

**HEARING OF THE CONSTITUTION, CIVIL RIGHTS AND CIVIL
LIBERTIES SUBCOMMITTEE OF THE HOUSE JUDICIARY
COMMITTEE**

- ☐ SUBJECT: THE USA PATRIOT ACT**
- ☐ CHAIRED BY: REP. JERROLD NADLER (D-NY)**
- ☐ WITNESSES: PANEL I TODD HINNEN, DEPUTY ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION, DEPARTMENT OF JUSTICE PANEL II SUZANNE SPAULDING, FORMER STAFF DIRECTOR, HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE; FORMER REP. THOMAS EVANS (R-DE); KENNETH WAINSTEIN, FORMER ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION, DEPARTMENT OF JUSTICE MICHAEL GERMAN, POLICY COUNSEL, AMERICAN CIVIL LIBERTIES UNION**

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REP. NADLER: (Sounds gavel.) The hearing of the Subcommittee of the Constitution, Civil Rights and Civil Liberties will come to order. We'll begin with -- I'll recognize myself for an opening statement.

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

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

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Additionally, I believe that we should not miss the opportunity to review the act in its entirety to examine how it is working, where it has been successful, and where it may need improvement. For example, I've introduced for the last few years the National Security Letters Reform Act which would make some vital improvements to the current law in order better to protect civil liberties while ensuring that NSLs remain a useful tool in national security investigations.

And Section 215 must be amended to conform to the changes we seek to make to the NSL provisions.

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

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

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

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

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

I yield back as I now recognize the distinguished ranking member of the subcommittee for five minutes for an opening statement.

REP. JAMES SENSENBRENNER (R-WI): Thank you, Mr. Chairman.

Two weeks ago, this country honored the 3,000 innocent people killed in the 9/11 terrorist attacks. In 100 days, the tools to prevent another horrific attack on America will expire.

While I appreciate the chairman holding this hearing today, it's long overdue. Congress must reauthorize the expiring provisions of the PATRIOT Act before December 31 of this year, and the clock is ticking.

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

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

I am deeply concerned that we are weeks away from adjourning this legislative session, and we're now only beginning the process of reviewing the act. During his Senate confirmation hearing in January, Attorney General Holder said he wanted to examine the expiring provisions of the PATRIOT Act, talk to investigators and lawyers, and get a sense of what has worked and what needs to be changed.

In May, General Holder appeared before this committee and I asked him about the department's position on reauthorizing the act. Again, he said he needed to examine how the expiring provisions have been used and to gather more empirical information. He assured me that the Department would express its views with sufficient time to reauthorize the act. Just last week, the Obama administration finally made up its views on the three expiring provisions.

I am dismayed as to why it took nine months to assess just three measures, but I commend the administration for recognizing the value of these important national security

tools and rightly encouraging Congress to reauthorize each of them. The administration has also promised to reject any changes to these or other PATRIOT Act provisions that would undermine their effectiveness.

Of particular importance to me is the lone wolf provision which closes a gap in the Foreign Intelligence Surveillance Act that, if allowed to expire, could permit an individual terrorist to slip through the cracks and endanger thousands of innocent lives. When FISA was originally enacted in the 1970s, terrorists were believed to be members of an identified group. This is not the case today.

Many modern-day terrorists may subscribe to a movement or certain beliefs, but they don't belong to or identify themselves with a specific terrorist group. Allowing the lone wolf provision to expire could impede our ability to gather intelligence about, perhaps, the most dangerous terrorists operating today.

Section 206 of the PATRIOT Act authorizes the use of roving wiretaps for national security and intelligence investigations. The roving wiretap allows the government to use a single wiretap order to cover any communications device that the target uses or may use. Without roving wiretap authority, investigators would be forced to seek a new court order each time they need to change the location, phone or computer that needs to be monitored.

Director Mueller testified before the committee in May that this provision has been used over 140 times and is exceptionally useful for facilitating FBI investigations.

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

The terrorist threat did not end on September 11, 2001. Just last week, federal authorities disrupted a potential al Qaeda bombing plot that stretched from New York City to Denver and beyond. It's time for this committee to act. We must not allow these critical counterintelligence tools to expire, and I look forward to hearing from today's witnesses and yield back the balance of my time.

REP. NADLER: Thank you. I must say I wish I was as confident as the gentleman from Wisconsin that this session has only weeks to go.

I now recognize the distinguished chairman of the full committee, Mr. Conyers, for an opening statement.

REP. JOHN CONYERS (D-MI): Thank you, Chairman Nadler.

And I wanted to thank Jim Sensenbrenner for his recapitulation of those days in the Judiciary Committee of where so much happened. I'm also pleased to see Tom Evans, our former colleague from Delaware back on the Hill.

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

The hearings that then-Chairman Sensenbrenner referred to were leading up to a bill that was sent to Rules Committee that never got out of Rules Committee. And that bill that the chairman and me, the ranking member, worked on so carefully was unanimously reported out of the House Judiciary Committee -- record vote.

And then the bill went to the Rules Committee. And then Chairman Dreier, under lord knows whose instructions, substituted that bill for another bill that we in Judiciary had never seen. And so we come here today now to consider what we do with those parts that are expiring.

And so I wanted to make a couple of ideas -- give you a couple of ideas about what might have happened if the bill that we debated and voted out -- Chairman Nadler was there, Ranking Member Lamar Smith was there. And the bill that we voted out required that targets of so-called roving

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wiretaps be identified in a FISA court order to prevent the John Doe roving wiretaps that some experts and many commentators consider abusive. That was our bill -- bipartisan -- 100 percent.

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

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

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

Now, the administration has stated that the protection of privacy and civil liberties is of deep and abiding concern, and they're willing to work on legislation that provides effective investigative authorities the power they need but, at the same time, protect the rights and civil liberties and privacy of the people that are under investigation.

And so I think it's critical that every member of this committee has accepted this invitation to work with the administration.

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

I thank you for your time, Chairman Nadler.

REP. NADLER: I thank the chairman.

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I now recognize for an opening statement the distinguished ranking member of the full committee, the gentleman from Texas, Mr. Smith.

REP. LAMAR SMITH (R-TX): Thank you, Mr. Chairman.

Is my mike on?

REP. NADLER: It is.

REP. SMITH: Thank you, Mr. Chairman.

America is fortunate not to have experienced a terrorist attack since 2001, but we must not be lulled into a false sense of security. The threat from terrorists and others who wish to kill Americans remains high. In the eight years since the attacks of September 11th, 2001, al Qaeda and other terrorist organizations have continued their war against innocent civilians worldwide.

In 2004, 191 people were killed in the Madrid train bombings. In 2005, 52 innocent civilians were killed when suicide bombers attacked the London subway. And last year, 164 people were killed in Mumbai by a Pakistan-based terrorist organization.

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

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

Many of these plots would not have been thwarted and terrorists would not have been convicted and thousands of lives would not have been saved without the Patriot Act. The Patriot Act gives intelligence officials the ability to

investigate terrorists and prevent attack. We cannot afford to let these life-saving provisions expire.

Last March I introduced the Safe and Secure America Act of 2009 to extend for 10 years Sections 206 and 215 of the USA Patriot Act and Section 6001 of the Intelligence Reform and Terrorism Prevention Act of 2004, which are scheduled to sunset on December 31st.

