prevail on the current appeal, we are confident that Moussaoui will be convicted of all of the charges against him.

In addition to the *Moussaoui* prosecution, EDVA has handled several other cases involving terrorism or support of terrorism. For example, John Walker Lindh, the so-called "American Taliban" was prosecuted for providing material support to a designated terrorist organization. The *Lindh* case was successfully completed with a guilty plea, a 20-year sentence of imprisonment and important cooperation. In May of this year, truck driver Iyman Faris pleaded guilty in our district to conspiracy to providing material support to al-Qaeda. He admitted to providing information to al-Qaeda regarding a major bridge in New York City, which was a potential target of attack, as well as other potential targets.[1]

We have learned a great deal from these cases. We have developed excellent working relationships between attorneys in EDVA, other U.S. Attorney offices, and Main Justice. The Department now has a cadre of experienced prosecutors ready to serve if and when the need arises.

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[1] We have arrested 11 other individuals in the course of what we have called the "Virginia Jihad case." We have charged eight of those defendants with traveling to Pakistan to attend jihad training camps in Pakistan or Afghanistan since 1999; indeed, four traveled to such a camp right after September 11th. Of those four, three have pled guilty, and admitted that they went to Pakistan after being exhorted to go to a jihad training camp of the Lashkar-e-Taiba group to get the military training that would be necessary in order to help defend Afghanistan against the American invasion that was then expected to occur. Two of those three told us that, among the reasons that they did not actually end up in Afghanistan to fight American troops was that they reconsidered their decisions in light of the rapid success of our military forces there. And for that, of course, we can all be thankful. Let me note here that while some of the defendants are now charged with conspiracy to levy war against the United States and material support to terrorists, they originally were charged with offenses involving firearms violations and the Neutrality Act, not run-of-the-mill terrorism charges. Once again, in the post-9/11 world, we are reaching a little deeper into the tool chest to deal with situations that perhaps were not previously recognized as problems for law enforcement.

This morning, I would like to go into more detail on our objectives of identifying terrorists and disrupting their activities in the United States.

III. Identifying Terrorists and Disrupting their Activities in the United States

As the Attorney General has said, "The protection of life and liberty is the cause of our time." Without any doubt, the number one priority of federal law enforcement is the identification and disruption of terrorist networks in the United States. This is the critical challenge we face: finding and stopping those terrorists who live among us before they can carry out attacks.

In this effort, we are making substantial progress not only in disrupting the activities of potential terrorists and their supporters but closing off whole avenues that terrorists have used to sustain themselves in the United States. In my district alone, we have clamped down on illegal money remitters, gone after credit-card bust-out schemes, and made it harder for people to pretend they are who they are not – or to pretend that they are legally in this country.

Terrorist Financing

As President George W. Bush said shortly after September 11th, "Money is the life blood of terrorist operations. Today, we're asking the world to stop payment." Money is indeed the life blood of terrorist operations. It is not just the deadly operations that require funding, but, like other large organizations, terrorists have overhead. In fact, their overhead likely dwarfs the cost of their operations. In order to provide command and control, a terrorist organization needs an infrastructure. This infrastructure needs to exist continuously – even during those sometimes long periods between actual terrorist operations. *In other words, sleeper cells cost money.* Moreover, the infrastructure has to have enough redundancy and flexibility to maintain continuity

even after the capture or death of individual terrorists, or the destruction of its buildings and vehicles.

In order to dry up potential sources of terrorist financing, we now investigate and prosecute cases that may help us to develop informants and cooperators who will provide information regarding terrorist financing. Individuals we catch selling smuggled cigarettes or bogus baby formula may now provide important information about terrorist financiers. Further, we prosecute the cases because the money from the scam may be heading back to terrorists.

Similarly, we now examine those Suspicious Activity Reports (SAR)[2] from financial institutions that too often went unread for lack of resources; we seize money from and prosecute unlicenced money remitters and money couriers at the international airports; and we scan the bankruptcy reports to detect credit card fraud among individuals claiming that they ran up hundreds of thousands of dollars in credit card debt but cannot pay it back, when, in reality, they transferred it overseas to support future terrorist activities.

With the assistance of the FBI, the Department of Homeland Security's Immigration and Customs Enforcement, and the Internal Revenue Service, we have engaged in a wide-ranging investigation of terrorist financing, focusing on money sent from America to support terrorism overseas. A portion of an affidavit used in support of numerous search warrants obtained in the course of this investigation is now unsealed, so I can tell you that the investigation encompasses among other items, tens of thousands of dollars that were sent from organizations and individuals

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[2] Since its inception in January, a task force has reviewed hundreds of SARs, served approximately 200 subpoenas for financial records, and obtained seizure warrants to seize and forfeit more than $1,700,000 involved in the offenses under investigation; we expect to make additional significant seizures within the next two weeks.

in Northern Virginia to Sami Al-Arian, who presently awaits trial in Tampa, Florida, on terrorism charges involving the Palestinian Islamic Jihad. Moreover, in furtherance of this investigation, we recently arrested Abdirahman Alamoudi, a founder of various American Muslim organizations, for violation of the rules against engaging in financial dealing with Libya. In the course of his detention hearing, we presented evidence that in August of this year, Alamoudi was found by British authorities to be smuggling $340,000 in cash on his way to Syria which, as you may know, is the home of various terrorists that Alamoudi has vocally supported in the past, as well as a jumping off point for foreigners seeking to enter Iraq to fight jihad against our soldiers.

