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**THREAT TO CIVIL LIBERTIES OR CONSTITUTIONAL SHIELD?**

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**THREAT TO CIVIL LIBERTIES**

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**ADVOCATE:** Bob Barr, former member of the U.S. House of Representatives (R-GA)

**SOURCE:** Testimony during hearings on, “America after 9/11: Freedom Preserved or Freedom Lost?” before the U.S. Senate Committee on the Judiciary, November 2003

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**CONSTITUTIONAL SHIELD**

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**ADVOCATE:** James B. Comey, Deputy Attorney General of the United States

**SOURCE:** Testimony during hearings on “Preventing And Responding to Acts of Terrorism: A Review of Current Law” before the U.S. Senate Committee on the Judiciary, April 2004

For most Americans, September 11, 2001, began well. It was sunny and 66°F at 8:00 A.M. in New York City. On the East Coast, people were arriving at work and otherwise beginning their days. Around the rest of the country, most folks were getting up or enjoying that last hour or two of sleep. All was normal.

Then at 8:45 A.M. an airliner smashed into the north tower of the World Trade Center. Within little more than an hour, another jet liner crashed into the south tower, a third dove into the Pentagon, and a fourth went down in a field near Pittsburgh. All tolled, 19 terrorists, 33 crewmembers, 219 passengers, and more than 3,000 people on the ground died that morning.

The impact on the Americans was profound. The attacks marked the “End of Illusion,” as columnist Robert J. Samuelson entitled a *Washington Post* essay. In addition to the physical damage, he wrote, “What was destroyed...[was] Americans’ dreamlike feeling [of being] insulated from the rest of the world.”

The U.S. reaction was dramatic. President George W. Bush soon ordered U.S. forces into Afghanistan to attack al-Qaeda and the Taliban regime. Congress quickly approved military action, and polls found nearly 90% of Americans agreed. The impact of 9/11 on U.S. foreign policy also included the formulation of the Bush Doctrine and the subsequent invasion of Iraq.

The political shock waves from 9/11 also rippled inward. Amid their shattered sense of security, Americans sought safety and were willing, at least temporarily, to surrender some of their civil liberties to get it. When asked less than a week after the attack, “Would you support new laws to strengthen security measures against terrorism, even if that meant reducing privacy protections?” 78% said yes, 14% replied no, and 8% were unsure.

Americans soon got what they wanted. Bush proposed legislation to greatly increase the ability of government agencies to conduct wiretaps and other covert operations and to ease the barriers to U.S. intelligence agencies conducting investigations

within the country. In an anxiety-ridden atmosphere, the USA Patriot Act (“The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001”) quickly passed both houses of Congress by huge margins and was signed into law. Among other things, it:

- Eases the authorization process for wiretaps, searches, and other covert activity. Standards for judicially authorized actions are lower; in limited circumstances action can be taken on authorization of the U.S. Attorney General.
- Permits surveillance of electronic communications, including e-mail and voice-mail and of communications records, such as Web sites visited.
- Eases barriers to domestic operations by intelligence agencies. This can now occur when foreign intelligence is a significant, no longer the only, concern.
- Permits “roving” surveillance of whatever communications device a subject is using, rather than being restricted to a single device.
- Allows access to information such as library records, book store purchases, student records (of foreign students) and also many tangible items controlled by rental companies, such as automobiles previously rented by a suspect.
- Expands the use of searches conducted without an individual’s knowledge or a requirement that the government reveal what it seized during the search.

The following readings by advocates Bob Barr and James Comey provide more detail on the Patriot Act. But you may want to see it in its entirety at: [http://www.fincen.gov/pa\\_main.html](http://www.fincen.gov/pa_main.html). Detailed knowledge will help you evaluate the worries of some that without the act the country stands virtually defenseless before terrorism and the voices of others who claim that under the act, CIA agents will soon be bugging your home. Neither extreme is likely. So proceed with caution in your evaluation.