For years the Patriot Act has been the subject of misinformation, rumors and innuendoes about how intelligence officials can use its provisions. As Congress once again considers these provisions, we must ensure that the debate is about facts, not fiction.

The expiring provisions we are considering today are designed to be used only by intelligence officials investigating terrorists and spies in cases involving national security. Despite allegations that the Patriot Act is unconstitutional, these provisions have been upheld in court and are similar to those used in criminal investigations. The Patriot Act simply applies the same provisions to intelligence-gathering and national-security investigations.

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

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

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

Thank you, Mr. Chairman. I'll yield back.

REP. NADLER: Thank you.

AUDIENCE MEMBER: (Off mike.)

REP. NADLER: If you insist on talking, you'll be escorted from the room. Sit down, please.

AUDIENCE MEMBER: (Off mike.)

REP. NADLER: Escort him from the room, please. Do we have a sergeant at arms here?

In the interest of proceeding to our witnesses, and mindful of our busy schedules, I ask that other members submit their statements for the record. Without objection, all members will have five legislative days to submit opening statements for inclusion in the record. Without objection, the chair will be authorized to declare a recess of the hearing.

We'll now turn to our first panel of witnesses. As we ask questions of our witnesses, the chair will recognize members in the order of their seniority on the subcommittee, alternating between majority and minority, provided that the member is present when his or her turn arrives. Members who are not present when their turn begins -- when their turns begin will be recognized after the other members have had the opportunity to ask their questions. The chair reserves the right to accommodate a member who is unavoidably late or only able to be with us for a short time.

Our first panel consists of one witness. Todd Hinnen is the deputy assistant attorney general for law and policy in the Department of Justice's National Security Division. Prior to rejoining the Justice Department, Mr. Hinnen was the chief counsel to then-Senator Joseph Biden, now vice president, of course.

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

Prior to serving on the NSC, Mr. Hinnen was a prosecutor in the Department of Justice Computer Crime Section and a clerk for the honorable Richard Tallman, United States Court of Appeals for the 9th Circuit. Mr. Hinnen is a graduate of Amherst College and Harvard Law School.

Welcome. Your written statement in its entirety will be made part of the record. I would ask you to summarize your testimony in five minutes or less. To help you stay within that time, there's a tiny light at your table. When one minute remains, the light will switch from green to yellow, and then red when the five minutes are up.

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

Do you swear or affirm, under penalty of perjury, that the testimony you're about to give is true and correct to the best of your knowledge, information and belief?

MR. HINNEN: (Off mike.)

REP. NADLER: Thank you. Let the record reflect the witness answered in the affirmative.

We'll now hear your statement, sir.

AUDIENCE MEMBER: (Off mike.)

REP. NADLER: The gentleman will be removed.

AUDIENCE MEMBER: (Off mike.)

REP. NADLER: The witness will proceed.

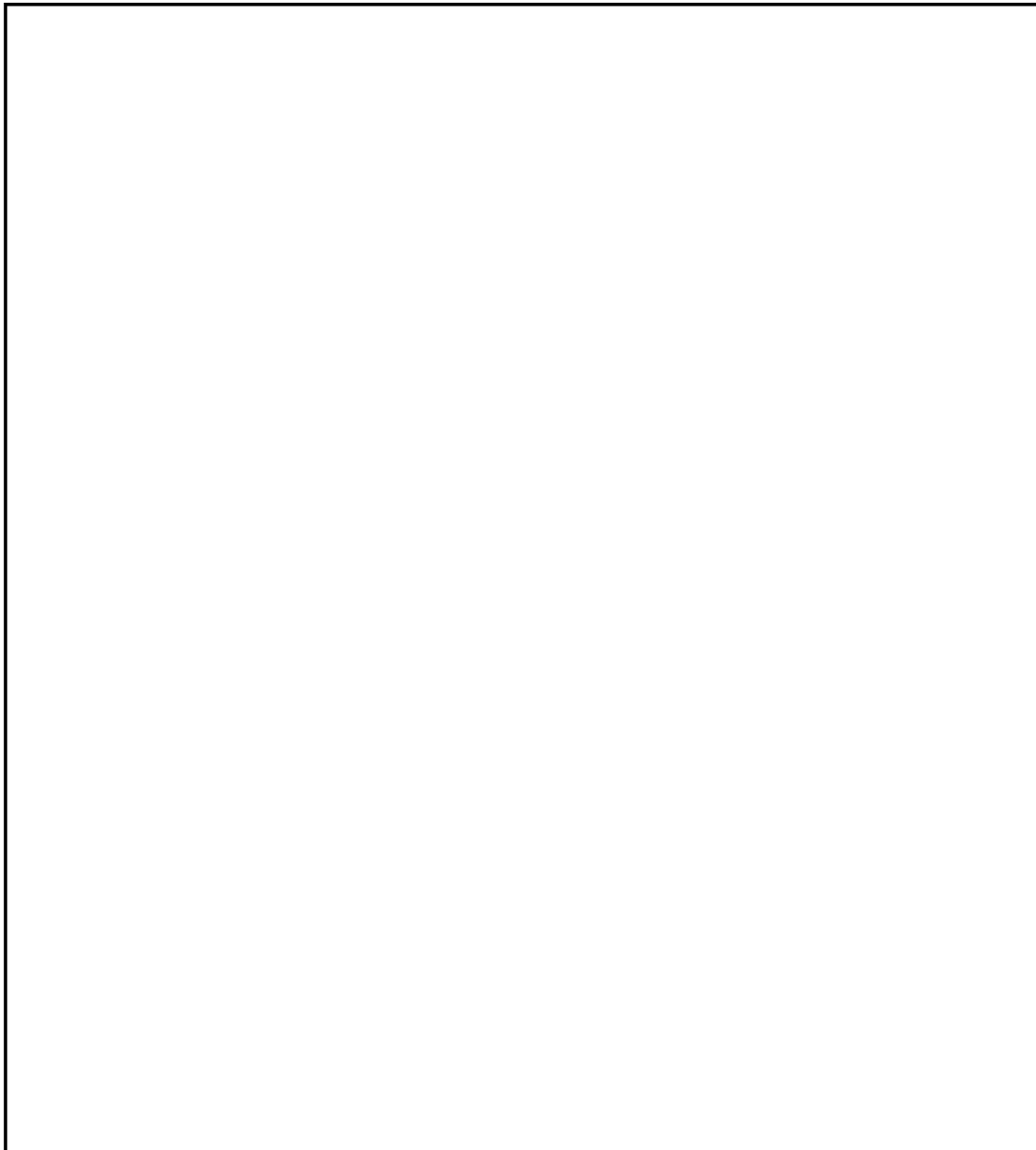
MR. HINNEN: Thank you.

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

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

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

Outside the Scope



[REDACTED]

The government has sought and been granted the authority in an average of 22 cases per year. The government has had occasion to use that authority granted by the court far more seldom than that. The business records provision allows the government to obtain any tangible thing it demonstrates to the FISA court is relevant to a counter terrorism or counter intelligence investigation. This provision is used to obtain critical information from the businesses unwittingly used by terrorists in their travel, plotting, preparation for, communication regarding, and execution of attacks. It also supports an important sensitive collection program about which many members of the subcommittee or their staffs have been briefed.