In addition, we recently obtained our first conviction in this wide-ranging financial support investigation. Soliman Biheiri, the founder of a company known as BMI, was charged with and convicted of immigration fraud. In the course of a related investigation, a BMI accountant contacted an FBI agent and stated that "funds the accountant was transferring overseas on behalf of the company may have been used to finance the embassy bombings in Africa." That we convicted Biheiri of an immigration offense (and charged Alamoudi with violation of the Libyan sanctions) rather than of material support to terrorism illustrates the challenges we still face in making successful terrorist financing cases even where there are financial trails between defendants and designated terrorists.

Identification document fraud

Not only do we disrupt the terrorist network by attacking its funding, but we also seek to unmask the terrorists. In America, it is too easy to hide behind someone else's or a fictitious identity. If a person is willing to pay the price, he or she can obtain fraudulent identification for any purpose, no questions asked. We have prosecuted many, many identification fraud cases

since September 2001, including two conspiracies involving Virginia DMV employees. These cases reveal that identification document fraud is big business. A pair of defendants dealing in fraudulent immigration documents made no less than $6,300,000 in the space of eighteen months, including $1,000,000 in cash seized from a suitcase under one of the defendant's beds. Similarly, both of the DMV rings I mentioned were collecting hundreds of thousands of dollars of illegal profits.

Identification document fraud directly undermines our homeland security. It creates huge holes in our immigration and naturalization controls; it aids terrorists to enter and remain in our country; and it facilitates crime – crime such as credit card fraud, mortgage fraud, and bank fraud. These crimes can provide terrorists with the capital they need to support sleeper cells or plan and carry out large-scale terrorist attacks.

Fraud involving state driver's licenses is of a particular concern. State driver's licenses are a mainstay of daily life in this country. With a driver's license, you may drive, board an airplane, and purchase a handgun. You may open bank accounts, buy alcohol, and obtain credit cards. Although a driver's license is not evidence of lawful residence in the United States, it may be perceived as such. Furthermore, a driver's license is often used by citizens and aliens as means of identification, along with an unrestricted social security card or other evidence of employment authorization, in the employment eligibility verification process (Form I-9). In short, the integrity of state driver's licenses is critical to our commerce and our national security.

The concern that identification document fraud may facilitate terrorism is no abstract point. Seven of the September 11th hijackers[3] obtained genuine Virginia driver's licenses by submitting false proof of Virginia residency to the DMV.[4] One of the seven was involved in the failed attempt to fly Flight 93 into a target here in the Washington, D.C., area; two were aboard the airplanes that crashed into the World Trade Center; and four were aboard Flight 77 when it was flown into the Pentagon. Notably, none of the seven lived in Virginia. Rather, they made a special trip to Virginia because they knew they could get a genuine driver's license in one day for approximately $100 in cash with no questions asked. And although we will never know for sure, we strongly suspect that these seven hijackers intentionally used their Virginia driver's licenses to board the flights they hijacked to avoid the scrutiny a foreign passport would bring. We are committed to never having to ask such questions again.

IV. The USA PATRIOT Act

After September 11, 2001, the Senate and the House passed the USA PATRIOT Act ("Patriot Act") by overwhelming margins. The USA PATRIOT Act is an integral part of our efforts to identify terrorists and disrupt their activities in the United States. It provides law

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[3] The seven were Hani Hanjour, Khalid Almihdhar, Majed Moqed, Salem Alhazmi, Abdulaziz Alomari, Ahmed Alghamdi, and Ziad Jarrah.

[4] Since September 11, 2001, this Office has prosecuted four individuals who helped the hijackers complete fraudulent forms and submit them to the Virginia Department of Motor Vehicles ("DMV"). All four were charged with and pled guilty to identification document fraud, in violation of 18 U.S.C. § 1028. In addition, this Office has used 18 U.S.C. § 1028 to prosecute several people who came to our attention through the 9/11 investigation, either due to their contacts with the hijackers or because of their presence near Dulles airport on September 11th with flight manuals. We also prosecuted two men who ran a checkpoint at the Pentagon in a tow truck in February of this year. In each of these cases, the defendant submitted false information to the Virginia DMV to obtain a Virginia identification card or license for himself or another by fraud.

enforcement with important tools to enhance our nation's domestic security and to prevent future acts of terrorism.

The Patriot Act does three things: First, it significantly enhances our ability to investigate terrorists. Second, it brings certain surveillance laws up to date with new technologies. Third, it breaks down artificial barriers and allows various agencies to share information and fight terrorism together.

There are numerous aspects of the Patriot Act that improve our ability to investigate terrorists, many of which simply extend powers already available in narcotics investigations to investigations of suspected terrorists. For example, investigators and prosecutors in my district used a Patriot Act provision to obtain a court-ordered search warrant from a single United States District Court in a complex multi-state financial investigation of terrorists' financial networks. This provision greatly expedited the investigation and saved precious time obtaining separate warrants in other districts.

By bringing the law up to speed with new technologies, the Patriot Act made some common-sense changes that were long overdue. In an age when criminals are using pre-paid, almost disposable cellular telephones, we must constantly adapt to new technologies and the uses to which criminals put them. Under the Patriot Act, for example, prosecutors may now use a "roving wiretap" to track a terrorist's communications even when he uses different phones to avoid detection. These roving wiretaps have been used to track suspected drug dealers for nearly twenty years. We can now use them to fight the war on terror as we have for years in the war on drugs.