### POINTS TO PONDER

- Read the following debates with almost two contradictory thoughts in mind. One is that it is healthy for citizens in a democracy to be leery of any form of covert government intrusion. At the same time, though, bear in mind that most of these methods are not new, only expanded, and the process for agencies to use them has been made less restrictive, not eliminated. This is an issue of balance, not right or wrong.
- One of the oft-quoted remarks of Benjamin Franklin is, “They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.” Is this a bit of enduring wisdom from the “sage of Philadelphia,” or is it a shibboleth from the man who also recommended the turkey become the national symbol? Would the maxim, “an ounce of prevention is worth a pound of cure,” be more appropriate?
- The ability of the government under the Patriot Act to monitor non-citizens, such as foreign students, is much greater than for citizens. Is this appropriate, or should most or all of the same civil liberties enjoyed by citizens also be extended for visiting foreign nationals?

## Anti-Terrorist Legislation: Threat to Civil Liberties

BOB BARR

[D]istinguished committee members, thank you for inviting me to testify on the state of our freedoms in post-9/11 America....My name is Bob Barr. Until January of this year [2004], I had the honor to serve as a [Republican] United States Representative from Georgia. Previously, I served as the presidentially appointed United States Attorney for the Northern District of Georgia, as an official with the U.S. Central Intelligence Agency, and as an attorney in private practice. Currently again a practicing attorney, I also now occupy the 21st Century Liberties Chair for Privacy and Freedom at the American Conservative Union, and consult on privacy matters for the American Civil Liberties Union. My testimony today will reflect this background as I speak on behalf of both these organizations, both long-dedicated to protecting constitutional principles cherished by many generations of Americans.

I also speak as a citizen deeply concerned about the erosions of basic constitutional liberties since the tragic and deplorable attacks here and in New York City on September 11, 2001.

The question before us today—whether the government response to those attacks has adversely affected our individual liberties, including the right to privacy—could not be more important. It is at once complex and simple. In short, the answer is yes.

While every one of us in this room today, and probably every person with whom we come in contact, understands the need for government to succeed in its responsibility to protect our nation and

our People against acts of terrorism, as a student and supporter of the Constitution and its component Bill of Rights, I will not concede that meeting this responsibility must sacrifice our Rights given us by God and guaranteed in that great document. Yet, unfortunately, the road down which our nation has been traveling these past two years, with the USA PATRIOT Act and other related government programs and activities, appears to take us in a direction in which our liberties are being diminished in that battle against terrorism. This need not be so, and it ought not to be so.

Traditionally and historically, except for aberrations throughout our history, the three branches of our government—legislative, executive and judicial—acting together if not always in concert, have acted responsibly, within the bounds of law and constitutional understanding. Throughout most of our nation's short but glorious history, our citizens could rest assured that government operated in a way as to balance security needs and civil liberties. When all else failed, our courts would guarantee this result even if one or both of the other two branches “got carried away.”

Any law or series of laws or federal programs that weakens the ability of any one of these three branches of government to serve as a check and balance on the other two, is inherently problematic and ought to be viewed with concern if not alarm. This is perhaps the fundamental concern with the manner in which the government has responded to the terrorist attacks of 9/11—significantly weakening as a matter of law the power and ability of the judi-

ary to check the exercise of executive power; and weakening as a matter of practice the ability of the legislature to conduct meaningful oversight of the same.

Our view of this problem, and how to address it, must be viewed from a politically neutral perspective; that is, regardless of which party maintains power in the Executive Branch.

Each member of this esteemed committee understands well the Constitution, federal criminal laws, the USA PATRIOT Act, and the full panoply of other laws, regulations, procedures and activities that comprise the arsenal of the federal government's response to the terror attacks of 9/11. I am respectfully mindful of the committee's expertise in this area, as I am aware of the constraints on the committee's time. Even though it would be difficult to treat the entirety of this topic in a year-long law class, let alone five-minute testimony, I will therefore touch upon a few of these post-9/11 policies, laws, initiatives and federal actions that offend traditional conservative values such as individual freedom, federalism and personal privacy.