All applications of this authority are subject to FISA court approval, minimization procedures, and robust oversight. Each of these authorities meets an important investigative need. The department and the administration are firmly committed to ensuring that they are used with due respect for the privacy and civil liberties of Americans. We welcome discussion with the subcommittee directed toward ensuring that these authorities are renewed in a form that maintains their operational effectiveness and protects privacy and civil liberties.

[REDACTED]

I appreciate the subcommittee's understanding in this regard and its recognition that today's hearing is only the beginning of a process of working closely together to create legislation that maintains the operational effectiveness of these important investigative tools and protects the privacy and civil liberties of Americans. Thank you.

[REDACTED]

REP. NADLER: [REDACTED]

[REDACTED]

The administration has noted (in their ?) support for the reauthorization that it's willing to consider proposals to better protect privacy as well as efficacy. Given that position, in the context of Section 215 orders would the administration support returning to a standard that required specific facts showing that the records sought are related to a foreign power rather than the current relevant standard, and if not why not?

MR. HINNEN: Thank you, Mr. Chairman. That's an interesting question whether the administration would support a return to this specific and articulable (ph) standard which existed before the PATRIOT Act as opposed to the relevant standard. This, of course, is something that Congress changed in the original PATRIOT Act. The administration has not taken an official position on this yet. I would say sitting here today that it's not entirely clear to me that there is a substantive difference between the specific and articulable (ph) standard and the relevance standard.

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

REP. NADLER: Well, clearly, if there's no difference it doesn't matter. But everybody seems to have said for the last 10 years that there's a big difference.

MR. HINNEN: If in fact there is a difference I think the presumption should -- would be against change.

REP. NADLER: Say again. I'm sorry.

MR. HINNEN: The presumption would be against change -- against returning --

REP. NADLER: Because --

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

REP. NADLER: Well, again, I would simply say this and then my time will have expired. Saying that we shouldn't change something because Congress did it is never a good argument because we're always changing something. I would ask you, again, after the committee -- after today to supply us, if you think we shouldn't change that, with specific reasons other than we're already doing it this way but specific reasons and illustrations of how that would affect intelligence gathering and why it would not be a good idea to change it.

MR. HINNEN: Certainly.

REP. NADLER: Thank you. My time is expired. I now recognize the distinguished ranking member of the subcommittee -- (inaudible).

REP. SENSENBRENNER: Thank you very much, Mr. Hinnen. You are a breath of fresh air and I would say that in many cases you have vindicated many of the assertions that I made both as the author of the PATRIOT Act in 2001 as well as the author of the PATRIOT Act reauthorization which was signed by the president in March of 2006. The PATRIOT Act has been extensively litigated and in most cases it has been held constitutional.

Outside the Scope



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

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

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

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

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

MR. HINNEN: As I mentioned in my opening statement, Mr. Ranking Member, we feel that these are very important investigative authorities and that it would be very unfortunate to allow them to lapse. The administration firmly supports renewal before December 31st so that there's no gap in the investigative capabilities of the government.

REP. SENSENBRENNER: Thank you. I yield back the balance of my time.

REP. NADLER: I thank the gentleman.

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I now recognize for five minutes the distinguished chairman of the full committee, Mr. Conyers.

REP. CONYERS: Thank you, Mr. Chairman.

Welcome Mr. Hinneman (sic). Is this the first time you testified before Judiciary?

MR. HINNEN: Yes, it is.

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

MR. HINNEN: Since January 21st, 2009, Mr. Chairman.

REP. CONYERS: Mm-hmm (in acknowledgement), January 21st.

You know, you sound like a lot of people from DOJ that's come over here before, and yet you've only been there a few months. You think that's a good thing or a bad thing?

MR. HINNEN: (No response.)

REP. CONYERS: Okay, you don't have to respond to that.

Let me ask you something, do you know how many times the Patriot Act has been challenged in the federal courts?

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

REP. CONYERS: How about five?

MR. HINNEN: I'll take the Chairman's word for it.

REP. CONYERS: All right, thank you.

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

MR. HINNEN: With due respect, Mr. Chairman, unless we're discussing one of the declassified opinions of the FISA

court, that's not something I'm at liberty to discuss here in this setting.

REP. CONYERS: You're not at liberty to discuss it? It's been in the newspapers. We're discussing it. I've had the secret clearance before you, and longer than you.

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

REP. CONYERS: Well, just a minute. Let me turn to the chief staff of the House Judiciary Committee. (Rep. Conyers consults with staff.

)

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

MR. HINNEN: When the inspector general for the Department of Justice, or another part of the Intelligence committee (sic), desires to make part of a report public, he works closely with the intelligence community to ensure that the information is appropriately declassified before it's publicly released.

REP. CONYERS: Well, the inspector general has had it redacted. Are you questioning the inspector general knowledge of the law since January 21st --

MR. HINNEN: Certainly not.

REP. CONYERS: -- of 2009?

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

REP. CONYERS: Well, have you ever -- have you ever seen the unclassified version of the inspector general's criticism of the fact that these orders were being issued,

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and he refused to let it -- you never heard of this ever happening before? There were several cases -- there were several instances in the same case which this occurred.

MR. HINNEN: I'm familiar with the inspector general's report on 215 orders, and familiar with the fact that the business-records provision, like other parts of FISA, contain express protections for First Amendment rights.

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

MR. HINNEN: I think the FBI --

REP. CONYERS: Okay.

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

Now, here's the problem -- it's very simple. What the court -- the Intelligence court, and what the inspector general were complaining about is that you could get around the court's refusal to issue an order in a terrorist investigation by merely going to the FBI -- getting around them, and they issue a national security letter for the very same information. Problem.

That means that the court and the inspector general found that there was an abuse of process in handling this terrorist investigation. And I'm going to have my staff supply you or your staff with all of this information, all of which is public.

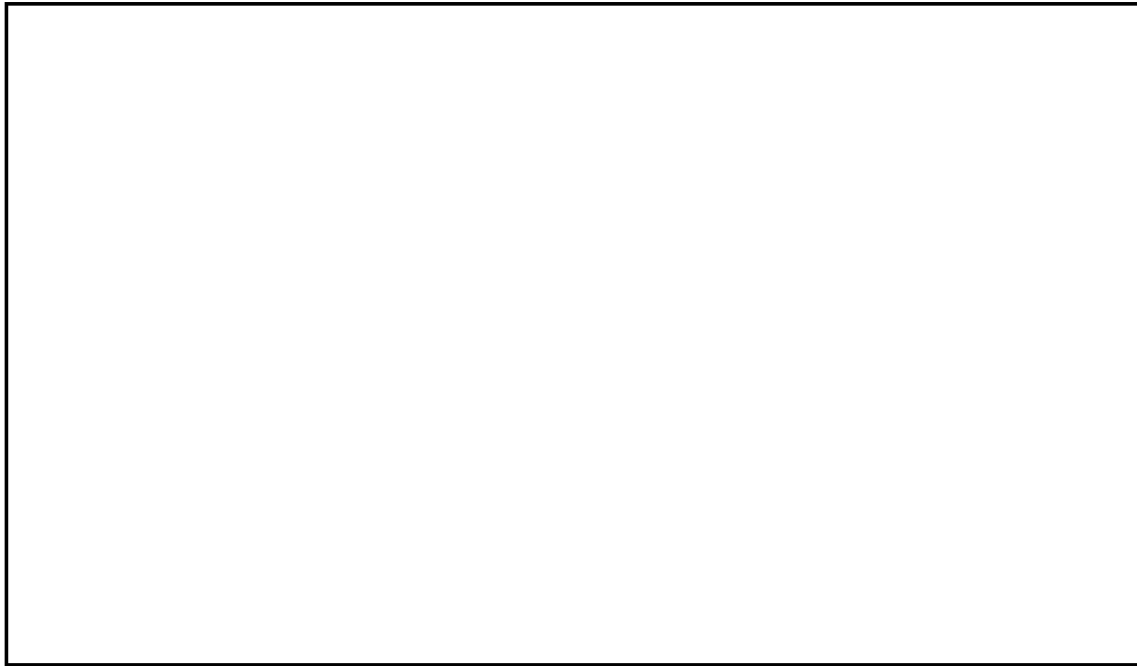
MR. HINNEN: Thank you, Mr. Chairman. Now that I'm clear on which reports we're referring to --

REP. CONYERS: (Off mike.) Okay.