Court-authorized delayed notification warrants have been used for years. These warrants permit federal judges, in certain narrow circumstances, to authorize investigators to give delayed notice that a search warrant has been executed. The Patriot Act merely established a uniform statutory standard applicable throughout the United States. My office has used this authority in terrorism investigations. For example, the court authorized a delayed notice search of a business in Virginia. Surreptitious entry permitted law enforcement agents to copy numerous records (without removing them) related to the offenses under investigation. Pursuant to the Court Order, a copy of the warrant was not left on the premises of the business at the conclusion of the search.

Had the court not permitted a delay of the notice, the investigation, as well as the safety of cooperating witnesses, would have been seriously jeopardized. As a result, purchases of illegal drugs had been made from targets, and a cooperating source working with law enforcement had delivered money used for the purchase of drugs to the owner of the business for subsequent transfer to targets of the investigation overseas. The cooperating source subsequently met with overseas sources to discuss future drug transactions, which could provide funding for terrorist organizations. The attorney for the operator of the business was subsequently notified of the search.

V. Conclusion

In short, the word from the front lines of the domestic war on terrorism is good. We are making progress in prosecuting terrorists and disrupting the criminal activity that supports them. The Patriot Act has played a significant part in the successes we have enjoyed to date, but more is possible with your help.

New York's Senator

CHARLES E. SCHUMER

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FOR IMMEDIATE RELEASE
October 21, 2003

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SCHUMER FAULTS DOJ'S SILENCE ON WHO IS RUNNING CIA LEAK INVESTIGATION

At Judiciary Hearing, Schumer presses officials to explain Attorney General's role in leak probe and answer basic questions about how investigation is being conducted

US Senator Charles Schumer issued the following statement at the Judiciary Committee's Hearing entitled *Protecting Our National Security from Terrorist Attacks: A Review of Criminal Terrorism Investigations and Prosecutions*:

The investigation I am most interested in is that of the allegation that someone in the Administration leaked the name of a covert CIA agent. It is, in my opinion, a dastardly crime and it goes to the heart of our ability to deal with terrorism.

Let me start by welcoming these three witnesses this morning. It's unfortunate, however, that the two people who can best answer questions about this investigation – Attorney General Ashcroft and John Dion, head of the Counterespionage Section, are not here today.

It's a shame that Attorney General Ashcroft has chosen to stay away from this hearing since he is a close ally of the President and has refused to recuse himself from the investigation so far. We don't have the slightest idea of the extent of his involvement. We don't know what his role will be in determining whether a grand jury will be convened. These are essential questions that deal wi th the integrity of the investigation.

I sent a letter to Chairman Hatch and we called the Department of Justice asking that Mr. Dion be here today, because he's really the only one who can tell us what we need to know about who's really running this investigation and how independent it really is. It's a shame too that he's not here today, but at least we'll have the opportunity to ask Mr. Wray to shed some much-needed light here.

There are a lot of questions we need answered in this investigation.

First and foremost, who's really in charge of this investigation? While DOJ says career prosecutors are running this investigation, it's quite clear that allies of the President are in the line of command and haven't recused themselves.

Does Mr. Dion have the power to take whatever investigative steps he deems appropriate? Or can he be blocked from subpoenaing documents, putting a witness in the grand jury, or doing anything else he believes is essential to finding out who committed this dastardly crime?

If someone with a conflict of interest or an apparent conflict of interest can block Mr. Dion from investigating this case the right way, that's a real big problem. I, for one, want to know what's being done about it.

Why have we seen such unusual delays? Why did the Department of Justice accede to a White House request to delay telling employees to preserve evidence?

And why hasn't a special prosecutor been appointed to run this investigation?

I take the Justice Department's criminal investigation into the leak of a covert CIA operative's identity very seriously because it is an act so vile and so heinous that it shock's the conscience.

It demands a full, fair, and fearless investigation that is above politics. But so far, the way this probe has been conducted falls quite short of that bar.

These questions go to the heart of whether the public can trust that the investigation is being conducted in responsible manner. It shouldn't take a hearing to determine that, but that's what we're left with.

I advised Mr. Wray's staff that I would be asking these questions today so there is no surprise here. I didn't want to surprise anyone or catch someone off guard – we just want the answers we've been seeking for weeks.

This Committee has important oversight responsibilities and we owe a duty to the American people and our Intelligence operatives – the brave men and women risking their lives on our behalf – to ensure this investigation is being done right. I look forward to getting those answers today.

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Letter to Gonzales
10/8/03 page 1

ORRIN G. HATCH, UTAH, CHAIRMAN

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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510–6275

October 8, 2003

Alberto R. Gonzales
Counsel to the President
The White House
Washington, D.C.

Dear Mr. Gonzales:

We are writing to express our concern about the manner in which your office is participating in the Department of Justice investigation into the leak of an undercover CIA employee's identity and the possibility that the leak was part of an intimidation plan.

According to a statement by Scott McClellan yesterday, although the White House staff was given a deadline of 5 p.m. on October 7, to submit to your office all materials requested by the Department of Justice, you intend to wait up to two weeks to forward that evidence to DOJ.

Given the President's commitment to full cooperation with this very serious investigation, a two-week delay is excessive. There appears to be only one legitimate basis for any meaningful delay in transmitting documents to Justice and that is to ensure the White House is not inadvertently waiving a privilege unrelated to this investigation. Surely, it cannot take two weeks to complete such a review and, at a minimum, documents can and should be provided to the Department of Justice on a rolling basis.