Some of these, such as the controversial Computer Assisted Passenger Pre-Screening System (CAPPS II), offend conservative values by blindly intruding into the private records of law-abiding Americans in the vain hope of that such privacy intrusions will somehow expose a terrorist. CAPPS II and its ilk are false security on the cheap. Airports and other terrorist targets will only be made safer with better, more solid, advance intelligence (and better coordination, analysis, evaluation and dissemination of same) on who the specific threats are—not which innocent person looks most suspicious at the gate or in a “black box” database. The arbitrary exercise of power by federal employees now occurring and which would be greatly expanded if

CAPPS II goes into effect is of the sort that has never heretofore withstood the test of probable cause or even reasonable suspicion. It ought not to be allowed to do so now.

Other programs, including certain provisions in the USA PATRIOT Act, implicate privacy but also imperil Americans' cherished right to engage in peaceful debate about the issues of the day. Several sections in the USA PATRIOT Act are especially illustrative of this suppressive attitude to security.

However, before I discuss these problem provisions, I first would like to express my sincere gratitude to the Justice Department and Attorney General Ashcroft. Few outside the halls of the Department and its component enforcement agencies, can truly be aware of the stresses and hard decisions required to keep us safe.

As I have repeatedly and publicly stated, my concern with the USA PATRIOT Act and other post-9/11 policies has nothing to do with politics or personalities—it is a matter of constitutional principle.

Indeed, much of the USA PATRIOT Act is non-controversial, and some of it quite welcome. The Act's problems lie in a relatively few provisions, squirreled away in the bill during the negotiations before its passage. While they may be few in number, they are major in their impact on civil liberties in America. Contrary to how some characterize these problem provisions, they represent anything but “tinkering” or “fine tuning” of pre-existing law and procedure.

Not only do these provisions undercut basic conceptions of due process and privacy, their effectiveness is questionable. As a former CIA official, I witnessed first-hand how much of our national security apparatus—even our counter-terrorism and international intelligence work—is built on

very basic policing methods. From your local grifters to the [Osama] Bin Ladens of the world, bad guys are generally found and punished using a system that includes basic checks and balances on government power and which militates against dragnet investigative fishing expeditions.

As an example of what not to do in national security, take Section 213 of the PATRIOT Act, the so-called “sneak and peek” provision. In addition to ignoring fundamental Fourth Amendment privacy rights, it also greases the slippery slope that was clearly anticipated, but specifically addressed and avoided by the drafters of our Constitution in the threefold separation-of-powers system of government they crafted so magnificently.

Specifically, Section 213 of the PATRIOT Act statutorily codifies delayed-notification search warrants, making them easier to obtain. This provision (not subject to a “sunset” expiration) takes what had been the exception to the rule of search and seizure notice, and has made it the rule.

Prior to the passage of the PATRIOT Act, this authority—which permits federal investigators to break into Americans’ homes and businesses and then search their belongings, peruse the contents of their computer hard drives, and not tell them about it until weeks or months afterward—was allowed by courts, but only in extreme circumstances when lives or evidence could be lost by observing the traditional Fourth Amendment “knock and announce” convention.

By lessening the burden on prosecutors seeking to obtain these warrants, thus giving the executive branch a leg up on the judiciary, the fear, especially among conservatives, is that this extraordinary power will become ordinary. My former colleague in the House, Rep. Butch Otter from Idaho, reportedly took up the fight to narrow sneak and peek power after

hearing from pro-life groups who worry the warrants would be misused, like the RICO statute [the Racketeer Influenced and Corrupt Organizations Act, 1970], to advance the pro-abortion agenda. This is hardly the only scenario wherein these powers could be abused; it is frighteningly illustrative.

The problems with another controversial new power, laid out in Section 215 of the 2001 Act, sounds similar themes as the sneak and peek issue. Under Section 215, FBI agents can obtain court orders for the release of, among other things, business information, reading histories, Internet surfing data, medical records and even lawful firearm purchase receipts, under a standard of evidence that equates to a “rubber stamp.”

Known primarily for its effect on access to library records—it could be used to monitor Americans’ book borrowing habits—[Section] 215 is legally wide-ranging; extending, frighteningly, even to medical and genetic information. While much has—appropriately—been written about this provision’s chilling effect on library users (a result that is very real regardless of how many times the government says it has or hasn’t employed the power), the dangers in its broad reach cannot be over emphasized.