MR. HINNEN: -- if you'll give me a moment to respond.

REP. CONYERS: (Off mike.) All right.

Outside the Scope



REP. CONYERS: Well, I'm glad your memory has been refreshed. That's wonderful.

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

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

MR. HINNEN: I'm certainly familiar with many of their comments and with their testimony today, yes.

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

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

REP. CONYERS: And some parts you find agreement with?

MR. HINNEN: Certainly.

REP. CONYERS: If I could indulge the Chairman's generosity for sufficient time --

REP. NADLER: Without objection.

REP. CONYERS: -- to just identify the parts that you find yourself in agreement with and the parts that you may not be so enthusiastic about.

MR. HINNEN: With due respect, Mr. Chairman, the -- you've asked me about the ACLU's positions in general. I would note --

REP. CONYERS: No, not in general. No.

MR. HINNEN: With respect to these provisions and with respect to the Patriot Act?

REP. CONYERS: Yes.

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

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

MR. HINNEN: Mr. Chairman, I didn't -- I didn't investigate the testimony with the mind to try to --

REP. CONYERS: I see.

MR. HINNEN: -- determine what percentage I agreed with and what I didn't.---

REP. CONYERS: Probably not. I can understand that.

MR. HINNEN: -- is that I agree with some parts of it and disagree with others.

REP. CONYERS: Um-hmm. And -- and how will we find out which parts you agreed with and which parts you didn't?

MR. HINNEN: Hopefully, Mr. Chairman, through the dialogue that the subcommittee is embarking upon today.

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

MR. HINNEN: I'd be happy to take that back to the department, Mr. Chairman.

REP. CONYERS: Well, I'm going to take it back to the department with you, and thank you very much for your testimony.

MR. HINNEN: Thank you for your questions.

REP. NADLER: Thank you. The gentleman from Florida is recognized for five minutes.

REP. TOM ROONEY (R-FL): Thank you, Mr. Chairman.

Mr. Hinnen, I also started my current employment in January, so hopefully this question is fairly simple. Last week, Senator Feingold introduced legislation that, amongst other things, repeals Title Eight of FISA, which provided civil liberty -- liability, excuse me, protections to telecommunication carriers who assisted the government following the 9/11 terrorist attacks, a provision that President Obama voted for. To your knowledge, does the administration support this proposal?

MR. HINNEN: Congressman Rooney, the administration has taken no official position on this or any other provision of Senator Feingold's bill. As you noted in your question, the president did vote for the FISA Amendments Act as a senator, and DOJ has defended the immunity provision in litigation.

So without forecasting an official position, as the president has suggested it may be more productive to look forward to meet the challenges still before us than to reopen debates resolved in past.

REP. ROONEY: Thank you. Thank you, Mr. Chairman.

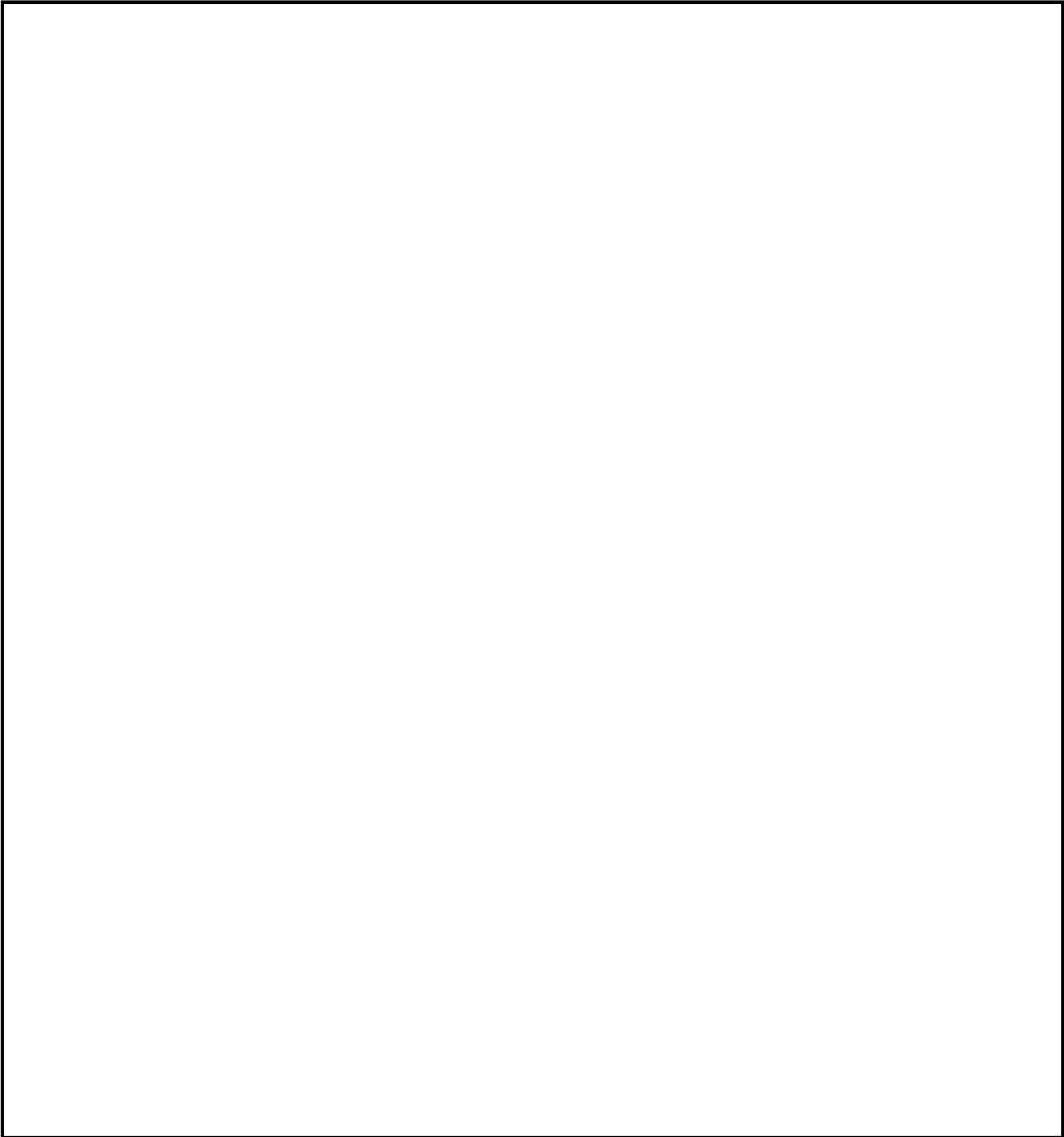
REP. NADLER: Thank you. I now recognize the gentleman from Georgia for five minutes.