We are also concerned that the White House has not announced necessary steps to protect the integrity of this investigation. Have all individuals who are vetting documents in the Counsel's office been cleared of wrongdoing? Are any individuals who are reviewing documents or who are involved in deciding whether to disclose them to DOJ also advising the President and White House press and political advisors on crisis management? Have White House staffers who might be uncomfortable disclosing documents to your office for fear of retaliation been given the option of disclosing documents directly to the Department of Justice? Will documents that are being provided to your office be circulated to anyone else outside the Counsel's office? If any privilege is to be asserted, will the White House make public a detailed privilege log accounting for all assertions of privilege? If any employees turn over to you documents they believe are relevant but which you decline to disclose to the Department of Justice investigators, will you publicly account for those documents as well?

Gonzales Page 2

Alberto R. Gonzales
October 8, 2003
Page 2

We urge you to make an immediate public statement detailing the measures you are taking to ensure that your office's involvement in this investigation does not impede the efforts to, as rapidly as possible, identify and prosecute those responsible for this national security breach.

We look forward to hearing from you promptly.

Sincerely,

Charles E. Schumer

Edward M. Kennedy

Response of Gonzales
Rec'd 10/15/03

10/15/03 WED 18:54 FAX 002

THE WHITE HOUSE

WASHINGTON

October 15, 2003

Dear Senators Schumer and Kennedy:

This responds to your October 8, 2003 letter concerning an investigation into reported disclosures concerning a CIA employee. As you know, the investigation is being conducted by career employees at the Department of Justice, and we have therefore forwarded your letter to the Department for its consideration.

Contrary to your letter, we have already forwarded on a rolling basis thousands of pages of documents to the Department that are potentially responsive to its requests. Although you express concern that we have not publicized "necessary steps to protect the integrity of the investigation," we have chosen instead to take our direction from the Department of Justice without the need to publicize our prompt compliance with its every request. It is a mistake to assume, as your letter does, that the integrity of the investigation has been compromised because of a lack of publicity about the steps that are being taken; indeed, some might argue that the investigation would be damaged were we to publicize our actions and those of DOJ. Instead, at each step of the way we have proceeded and will continue to proceed in accordance with the express direction of the Department of Justice.

The President has directed all members of his Administration to cooperate fully with the Department of Justice's investigation, and should the Department in its judgment conclude that the issues you identify concerning our handling of its requests should be addressed in the course of its investigation, we are confident it will have the full support of the President and those in his Administration.

Sincerely,

Alberto R. Gonzales
Counsel to the President

The Honorable Edward M. Kennedy
The Honorable Charles E. Schumer
United States Senate
Washington, D.C. 20510

10/15/2003 05:00PM

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Appointments

For Immediate Release
Office of the Press Secretary
August 27, 2004

Executive Order Strengthening the Sharing of Terrorism Information to Protect Americans

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to further strengthen the effective conduct of United States intelligence activities and protect the territory, people, and interests of the United States of America, including against terrorist attacks, it is hereby ordered as follows:

Section 1. Policy. To the maximum extent consistent with applicable law, agencies shall, in the design and use of information systems and in the dissemination of information among agencies:

(a) give the highest priority to (i) the detection, prevention, disruption, preemption, and mitigation of the effects of terrorist activities against the territory, people, and interests of the United States of America, (ii) the interchange of terrorism information among agencies, (iii) the interchange of terrorism information between agencies and appropriate authorities of States and local governments, and (iv) the protection of the ability of agencies to acquire additional such information; and

(b) protect the freedom, information privacy, and other legal rights of Americans in the conduct of activities implementing subsection (a).

Sec. 2. Duty of Heads of Agencies Possessing or Acquiring Terrorism Information. To implement the policy set forth in section 1 of this order, the head of each agency that possesses or acquires terrorism information:

(a) shall promptly give access to the terrorism information to the head of each other agency that has counterterrorism functions, and provide the terrorism information to each such agency in accordance with the standards and information sharing guidance issued pursuant to this order, unless otherwise directed by the President, and consistent with (i) the statutory responsibilities of the agencies providing and receiving the information, (ii) any guidance issued by the Attorney General to fulfill the policy set forth in subsection 1(b) of this order, and (iii) other applicable law, including section 103(c)(7) of the National Security Act of 1947, section 892 of the Homeland Security Act of 2002, Executive Order 12958 of April 17, 1995, as amended, and Executive Order 13311 of July 29, 2003;

(b) shall cooperate in and facilitate production of reports based on terrorism information with contents and formats that permit dissemination that maximizes the utility of the information in protecting the territory, people, and interests of the United States; and

(c) shall facilitate implementation of the plan developed by the Information Systems Council established by section 5 of this order.