A companion provision, found in Section 505 of the USA PATRIOT Act, raises concerns similar to those raised by Section 215. Section 505 is, in some respects even more troubling; it expands the government’s ability to use so-called “national security letters,” which are essentially administrative subpoenas, to secure access to a wide range of data and information on U.S. citizens. As this committee knows, administrative subpoenas can be issued without probable cause, and without even the “rubber stamp” judicial review of a Section 215 search.

Of great concern to conservatives and liberals alike, is Section 802 of the Act. This section defines a new crime of “domestic terrorism.” Direct action conservative advocates, such as those advocating anti-abortion principles, fear use of this provision just as do direct action liberals, such as those protesting certain government policies (for example, military use of Vieques), because it could very easily be employed as the justification to target such groups. [Vieques is a small island that is part of Puerto Rico. Beginning in World War II, part of the island was set aside as a U.S. Navy target range. Recent protests by Puerto Ricans led the Navy to withdraw in 2003, but issues remain such as the U.S. government responsibility to clean up toxic waste and other damage cause by 60 years of naval gunfire and bombing.] This abuse of the Act could very easily prevail, even though no reasonable person would equate the activities of such groups or advocates with “terrorism”—such as gave rise to consideration of the USA PATRIOT Act in the first place.

Under 802, terrorism is defined sufficiently broad such that if this, or indeed any future administration were so inclined, it could use the USA PATRIOT Act to prosecute protesters as terrorists when any reasonable person would view that as excessive. Section 802 has a suppressive, Orwellian effect on speech and political advocacy, especially direct action advocacy, arguably the most effective grassroots technique to influence political change.

Furthermore, Section 802’s overbreadth implicates other sections of the USA PATRIOT Act and even other laws. If the contemplated, so-called “Son of PATRIOT” were ever to be enacted, its further expansion of terrorism offenses, and its further reductions of due process in those prosecutions, could all be extended to political advocacy under 802’s overly

ambitious language. Sections 803 and 805 build on 802 and expand the crime of “material support,” which now could result in those who harbor or conceal political protesters being hit with a terrorism prosecution. [Section] 802 should be narrowed so that terrorism offenses target terrorism, not political protest.

My fellow witnesses have addressed, and will touch on other parts of the USA PATRIOT Act. I need not belabor the specifics of the law but I do hope its flaws will be corrected, and soon, before they harden into a concrete barrier surrounding the Bill of Rights. The SAFE Act, introduced and supported by an impressively bipartisan group of Senators, is one commendable and responsible such effort. [Versions of the Security and Freedom Ensured (SAFE) Act of 2003 was referred respectively to the House and Senate Judiciary Committees but were not reported out of either those committees for floor debate and votes.]

In line with the reflective approach of this hearing, I think it is important to note several encouraging victories for constitutional freedoms in a post-9/11 America. The looming specter of giant, voracious super-databases—tasked with assessing our threat levels through the monitoring, cross-referencing and analyzing of minute details in the daily lives of law-abiding citizens—has to some degree abated. But only sufficiently to allow us to catch our breath; not nearly to the extent we can breathe easy.

Around this time last year [that is, late 2002], the controversy surrounding the citizen-spy program known as Operation TIPS (Terrorism Information Prevention System) reached its boiling point. Thankfully, the program was then shelved. The program, which would have recruited postal workers, utility workers, and many others with vocational or simply occasion-

al access to private residences, as government informants encouraged to report any “suspicious” activity to a central government hotline.

In what has been one of the most unexpected “strange bed fellows” moves of recent years, but emblematic of how fundamental these issues are in our democracy, then-majority leader Richard Arme from Texas and minority leader Nancy Pelosi inserted an amendment in the Homeland Security Bill barring all funding for Operation TIPS and like programs.

Regrettably, programs expanding federal powers—programs such as TIPS or the similarly discredited TIA (Total Information Awareness)—rarely die a final death, even if Congress directs their demise. However, that at least some action is being taken is a heartening development. Hopefully, it will continue, especially through both the oversight and legislative work of this committee and its counterpart in the House.