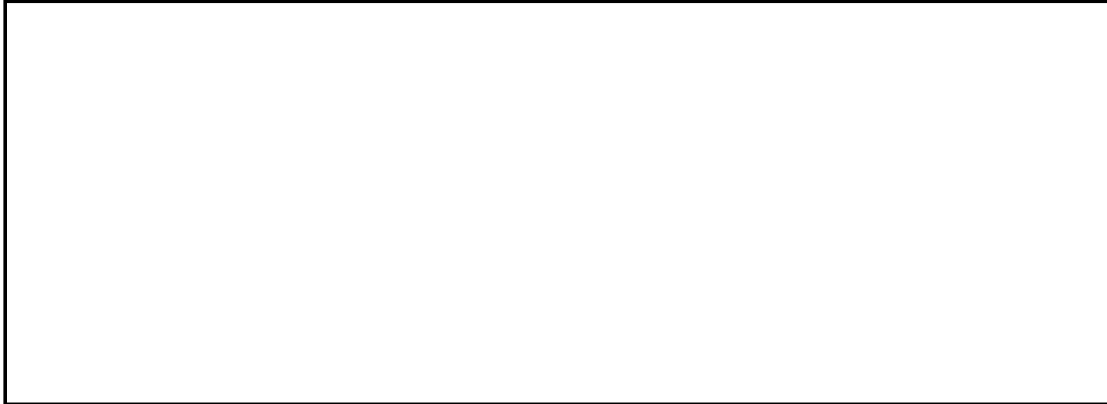
REP. HANK JOHNSON (D-GA): Thank you, Mr. Chairman, and I think issue --

REP. NADLER: Would you use the microphone please?

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

Outside the Scope





REP. NADLER: The gentleman's time has expired. I thank the gentleman, and I thank the witness.

Anybody else? Nope.

I thank the witness. We look forward to -- to your providing us with the information that you said you would, and I thank you.

We will now proceed with our second panel, and I would ask the witnesses to take their places. In the interest of time, I will introduce them while they are taking their seats.

Suzanne Spaulding is currently a principal in Bingham Consulting Group and counsel to Bingham & Kutchin (ph) where she advises clients on issues related to national security. Ms. Spaulding was Democratic staff director for the U.S. House of Representatives Permanent Select Committee on Intelligence. She had started working on terrorism and other national security issues 20 years earlier in 1983 as senior counsel and later legislative director for Senator Arlen Specter.

After six years at the Central Intelligence Agency where she was assistant general counsel and the legal adviser to the director of Central Intelligence's Nonproliferation Center, she returned to the Hill as general counsel for the Select Committee on Intelligence.

She served as the executive director to two congressionally mandated commissions, the National Commission on Terrorism chaired by Ambassador L. Paul Bremer III, and the Commission to Assess the Organization of the Federal Government to Combat the Proliferation of

Weapons of Mass Destruction, chaired by former Deputy Secretary of Defense and CIA Director John Deutch.

She advised both the Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction, the Gilmore Commission, and President George Bush's Commission on the Intelligence of the United States Regarding Weapons of Mass Destruction, the Robb-Silberman Commission.

She is currently a member of the CSIS Commission on Cybersecurity for the 44th presidency.

In 2002, she was appointed by then-Virginia Governor Mark Warner to the Secure Commonwealth Panel established after the attacks of September 11th to advise the governor and the legislature regarding preparedness and response issues in the Commonwealth of Virginia. She received her undergraduate and law degrees from the University of Virginia.

Tom Evans represented Delaware in the House of Representatives from 1977 to 1983. He served as co-chairman and operating head of the Republican National Committee, deputy chairman of the Republican National Finance Committee, and Republican National Committeeman from Delaware. He was also chairman of the Congressional Steering Committee of the Reagan for President Committee, served on the executive committee of the Reagan-Bush campaign, and was vice chairman of the Congressional Campaign Committee with responsibility for White House liaison.

Tom Evans also served as a member of an informal group known as the Reagan Kitchen Cabinet that directly and regularly advised the president on a broad range of issues. In Congress he was a member of the House Banking Committee and the Merchant Marine and Fisheries Committee. He has a B.A. and an LLB from the University of Virginia.

Ken Wainstein -- and I hope I pronounced that correctly -- is a partner in O'Melveny's Washington, D.C. office and a member of the white collar defense incorporated investigations practice. He focuses his practice on handling civil and criminal trials and corporate internal investigations. Mr. Wainstein spent 19 years in the Department of Justice from 1989 to 2001. He served as

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assistant U.S. attorney in both the Southern District of New York and the District of Columbia.

In 2001, Mr. Wainstein was appointed director of the executive office for U.S. Attorneys. The next year Mr. Wainstein joined the Federal Bureau of Investigation to serve as general counsel, and later as chief of staff to Director Robert S. Mueller. Two years later he was appointed and later confirmed as U.S. Attorney for the District of Columbia.

In 2006 he became the first assistant attorney general for national security at the Justice Department. In 2008, Mr. Wainstein was named President Bush's homeland security advisor with a portfolio covering the coordination of the nation's counterterrorism, homeland security, infrastructure protection, and disaster response and recovery efforts. He has a B.A. from the University of Virginia and a J.D. from the University of California at Berkeley.

Mike German is a policy counselor for the American Civil Liberties Union's Washington legislative office. Prior to joining the ACLU Mr. German served 16 years as a special agent with the FBI, where he specialized in domestic terrorism and covert operations. Mr. German served as an adjunct professor for law enforcement and terrorism at the National Defense University and as a senior fellow with GlobalSecurity.org. He has a B.A. in philosophy from Wake Forest University and a J.D. from Northwestern University Law School.

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

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

(The witnesses are sworn in.)

REP. NADLER: Our first witness is Suzanne Spaulding, who is recognized for five minutes.

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MS. SPAULDING: (Off mike) -- Nadler, full committee Chairman Conyers, and members of the committee, thank you for inviting me to participate in today's hearing on the USA Patriot Act and related provisions. Earlier this month we marked another anniversary of the attacks of September 11th. In the eight years since that indelible manifestation of the terrorist threat, we've come to better understand that respect for the Constitution and the rule of law is a source of strength and can be a powerful antidote to the twisted lure of the terrorist narrative.