Sec. 3. Preparing Terrorism Information for Maximum Distribution within Intelligence Community. To assist in expeditious and effective implementation by agencies within the Intelligence Community of the policy set forth in section 1 of this order, the Director of Central Intelligence shall, in consultation with the Attorney General and the other heads of agencies within the Intelligence Community, set forth not later than 90 days after the date of this order, and thereafter as appropriate, common standards for the sharing of terrorism information by agencies within the Intelligence Community with (i) other agencies within the Intelligence Community, (ii) other

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agencies having counterterrorism functions, and (iii) through or in coordination with the Department of Homeland Security, appropriate authorities of State and local governments. These common standards shall improve information sharing by such methods as:

(a) requiring, at the outset of the intelligence collection and analysis process, the creation of records and reporting, for both raw and processed information including, for example, metadata and content, in such a manner that sources and methods are protected so that the information can be distributed at lower classification levels, and by creating unclassified versions for distribution whenever possible;

(b) requiring records and reports related to terrorism information to be produced with multiple versions at an unclassified level and at varying levels of classification, for example on an electronic tearline basis, allowing varying degrees of access by other agencies and personnel commensurate with their particular security clearance levels and special access approvals;

(c) requiring terrorism information to be shared free of originator controls, including, for example, controls requiring the consent of the originating agency prior to the dissemination of the information outside any other agency to which it has been made available, to the maximum extent permitted by applicable law, Executive Orders, or Presidential guidance;

(d) minimizing the applicability of information compartmentalization systems to terrorism information, to the maximum extent permitted by applicable law, Executive Orders, and Presidential guidance; and

(e) ensuring the establishment of appropriate arrangements providing incentives for, and holding personnel accountable for, increased sharing of terrorism information, consistent with requirements of the Nation's security and with applicable law, Executive Orders, and Presidential guidance.

Sec. 4. Requirements for Collection of Terrorism Information Inside the United States. (a) The Attorney General, the Secretary of Homeland Security, and the Director of Central Intelligence shall, not later than 90 days after the date of this order, jointly submit to the President, through the Assistants to the President for National Security Affairs and Homeland Security, their recommendation on the establishment of executive branch-wide collection and sharing requirements, procedures, and guidelines for terrorism information to be collected within the United States, including, but not limited to, from publicly available sources, including nongovernmental databases.

(b) The recommendation submitted under subsection (a) of this section shall also:

(i) address requirements and guidelines for the collection and sharing of other information necessary to protect the territory, people, and interests of the United States; and

(ii) propose arrangements for ensuring that officers of the United States with responsibilities for protecting the territory, people, and interests of the United States are provided with clear, understandable, consistent, effective, and lawful procedures and guidelines for the collection, handling, distribution, and retention of information.

Sec. 5. Establishment of Information Systems Council. (a) There is established an Information Systems Council (Council), chaired by a designee of the Director of the Office of Management and Budget, and composed exclusively of designees of: the Secretaries of State, the Treasury, Defense, Commerce, Energy, and Homeland Security; the Attorney General; the Director of Central Intelligence; the Director of the Federal Bureau of Investigation; the Director of the National Counterterrorism Center, once that position is created and filled (and until that time the Director of the Terrorism Threat Integration Center); and such other heads of departments or agencies as the Director of the Office of Management and Budget may designate.

(b) The mission of the Council is to plan for and oversee the establishment of an interoperable terrorism information sharing environment to facilitate automated sharing of terrorism information among appropriate agencies to implement the policy set forth in section 1 of this order.

(c) Not later than 120 days after the date of this order, the Council shall report to the President through the Assistants to the President for National Security Affairs and Homeland Security, on a

plan, with proposed milestones, timetables for achieving those milestones, and identification of resources, for the establishment of the proposed interoperable terrorism information sharing environment. The plan shall, at a minimum:

(i) describe and define the parameters of the proposed interoperable terrorism information sharing environment, including functions, capabilities, and resources;

(ii) identify and, as appropriate, recommend the consolidation and elimination of current programs, systems, and processes used by agencies to share terrorism information, and recommend as appropriate the redirection of existing resources to support the interoperable terrorism information sharing environment;

(iii) identify gaps, if any, between existing technologies, programs, and systems used by agencies to share terrorism information and the parameters of the proposed interoperable terrorism information sharing environment;

(iv) recommend near-term solutions to address any such gaps until the interoperable terrorism information sharing environment can be established;

(v) recommend a plan for implementation of the interoperable terrorism information sharing environment, including roles and responsibilities, measures of success, and deadlines for the development and implementation of functions and capabilities from the initial stage to full operational capability;

(vi) recommend how the proposed interoperable terrorism information sharing environment can be extended to allow interchange of terrorism information between agencies and appropriate authorities of States and local governments; and

(vii) recommend whether and how the interoperable terrorism information sharing environment should be expanded, or designed so as to allow future expansion, for purposes of encompassing other categories of intelligence and information.

Sec. 6. Definitions. As used in this order:

(a) the term "agency" has the meaning set forth for the term "executive agency" in section 105 of title 5, United States Code, together with the Department of Homeland Security, but includes the Postal Rate Commission and the United States Postal Service and excludes the Government Accountability Office;

(b) the terms "Intelligence Community" and "agency within the Intelligence Community" have the meanings set forth for those terms in section 3.4(f) of Executive Order 12333 of December 4, 1981, as amended;

(c) the terms "local government," "State," and, when used in a geographical sense, "United States," have the meanings set forth for those terms in section 2 of the Homeland Security Act of 2002 (6 U.S.C. 101); and

(d) the term "terrorism information" means all information, whether collected, produced, or distributed by intelligence, law enforcement, military, homeland security, or other United States Government activities, relating to (i) the existence, organization, capabilities, plans, intentions, vulnerabilities, means of finance or material support, or activities of foreign or international terrorist groups or individuals, or of domestic groups or individuals involved in transnational terrorism; (ii) threats posed by such groups or individuals to the United States, United States persons, or United States interests, or to those of other nations; (iii) communications of or by such groups or individuals; or (iv) information relating to groups or individuals reasonably believed to be assisting or associated with such groups or individuals.