We must remain vigilant. TIPS and TIA are being resurrected in part under other names in other departments. For instance, some proponents of blanket surveillance technologies are attempting to circumvent Congress, the agencies or even federal law (such as the Privacy Act) by providing federal taxpayer funds to states or local governments to establish or implement the programs themselves.

The MATRIX Program (Multi-state Anti-Terrorism Information Exchange) developed in Florida with federal dollars, by a private company, to do what Congress has already indicated it did not want done directly through TIA, is an example of this approach.

The Justice Department is presumably taking similar steps with future PATRIOT-style legislation, including the Domestic Security Enhancement Act of 2003, also known as “Son of PATRIOT Act,” or “PATRIOT II.” While it hasn’t been formally introduced in Congress, pieces of it

are appearing piecemeal in other seemingly innocuous or non-germane legislation.

Not least of Son of PATRIOT’s problems, is a proposed section that would permit the federal government to strip Americans of their citizenship (whether natural-born or naturalized), if they are convicted of “material support” for terrorism (a charge that could apply to actions that citizens of common sense would be hard-pressed to see as terrorism). The framers of our Constitution deliberately omitted mention of such power, because they realized the authority to strip our citizenship is the ability to tailor the electorate to one’s advantage—a truly terrifying state of affairs.

In sum, the Constitution and its Bill of Rights have taken some hits in the two years since 9/11; hits that must be fixed via the SAFE Act, for example. The simple fact that we appear here seeking to identify and address these problems demonstrates Americans’ reticence to allow understandable concern over terrorism to mutate into the crippling of our most cherished rights and freedoms.

That should give us some encouragement. There is a great deal of work to be done, and further hard decisions to be made, but there remains time to turn back the constitutional clock and roll back excessive post-9/11 powers before we turn the corner into another Japanese internment or, closer to our own experiences, before we witness a legally sanctioned Ruby Ridge or Waco scenario [site where confrontations between federal law-enforcement officials and dissidents leading to death on both sides].

In many other countries, it is neither acceptable nor lawful to reflect openly on and refine past action. In America, it is not only allowable, it is our obligation, to go back and reexamine the decisions made by the federal government during the panic of an event like September 11th.

Of course, a country suffering through the immediate fallout from the worst terrorist attack on American soil ever is going to make some mistakes. To err isn't just human, it's a direct result of representative democracy.

Case in point: myself. I voted for the USA PATRIOT Act. I did so with the understanding the Justice Department would use it as a limited, if extraordinary power, needed to meet a specific, extraordinary threat. Little did I, or many of my colleagues, know it would shortly be used in contexts other than terrorism, and in conjunction with a wide array of other, privacy-invasive programs and activities.

According to a growing number of reports, as well as a GAO [General Accounting Office] survey, the Justice Department is actively seeking to permit USA PATRIOT Act-aided investigations and prosecutions in cases wholly unrelated to national security, let alone terrorism.

This should not be allowed to continue. As my esteemed colleague in the

House, former Speaker Newt Gingrich [R-GA] wrote recently, "in no case should prosecutors of domestic crimes seek to use tools intended for national security purposes." When we voted for the bill, we did so only because we understood it to be essential to protect Americans from additional, impending terrorist attacks.

That I can stand before you and urge the Act's correction should serve as a lesson to lawmakers who voted for the PATRIOT Act, and supported similar initiatives, that you can go back again. It's okay to revisit past decisions. Indeed, it's an obligation.

Conservative or liberal, Republican or Democrat, all Americans should stand behind the Constitution; for it is the one thing—when all is said and done—that will keep us a free people and a signal light of true liberty for the world. Thank you again for allowing me to testify in support of this principle.

## Anti-Terrorist Legislation: Constitutional Shield

JAMES B. COMEY

Members of the Committee.... Thank you for giving me the opportunity to appear before you today and discuss the vital tools of the USA PATRIOT Act and the efforts of the Department of Justice in the war on terror. I am grateful to you and to this committee for your strong support of the Department of Justice. The department has had many successes in the war on terror, in battling corporate fraud, in stemming violent gang and drug crime, and in preserving the civil rights and liberties of Americans. That success has come from the commitment of the people of the department, from strong leadership and from your dedication to our cause.