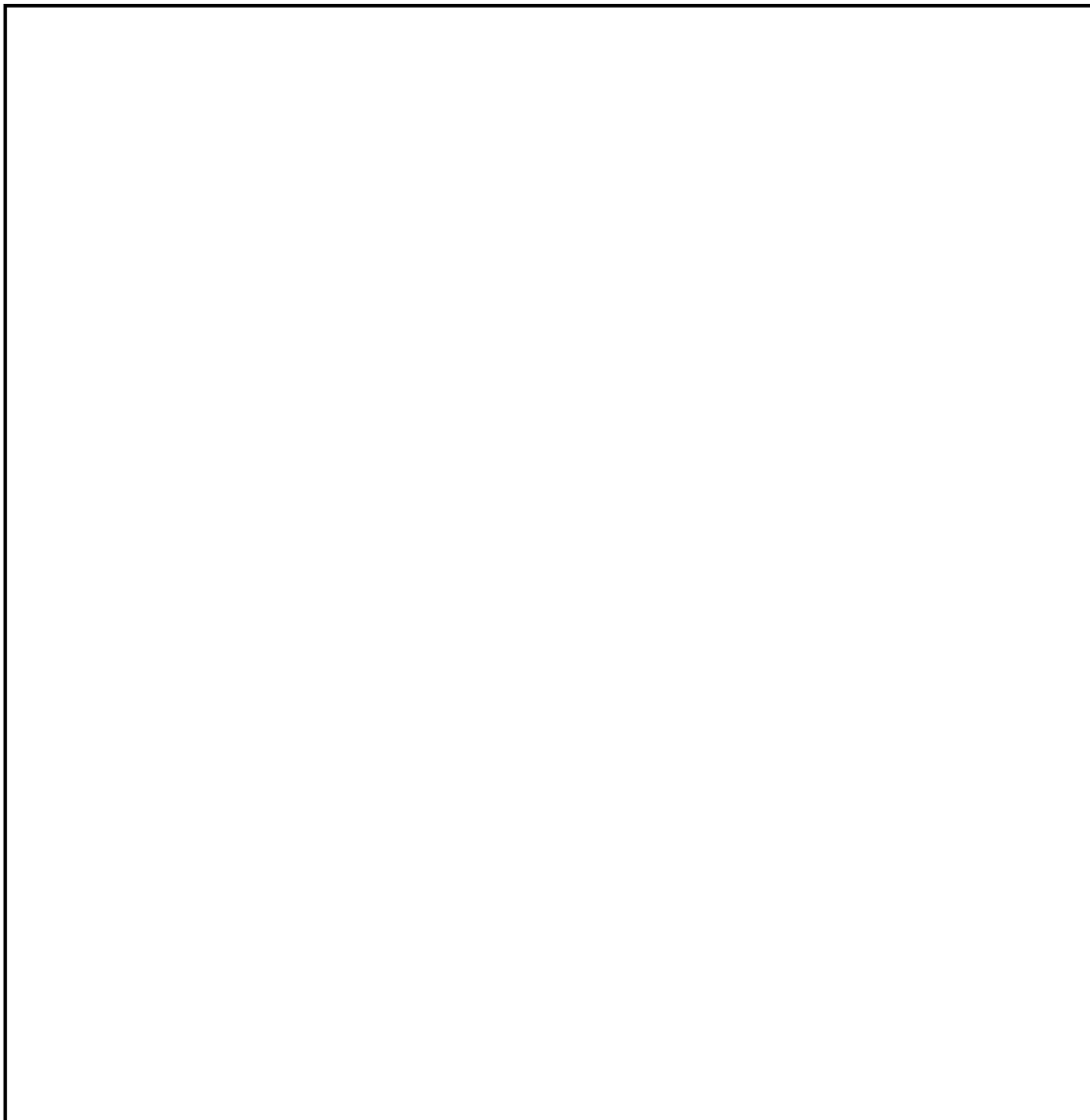
In fact, after spending 20 years working terrorism and national security issues for the government, I am convinced that this approach is essential to defeating the terrorist threat. Given this national security imperative, Congress should use this opportunity to more broadly examine ways to improve our overall domestic intelligence framework, including a comprehensive review of FISA, national security letters, Attorney General guidelines and applicable criminal investigative authorities. And I would encourage the administration to do the same.

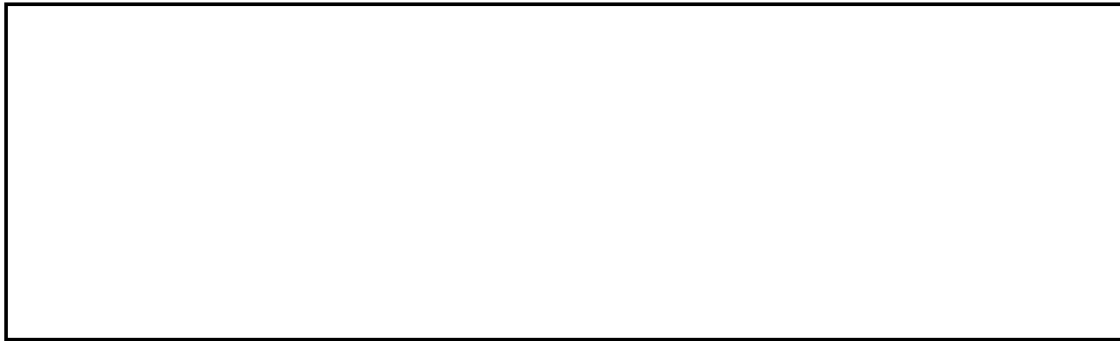
This morning, however, I will focus on the sunset provisions that are the focus of this hearing. Sections 215 and 206 both have corollaries in the criminal code. Unfortunately, important safeguards were lost in the translation as these moved into the intelligence context. Section 206, for example, was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

However, there are specific safeguards in the criminal Title 3 provisions that were not carried over to FISA, requirements that provided significant safeguards designed to protect Fourth Amendment rights of innocent people. Their absence in Section 206 increases the likelihood of mistakes and the possibility of misuse. In addition, in the criminal context where the focus is on successful prosecution, the exclusionary rule, there is an essential deterrent against abuse, one that is largely absent in intelligence investigations, where prosecution may not be the primary goal. This highlights the care that must be taken when importing criminal authorities into the intelligence context, and why it may be necessary to include more rigorous standards or safeguards, and I have suggested some in my written testimony.

Similarly, Section 215 governing orders for tangible things attempted to mimic the use of grand jury or administrative subpoenas in the criminal context. However, criminal subpoenas require some criminal nexus. FISA Section 215 does not. Moreover, the Patriot Act Amendment's broadens this authority well beyond business records, to allow these orders to be used to obtain any tangible things from any person. This could include an order compelling you to hand over your personal notes, your daughter's diary, or your computer, things to which the Fourth Amendment clearly applies. Again, in my written testimony I have tried to suggest ways to tighten the safeguards for Section 215 without impairing the national security value of this provision.

Outside the Scope





Let me close by commending the committee for its commitment to ensuring that the government has all appropriate and necessary tools at its disposal in this vitally important effort to counter today's threat, and that these authorities are crafted and implemented in a way that meet our strategic goals as well as our tactical needs.

With a new administration that provokes less fear of the misuse of authority, it may be tempting to be less insistent upon statutory safeguards. On the contrary, this is precisely the time to seize the opportunity to work with the administration to institutionalize appropriate safeguards in ways that will mitigate the prospect of abuse by future administrations or by this administration in the aftermath of an event. Thank you very much.

REP. NADLER: Thank you. Congressman Evans, you're recognized for five minutes.

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

REP. NADLER: Will you pull the mike a little closer, please? It's not on. You have to press something.

No.

MR. EVANS: I still have five minutes?

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

MR. EVANS: (Laughs.) Well, anyway, it is a privilege to be here. And I'm delighted to be invited. I'm delighted to see my friend, the chairman of the committee, the gentleman from Michigan, Mr. Conyers. And I'm honored to represent the Liberty and Security Committee of the Constitution Project today.

You have my previously prepared statement. And attached to it is the Liberty and Security Committee's statement on reforming the Patriot Act.