Sec. 7. General Provisions. (a) This order:

(i) shall be implemented in a manner consistent with applicable law, including Federal law protecting the information privacy and other legal rights of Americans, and subject to the availability of appropriations;

(ii) shall be implemented in a manner consistent with the authority of the principal officers of agencies as heads of their respective agencies, including under section 199 of the Revised

Statutes (22 U.S.C. 2651), section 201 of the Department of Energy Reorganization Act (42 U.S.C. 7131), section 102(a) of the National Security Act of 1947 (50 U.S.C. 403(a)), section 102(a) of the Homeland Security Act of 2002 (6 U.S.C. 112(a)), and sections 301 of title 5, 113(b) and 162(b) of title 10, 1501 of title 15, 503 of title 28, and 301(b) of title 31, United States Code; and (iii) shall not be construed to impair or otherwise affect the functions of the Director of the Office of Management and Budget relating to budget, administrative, and legislative proposals.

(b) This order is intended only to improve the internal management of the Federal Government and is not intended to, and does not, create any rights or benefits, substantive or procedural, enforceable at law or in equity by a party against the United States, its departments, agencies, instrumentalities, or entities, its officers, employees, or agents, or any other person.

GEORGE W. BUSH

THE WHITE HOUSE,

August 27, 2004.

# # #

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STATEMENT OF
CHRISTOPHER A. WRAY
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

PRESENTED ON

OCTOBER 21, 2003

INTRODUCTION

Mr. Chairman, members of the Committee, thank you for asking us here today. I am pleased to be able to discuss with you the Justice Department's efforts in the investigation and prosecution of terrorists, and in the protection of the American people from future terrorist attacks. I am also pleased to discuss how the anti-terrorism tools, overwhelmingly passed by the Congress, have been crucial to those efforts, and particularly how they have helped prosecutors and agents on the "front lines" of the war on terrorism.

We have enjoyed key successes: Since the attacks of September 11th, we have charged 284 defendants as a result of terrorism investigations; to date, 152 have been convicted or have pled guilty. The United States government has broken up terrorist cells in Buffalo, Charlotte, Detroit, Seattle, and Portland; five defendants in Portland recently pled guilty to conspiring to travel to Afghanistan to fight for the Taliban and Al Qaeda after September 11th. The communication and cooperation between government agencies has been exceptional and continues to improve. Our friends and allies overseas have been working closely with us to investigate and prosecute a number of major cases; for example, our cooperation with German

prosecutors assisted in the conviction of Mounir el Motassadeq in Germany for helping the Hamburg-based Al Qaeda cell behind the September 11th attacks. Through interagency and international cooperation, over half of Al Qaeda's leadership worldwide has been captured or killed. We are dismantling the terrorist financial network: $133 million in assets have been frozen in 660 accounts around the world, and investigations of terrorist financing have led to 27 convictions or guilty pleas to date. Our manpower has increased dramatically: Over 1,000 new and redirected FBI agents have been dedicated to counterterrorism and counterintelligence, and positions for 250 new Assistant U.S. Attorneys have been authorized. And, thankfully, we have so far not seen another major attack on American soil since September 11, 2001, though we are all aware that our enemies continue to plot such attacks and will not willingly give up trying to strike us at home.

The Patriot Act has been vital to our success, and this Committee should be proud of its role in passing this critical legislation. Of particular importance, the Act has improved communication and information sharing among the agencies tasked with fighting terrorism, allowed law enforcement to adapt to terrorists' technologically sophisticated methods, and given investigators and prosecutors stronger tools to identify, pursue, disrupt, prosecute, and punish terrorists. The capabilities afforded to us by the Patriot Act have been and will continue to be critical in bringing terrorists to justice and in ensuring the safety of our country against terrorist attacks.

Information Sharing

Two of the Patriot Act's most important provisions helped to knock down barriers that had limited law enforcement officials from sharing information with the intelligence and military communities. Before passage of the Patriot Act, many statutory provisions had been interpreted to require these groups to form two separate huddles that could not readily talk to each other; as a result, the collective defense against terrorism was weaker than it should have been. As the recent 9/11 Congressional Joint Inquiry Report confirms, before September 11th our capacity to "connect the dots" was hampered by the difficulty of coordinating throughout our own government. Now, criminal investigative information that contains foreign intelligence or counterintelligence, including grand jury and wiretap information, may be shared with national security and intelligence officials. For example, during the investigation and prosecution of several significant terrorism cases (including the 1993 attack on the World Trade Center, the 1998 embassy bombings in Africa, the millennium bombing plot, and the 2000 attack on the U.S.S. Cole), the U.S. Attorney's Office in the Southern District of New York accumulated extensive intelligence and grand jury information that can aid, and has aided, many ongoing terrorist cases. Since the passage of the Patriot Act, that U.S. Attorney's Office has shared this wealth of terrorist information with intelligence and law enforcement agencies, helping them further their own investigations.

Similarly, information obtained under the Foreign Intelligence Surveillance Act (FISA) is now shared far more readily between criminal and intelligence officials. This ability to review the complete scope of information applies retrospectively as well as to developing investigations.

Thus, the Attorney General has instructed all U.S. Attorneys to review intelligence materials for previously collected information that could support a criminal prosecution; as a result, thousands of intelligence documents have been reexamined, and many criminal investigations have been initiated or strengthened.