Since assuming my current post [as Deputy Attorney General, U.S. Department of Justice], I've met with hundreds of the department's employees to talk about their work and their efforts to help safeguard the lives and liberties of Americans. It's been said by many wiser than I that we live in challenging times. Fortunately, at the Department of Justice, our people are up to the challenge. They are simply the best of the best. These are people who chose public service and they are committed to serving the cause of justice.

As I stated, the Department of Justice's number one priority continues to be the prevention, investigation, and prosecution of terrorist activities against U.S. citizens and U.S. interests. Following the tragedy of September 11, 2001, Congress overwhelmingly passed, and on October 26, 2001, the President signed the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept

and Obstruct Terrorism Act" ("USA PATRIOT Act" or "Act"). This legislation provided our nation's law enforcement, national defense, and intelligence personnel with enhanced and vital new tools to prevent future terrorist attacks and bring terrorists and other dangerous criminals to justice. Over two and one-half years have passed since the catastrophic attacks of September 11, 2001, but the danger is still clear. Survival and success in this very real war on terrorism demands that the Department of Justice continuously improve its capabilities to protect Americans. The United States of America is winning this war on terrorism with unrelenting focus and unprecedented cooperation. For example, the Department of Justice secured convictions of nine individuals in the Virginia jihad case on terrorism-related charges, including conspiracy to levy war against the United States and conspiracy to provide material support to the Taliban and Lashkar-e-Taiba. As the Attorney General [John Ashcroft] stated, "[those] convictions are a stark reminder that terrorist organizations are active in the United States. We will not allow terrorist groups to exploit America's freedoms for their murderous goals."

As our work continues, a debate also continues. Much of that debate surrounds civil liberties after September 11th and particularly the USA PATRIOT Act. Good people will always disagree about policy issues, particularly when they touch on the powers of government. All citizens should question the power of government and demand explanations. But because I

believe the USA PATRIOT Act is wholly constitutional and just plain smart, I feel strongly those tools should remain on the books for our prosecutors and agents to use. Having served as a prosecutor, I've used many of those tools and know how valuable they are. I firmly believe that if the American people understood how we use these important provisions, their reaction would be the reaction I've gotten all across the country, "I certainly would not want to take that out of your toolbox."

What the USA PATRIOT Act did was to equip federal law enforcement and intelligence officials with the tools they needed to mount a seamless, coordinated campaign against our nation's terrorist enemies. The USA PATRIOT Act eased legal restraints that impaired law enforcement's ability to gather, analyze, and share critical terrorism-related intelligence information. The Act also enhanced America's criminal laws against terrorism, and clarified that existing laws against terrorism apply to the new types of attacks planned by al Qaida and other international terrorist organizations.

As I've discussed privately with a number of senators and members [of the House of Representatives], the USA PATRIOT Act did something absolutely critical to our national security and that is breaking down the wall between the intelligence investigators responding to al Qaida and other terrorist threats and the criminal investigators responding to those same threats. That changed our world and has made us immeasurably safer. The USA PATRIOT Act authorized government agencies to share intelligence so that a complete mosaic of information could be compiled to understand better what terrorists might be planning and to prevent attacks from happening. Prior law and policy sharply limited the ability of law enforcement and intelligence agents to

share information, which severely hampered terrorism investigators' ability to "connect the dots." The USA PATRIOT Act, however, brought down this "wall" and greatly enhanced foreign intelligence information sharing among federal law enforcement and national security personnel, intelligence agencies, and other entities entrusted with protecting the nation from acts of terrorism. This increased ability to share information has been invaluable to the department in terrorism investigations and has directly led to numerous arrests, prosecutions, and convictions in terrorism cases.