One word about the make-up of our committee. It is truly bipartisan. Bipartisan in nature, we address issues, not as Republicans or Democrats, but we need more of that, I think, in this country and here in Washington. Our membership is broad based, and it includes a number of former U.S. attorneys, some distinguished judges, former judges, professors of law, a few deans of law schools, even a publisher, Mr. Conyers, who is the publisher of The Detroit Free Press, Mr. Lawrence and, I might add, foundation chairmen and senior members of the administration.

And I also want you to know that there are a number of conservative Republicans. I'm a moderate Republican, but there are a number of conservative Republicans on this committee, including several who were members of this body, constitutional scholars, both.

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

That's why I'm especially heartened to see this committee exercising its oversight responsibility which is such a critically important element in our system of checks and balances. The members of the Liberty and Security Committee of the Constitution Project have all joined

together in the statement on reforming the Patriot Act, which is attached to my statement, for the record.

Broadly speaking, we are urging the Congress to initiate some important changes if you proceed with the reauthorization of three provisions that are sun-setted in the Patriot Act.

Briefly, we believe the business records or library records provision provides largely unchecked powers. We believe they should be tightened, and the inclusion of a gag order should be limited to 30 days.

Outside the Scope





Thank you, again, for asking me to be here.

REP. NADLER: I thank the gentleman.

Mr. Wainstein, you're recognized for five minutes.

MR. WAINSTEIN: Thank you, Mr. Chairman. Chairman Nadler, Chairman Conyers, members of the subcommittee, thank you for holding this important hearing, and thank you for soliciting our views about the Patriot Act.

My name is Ken Wainstein. I'm a partner with the law firm of O'Melveny & Myers. Prior to my leaving government in January of this year, I served in a variety of positions and had the honor to work alongside the fine men and women who defend our country day in and day out.

I also had the honor to participate, along with my co-panelists, in what has been, I think, a very constructive national discussion over the past eight years over the limits of government investigative powers in this country's fight against international terrorism.

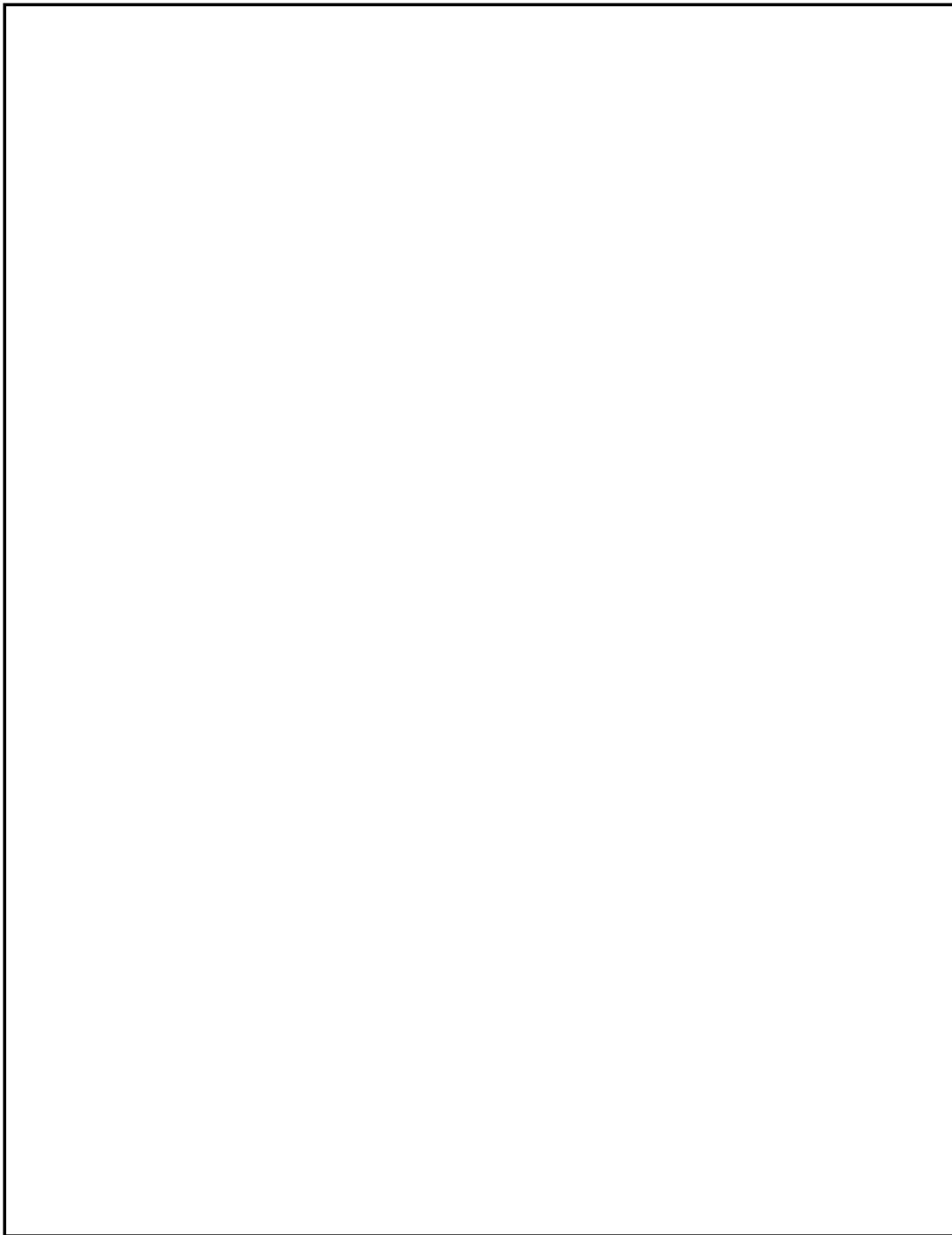
Today I want to discuss the three provisions of the Foreign Intelligence Surveillance Act that are scheduled to expire at the end of this year, and explain my position that all three of these authorities are important to our national security and should be reauthorized.

The Patriot Act was originally passed within 45 days after 9/11 in response to the tragic attacks of that day. In 2005, Congress, to its enduring credit, undertook a lengthy process of carefully scrutinizing each and every provision of that statute, a process that resulted in the reauthorization act that provided significant new safeguards for many of the original provisions.

The authorities in the Patriot Act are now woven into the fabric of our counterterrorism operations and have now become a critical part of our defenses against what

President Obama has aptly described al Qaeda's, quote, "far-reaching network of violence and hatred." And this is particularly true of the three provisions that are subject to reauthorization this year.

Outside the Scope



Section 215 authorized the FISA Court to issue orders for the production of records that law enforcement prosecutors have historically been able to acquire through grand jury subpoenas. Prior to the enactment of Section 215, our national security personnel were hamstrung in their effort to obtain business records because the operative statute at the time required a higher showing of proof and limited those orders to only certain types of businesses.