Such enhanced information sharing has proved effective: For example, it led directly to the indictment of Sami Al-Arian and other alleged members of the Palestinian Islamic Jihad (PIJ) in Tampa, Florida. PIJ is believed responsible for over 100 murders, including those of two young Americans in Israel: 20-year old Alisa Flatow, who was killed in a bus bombing, and 16-year old Shoshana Ben-Yishai, who was shot on the way home from school. Information sharing, along with close cooperation with Russian law enforcement, also contributed to the capture and indictment in New Jersey of Hemant Lekhani, the arms dealer charged with attempting to sell shoulder-fired anti-aircraft missiles to terrorists for use against American targets. Information from previous intelligence investigations assisted in the criminal investigation of Ilyas Ali and his cohorts in San Diego, California, who have been charged with conspiring to exchange tons of hashish for anti-aircraft missiles, for sale to Al-Qaeda. This ability to share vital intelligence and law enforcement information has disrupted terrorist operations in their early stages, has led to more arrests and prosecutions for terrorism offenses, and ultimately saves American lives.

Technology

The Patriot Act also brought the law up to date with current technology, so we no longer

have to fight a digital-age battle with antique weapons. Terrorists, like drug dealers and other organized criminals, have employed modern technology to conduct and conceal their activities. They are now trained to thwart surveillance by rapidly changing cell phones. The Patriot Act simply leveled the playing field by allowing terrorism investigators to adapt to these methods. Section 216 clarified that the authority to use pen registers and trap-and-trace devices—long used for performing surveillance on phones—may be sought from a court for Internet communications. "Roving" wiretaps, when approved by a court, allow investigators to conduct electronic surveillance on a particular suspect, rather than a particular telephone. This technique has been used for over a decade to investigate ordinary crimes, including drug offenses and racketeering; thanks to the Patriot Act, terrorism investigators now have the same valuable tool.

Stronger Tools

The Patriot Act has also given prosecutors and investigators stronger tools with which to deter and disrupt terrorist activity. For example, the Act increased the maximum sentences for a number of terrorism-related offenses, ensuring that convicted terrorists and supporters of terrorism are punished appropriately and kept incapacitated for a substantial period of time, and that others are deterred from committing or supporting terrorist acts. Strong penalties also now lead to more information and cooperation from those with links to terrorist operations. Since September 11th, we have obtained criminal plea agreements from a considerable number of individuals who must, and will continue to, cooperate with the government in its terrorist investigations.

The prosecution of Abdel-Ilah Elmardoudi and Karim Koubriti illustrates the Patriot Act's success in achieving these goals. After a lengthy trial, a jury convicted both of conspiring to provide material support to terrorists. Koubriti and Elmardoudi face up to ten and fifteen years in prison, respectively, for this offense; Elmardoudi faces a stiffer penalty because some of his criminal conduct, unlike Koubriti's, was committed after the Patriot Act was enacted.

Another important tool has been the court-approved delayed notice search warrant. This warrant allows investigators, with court approval, to delay notifying the target of a search for a limited time while the warrant is executed. Authority to delay notice can be used only upon the issuance of a court order in narrow circumstances, such as when delay is necessary to protect witnesses and cooperators, to avoid the disclosure of undercover operations, or to prevent the removal or destruction of evidence. This is a valuable tool, the use of which has long been upheld by courts nationwide in investigations of organized crime, drug offenses, and child pornography. The Patriot Act simply codified the case law in this area to provide certainty and nationwide consistency in terrorism and other criminal investigations. For example, in a recent narco-terrorism case, a court issued a delayed notice warrant to search an envelope that had been mailed to the target of an investigation. The warrant allowed officials to continue the investigation without compromising an ongoing wiretap. The search confirmed that the target was funneling money to an affiliate of the Islamic Jihad terrorist organization in the Middle East. The target of the warrant was then charged and notified of the warrant. Similar warrants were also used in the investigation of a charity suspected of illegally channeling money abroad. Authority to delay notice can be used only upon the issuance of a court order in narrow

circumstances, such as when delay is necessary to protect cooperators and witnesses, to avoid the disclosure of undercover operations, or to prevent the removal or destruction of evidence.

Several provisions of the Patriot Act that streamline procedures for terrorism investigations also have had profound effects. Before the Patriot Act, a court could only issue certain warrants—for example, those authorizing searches or the use of pen registers and trap-and-trace devices—that were enforceable within its own district. This created unnecessary delays and burdens when investigating terrorist networks, which often span a number of judicial districts; time-sensitive investigations were delayed by the need to obtain additional warrants in every district where terrorist activity was being investigated. The Patriot Act authorized courts to issue search warrants and pen register orders that are enforceable nationwide in terrorism investigations. For example, this aided authorities investigating Sami Omar Al-Hussayen, a Ph.D. candidate in computer science in Idaho who, according to the indictment, had set up a website promoting violent jihad for an organization in another state. The judge where the case was being brought, who was most familiar with the case, approved the search warrant; this allowed agents to execute simultaneous searches in different districts, thus preserving potential evidence. Such coordination is extremely important in cases where one suspect may be able to warn others of an impending search.

By fostering better information sharing, responding to advances in technology, and providing stronger tools for the investigation and prosecution of terrorists, the Patriot Act has been indispensable to our efforts to deter and disrupt terrorist activity. Anything that weakens

the Patriot Act will seriously undermine our ability to prevent future acts of terrorism. One troubling proposal to do so is the Otter Amendment, recently passed by the House, which seeks to impair our use of delayed notice warrants. Under that amendment, terrorists may learn of our investigations before we can learn enough to identify and disrupt their plots. Premature notification of a search warrant can result in the intimidation of witnesses, physical injury -- even death -- destruction of evidence, and flight from prosecution. It would put us in a *worse* and *less* safe position than before the Patriot Act was enacted. I strongly oppose this and any other measure that will hamstring our front-line agents and prosecutors in the war on terrorism.