The removal of the "wall" separating intelligence and law enforcement personnel, for example, played a crucial role in the department's successful dismantling of a Portland, Oregon terror cell, known as the "Portland Seven." Members of this terror cell had attempted to travel to Afghanistan in 2001 and 2002 to defend the Taliban and al Qaida by taking up arms against United States and coalition forces fighting there. Utilizing sections 218 and 504 of the USA PATRIOT Act, however, the FBI was able to conduct Foreign Intelligence Surveillance Act (FISA) surveillance of one of the suspects to detect whether he had received orders from an international terrorist group to reinstate a domestic attack plan on Jewish targets that the lead defendant had once discussed and in turn, keep prosecutors informed as to what they were learning. This gave prosecutors the confidence not to arrest the suspect prematurely while they continued to gather evidence on the other members of the terrorist cell. Ultimately, prosecutors were able to collect sufficient evidence to charge seven defendants and then to secure prison sentences for the six defendants taken into custody ranging from three to eighteen years.

Section 213 of the USA PATRIOT Act codified and made nationally consistent an important tool by expressly authorizing courts to issue delayed notification search warrants. Court-authorized delayed-notice search warrants are a vital aspect of the Justice Department's strategy of prevention—detecting and incapacitating terrorists before they are able to strike. In some cases, if criminals are tipped off too early to an investigation, they might flee, destroy evidence, intimidate or kill witnesses, cut off contact with associates, or take other action to evade arrest. Under the Act, courts can delay notice only when immediate notification may result in death or physical harm to an individual, flight from prosecution, evidence tampering, witness intimidation, or serious jeopardy to an investigation.

Section 215 of the USA PATRIOT Act allows the Foreign Intelligence Surveillance Court to order production of business records. Under long standing authority, grand juries have issued subpoenas to many varieties of businesses, including libraries and bookstores, for records relevant to criminal inquiries. The USA PATRIOT Act authorized the FISA Court (or a designated magistrate) to issue similar orders in national security investigations. And while these judicial orders could be issued to bookstores or libraries, section 215 does not single them out.

The USA PATRIOT Act has also strengthened the nation's criminal laws against terrorism, providing prosecutors with a solid foundation to pursue what has become the department's highest priority. A critical element in our battle against terrorism is to prevent the flow of money and other material resources to terrorists and terrorist organizations. By using the statutes Congress provided against material support of terrorism, the department

has successfully disrupted terrorist planning at the earliest possible stages, well before such violent plans can become reality. Utilizing the terrorist financing and material support provisions created by Congress, the department has charged more than 50 individuals and obtained 28 convictions. In addition, using the material support statutes, the department has obtained convictions yielding lengthy prison sentences, as in the case of Mohammed Hammoud, the main defendant in the Charlotte Hizballah case, who was ultimately sentenced to 155 years in federal prison.

Lastly, prior to enactment of the USA PATRIOT Act, the federal prohibition on attacking transportation carriers was a patchwork of federal statutes with gaps that had the potential to hamper terrorism investigations. Section 801 of the Act filled in these gaps by creating a new crime of attacking a mass transportation system. Among other things, it now is illegal to destroy a mass transportation vehicle or place a biological toxin near a mass transportation vehicle. Since the passage of the Act, the department has used section 801 in at least two cases.

The USA PATRIOT Act also removed a number of significant legal obstacles that prevented law enforcement from effectively investigating terrorism and related criminal activity. It has greatly improved the department's ability to disrupt, weaken, thwart, and eliminate the infrastructure of terrorist organizations, to prevent or thwart terrorist attacks, and to punish perpetrators of terrorist acts. In the past, investigators had to waste precious time petitioning multiple judges in multiple districts for search warrants. Section 219 of the USA PATRIOT Act, however, streamlined this process, making nationwide search warrants available to law enforcement in terrorism cases. Law

enforcement already has used this authority on numerous occasions.

I would also like to discuss some of the critical protections for civil liberties encompassed within the USA PATRIOT Act and long-standing law. The Act provides for ample judicial, congressional and public oversight to ensure that the civil rights and civil liberties of all Americans are protected. First, the USA PATRIOT Act preserves the historic role of courts by ensuring that the vital role of judicial oversight is not diminished. For example, the provision for delayed notice for search warrants requires judicial approval. In addition, under the Act, investigators cannot obtain a FISA pen register unless they apply for and receive permission from federal court. The USA PATRIOT Act actually goes farther to protect privacy than that Constitution requires, as the Supreme Court has long held that law enforcement authorities are not constitutionally required to obtain court approval before installing a pen register. Furthermore, a court order is required to compel production of business records, in national security investigations.

Second, the USA PATRIOT Act respects important congressional oversight by placing new reporting requirements on the department. Every six months, the Attorney General is required to report to Congress the number of times section 215 has been utilized, as well as to inform Congress concerning all electronic surveillance under the Foreign Intelligence Surveillance Act. Under section 1001 of the USA PATRIOT Act, Congress receives a semiannual report from the department's Inspector General detailing any abuses of

civil rights and civil liberties by employees or officials of the Department of Justice. It is important to point out that in the Inspector General's most recent report to Congress, he reported that his office has received no complaints alleging misconduct by department employees related to the use of a substantive provision of the USA PATRIOT Act.

Finally, the USA PATRIOT Act fosters public oversight of the department. In addition to the role of the Inspector General to review complaints alleging abuses of civil liberties and civil rights, the Act provides a cause of action for individuals aggrieved by any willful violation of Title III or certain sections of FISA. To date, no civil actions have been filed under this provision.

I believe that if people would take the time to have a reasoned discussion about the tools used by law enforcement in the war on terror, they would realize that the USA PATRIOT Act was not rushed, it actually came 10 years too late. As the Attorney General stated on November 8, 2001, the Department of Justice has been called to "the highest and most noble form of public service—the preservation of American lives and liberty." Now, more than two years after the attacks of September 11, the department continues to respond to this call with enthusiasm, and with a profound respect for this country's tradition of civil rights and liberties.

...I hope that the work we do today, and the work that we will continue to do, will help the American people understand how vital the tools of the USA PATRIOT Act are in our efforts to root out terrorism and keep Americans safe.

## THE CONTINUING DEBATE: Anti-Terrorist Legislation

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### What Is New

In 2003, the Bush administration proposed the Domestic Security Enhancement Act of 2003 (dubbed Patriot Act II), which further expands the surveillance possibilities of Patriot Act I. The legislation did not pass in Congress, but critics charge that many of its provisions were slipped into other legislation, such as the Intelligence Authorization Act for 2004.

One reason that resistance to Patriot Act II was higher than it was to Patriot Act I was that the public has reverted to its more traditional wariness of government surveillance. That was evident in a 2003 poll that asked, “Which comes closer to your view—the government should take all steps necessary to prevent additional acts of terrorism in the U.S. even if it means your basic civil liberties would be violated, or the government should take steps to prevent additional acts of terrorism but not if those steps would violate your basic civil liberties?” Of the respondents, 33% were willing to see civil liberties violated, 64% were unwilling to see that occur, and 3% were unsure.

### Where to Find More

There are numerous Web sites lauding and decrying the Patriot Act. For a supportive view, go to the U.S. Department of Justice Web site at: <http://www.usdoj.gov/>. Select search and keyboard in “patriot act.” For a critical perspective, visit the site of the American Civil Liberties Union at: <http://www.aclu.org/SafeandFree/>. Finally, for a balanced analysis of the Patriot Act, including an exposition of the surveillance possibilities prior to it, read Nathan C. Henderson, “Impact on the Government’s Ability to Conduct Electronic Surveillance of Ongoing Domestic Communications,” *Duke Law Journal*, October 2002. The article is available on the Web at: <http://www.law.duke.edu/journals/>.

### What More to Do

One key thing to do is to get involved. The Patriot II Act is pending before Congress. Decide what you think, and act on that conviction by telling your three representatives in Congress what your position is and why.

Also, Patriot Act I is “up for grabs.” To the dismay of the Bush administration, Congress inserted a “sunset provision” in the law. Under this clause, the act will expire at the end of 2005 unless Congress renews it. So the struggle over Patriot Act II in 2003 and 2004 will flow into what promises to be a monumental political fight over Patriot I in 2005. A 2004 poll found 57% of the public wanting the act renewed, 34% opposed to it, and 9% unsure.

Finally, do not just be “for” or “against” things. How would you simultaneously give the government the tools it needs to guard against terrorists and preserve the civil liberties the citizenry needs to guard against the government. Perhaps you and others in your class could write an act to Protect Americans’ Traditional Rights while Investigating and Obstructing Terrorism, Patriot III.