DISPELLING MYTHS

The Patriot Act has come under fire recently from a number of groups. Unfortunately, their criticisms have in many instances misled the public as to what the Patriot Act enables the government to do. The resulting and persisting myths notwithstanding, the American people should know that almost all of the actions the Department takes under the Patriot Act are reviewed by independent federal judges. Moreover, to date, no provision of the Act has been held unconstitutional by any court. I believe that the Patriot Act has helped preserve and protect liberty and freedom, not erode them. By a nearly unanimous vote in this body, Senators agreed that these new enhancements are critical to the war on terrorism, and that they respect civil liberties.

The Library Issue

As you know, several groups including the ACLU, have claimed that Section 215 of the

Patriot Act allows the government to investigate the library habits of ordinary citizens. This misinformation has apparently led a number of librarians to warn patrons needlessly of possible government monitoring. This overreaction has only led to further public confusion and misunderstanding about the scope of the Patriot Act.

The suggestion that federal agents are snooping on innocent citizens' reading habits is inflammatory and simply untrue. First, the Patriot Act *explicitly* protects Americans' First Amendment rights by providing that an investigation may not be conducted "of a United States person solely upon the basis of activities protected by the first amendment to the Constitution of the United States." Second, terrorism investigators have no interest in the reading habits of ordinary Americans. As the Attorney General pointed out recently, as of September 18, 2003, this provision had never been used. The House Judiciary Committee also concluded in its October 17, 2002, press release that its "review of classified information related to FISA orders for tangible records, such as library records, has not given rise to any concern that the [government's] authority is being misused or abused."

But historically, terrorists and spies *have* used libraries to plan and carry out activities that threaten our national security. For example, Brian Patrick Regan, who was convicted last February of offering to sell U.S. intelligence information to Iraq and China, used a computer at a local public library to look up addresses for Iraqi and Libyan embassies overseas. Similarly, in a recent domestic terrorism criminal case, a grand jury served a subpoena on a bookseller to obtain records showing that a suspect had bought a book giving instructions on how to build a

particularly unusual detonator that had been used in several bombings. This was important evidence identifying the suspect as the bomber. We should not allow libraries or any other businesses to become safe havens for terrorist planning, financing, or communication. The Patriot Act ensures that business records can be obtained in a national security investigation with the approval of a federal judge. Under the Patriot Act, the government can now ask a federal court to order production of the same type of records available through grand jury subpoenas, but only after the government shows that the records are sought for an authorized foreign intelligence investigation or to protect against international terrorism or clandestine intelligence activities. Moreover, Congress also exercises careful and ongoing oversight: Every six months, the Attorney General must "fully inform" Congress of how Section 215 has been used.

Foreign Intelligence Information

Critics have also attacked Section 218 of the Act, which allows the use of surveillance under FISA whenever a significant purpose of the investigation is foreign intelligence collection. Critics have suggested that pursuant to Section 218, the FBI may now conduct a secret search or secretly record telephone conversations without a showing of probable cause. This characterization of the Act is misleading.

Section 218 was passed to ensure an integrated investigation of terrorist activity by intelligence and law enforcement agents. As I described earlier, before the Patriot Act, a perceived "wall" inhibited information sharing and coordination between the two groups. Intelligence investigators were afraid that consultation with law enforcement investigators would

mean that they would be unable to obtain or continue intelligence-related surveillance. Section 218 recognizes the need for, and legality of, full coordination between the two groups by permitting the use of FISA whenever foreign intelligence is a "significant purpose" of a national security investigation. And Section 504 of the Patriot Act specifically permits intelligence investigators to consult with federal law enforcement officers to coordinate efforts to investigate or to protect against threats from foreign powers and their agents.

As with other Patriot Act provisions, safeguards exist to ensure that Section 218 is not abused, most notably the fact that a surveillance or search under FISA can be ordered only if the government demonstrates, to the satisfaction of a federal court, that there is probable cause to believe that the target is a foreign power or an agent of a foreign power. Last November, the Foreign Intelligence Surveillance Court of Review upheld the constitutionality of Section 218 and the Department's procedures implementing it. The court held that "FISA as amended is constitutional because the surveillances it authorizes are reasonable."

The various misconceptions that have been perpetuated about the Patriot Act are disturbing and simply wrong. The Department is very aware of its responsibility to protect civil rights while protecting the country from future terrorist attacks, and we want to ensure that the American people understand the safeguards embedded in the Patriot Act. As you know, the Attorney General and the U.S. Attorneys have spoken about these concerns recently in communities across the country, and the Department has set up a Web site to address the issue as well. We encourage the members of the Committee and all Americans to review the site,

lifeandliberty.gov, to learn more about how the Patriot Act protects our nation's security while protecting the personal liberties we so dearly cherish.

CLOSING

Mr. Chairman, I thank you again for inviting us here and giving us the opportunity to discuss how the Patriot Act is being used every day in the field to fight terrorism. I would also like to thank this Committee for its continued leadership and support. With your support we will continue to make great strides in our battle to defeat those who would do this country harm.

After you hear from my colleagues, Mr. Fitzgerald and Mr. McNulty, I will be happy to respond to any questions you may have.

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