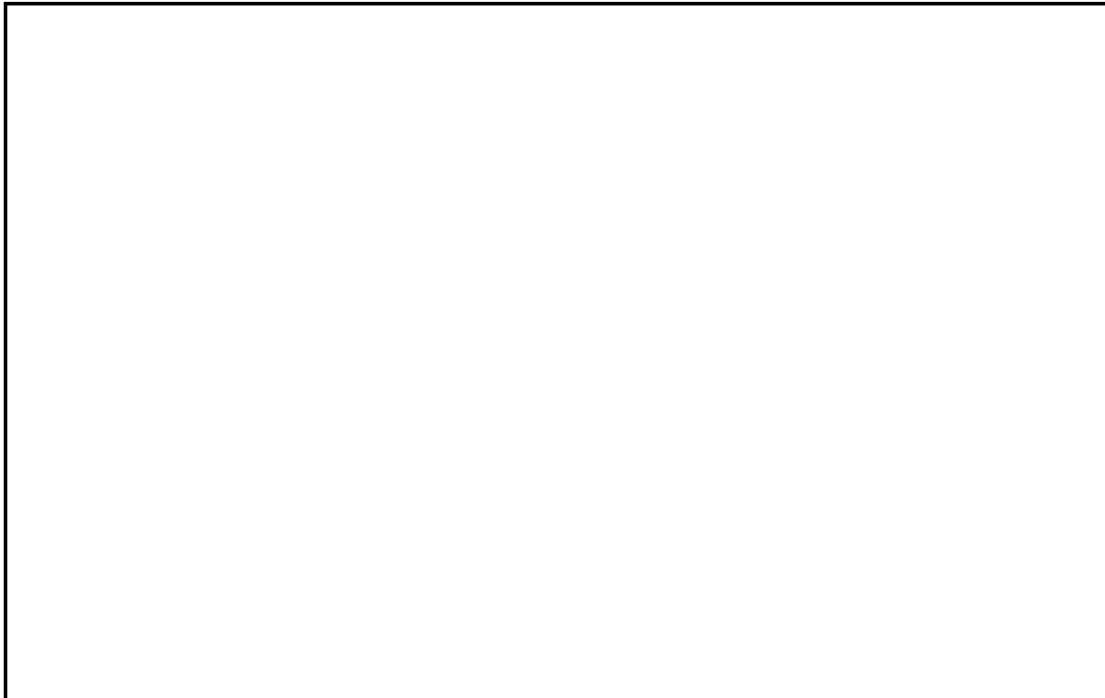
Section 215 addressed these weaknesses by adopting a regular relevance standard for the issuance of the order and expanding the reach of the authority to any entity or any business.

And like the roving-wiretap authority, Congress built into this provision a number of safeguards that make Section 215 (orders ?) significantly more protective of civil liberties than the grand jury subpoenas that are issued every day around this country by federal and state prosecutors.

Unlike grand jury subpoenas the prosecutor can issue on his or her own, a 215 order must be approved by Court. Unlike subpoenas, 215 -- Section 215 specifically bars issuance of an order if the investigation is focused only on someone's First Amendment activities. And unlike grand jury subpoenas, Section 215 requires regular reporting to Congress and imposes a higher standard for particularly sensitive records like library records.

With these safeguards in place, there is absolutely no reason to return to the days when it was easier for prosecutors to secure records in a simple assault prosecution than for national security investigators to obtain records to help defend our country against terrorist attack.

Outside the Scope



Thank you again, Mr. Chairman, for the opportunity to discuss the sun setting PATRIOT Act provisions and for the reasons for my belief that they should all be re-authorized.

REP. NADLER: I thank you and now I recognize Mr. German for five minutes.

MR. GERMAN: Chairman Nadler, Chairman Conyers, Ranking Member Sensenbrenner, thank you for the opportunity to testify on behalf of the American Civil Liberties Union as Congress revisits the USA PATRIOT Act.

The PATRIOT Act vastly and unconstitutionally expanded the government's authority to pry into people's private lives with little or no evidence of wrong doing violating the Fourth Amendment protections against unreasonable searches and seizures and First Amendment protections of free speech and association.

Worst, it allows this expanded spying to take place in secret with few protections to ensure these powers are not abused and little opportunity for Congress to determine whether these authorities are doing anything to make America safer.

The three expiring provisions give Congress the opportunity as the Department of Justice's September 14th letter suggested, to carefully examine how these expired authorities -- expanded authorities impact Americans' privacy.

We urge Congress to broaden its review to include all post 9/11 domestic intelligence programs, including the Foreign Intelligence Surveillance Act amendments and the new Attorney General guidelines for FBI domestic operation and rescind, repeal or modify any provisions that are unused, ineffective or prone to abuse.

When several PATRIOT Act provisions came up for renewal in 2005, there was little in the public record for Congress to evaluate. Today Congress is not completely in the dark. Inspector General audits ordered in the Patriot Act Reauthorization revealed significant abuse to national security letters, and courts have found several Patriot Act provisions unconstitutional, including NSL gag orders, certain material support provisions, ideological exclusions provisions and the FISA significant purpose test (sic).

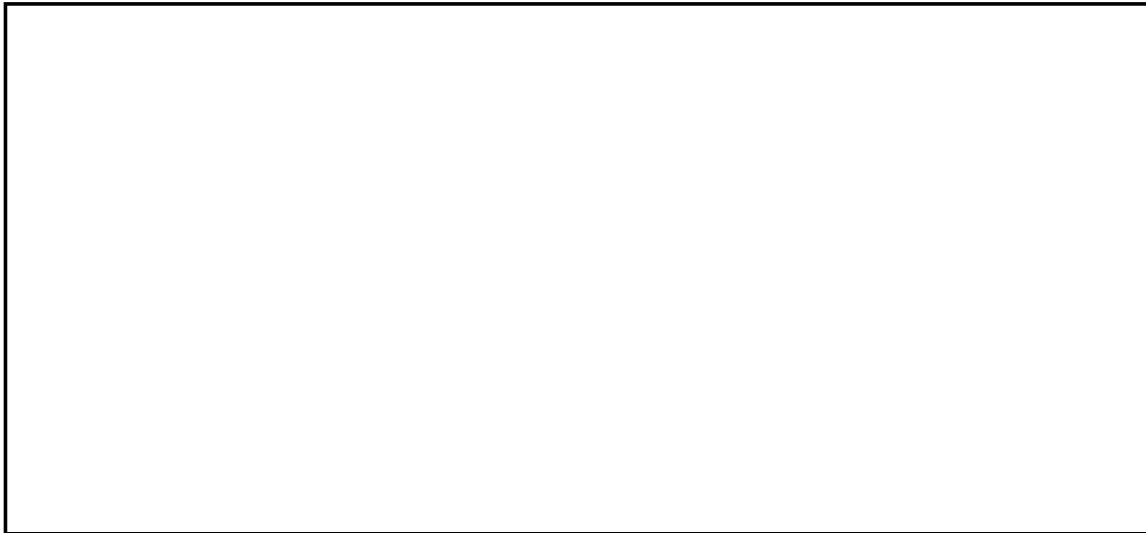
There is also evidence that the government abused even the broadly expanded wiretapping authorities that Congress approved under the FISA Amendments Act. Congress needs to address all of these provisions and indeed this work is beginning.

The ACLU fully supports both the National Security Letter Reform Act of 2009, sponsored by Chairman Nadler; and the Justice Act, a comprehensive reform bill introduced by Senators Russ Feingold and Richard Durbin last week. They should be acted upon promptly.

Outside the Scope

Regarding the expiring provisions, the government's arguments for extending these authorities without amendment are simply unpersuasive. [REDACTED]





The third expiring provision, Section 215, or the library records provision is also rarely used. Only 13 Section 215 applications were made in 2008, but that doesn't mean there isn't abuse. The IG reported that in 2006 the FBI twice asked the FISA Court for a Section 215 order seeking tangible things as part of a counter-terrorism case. The Court denied the request both times because, quote, "the facts were too thin, and the request implicated the target's First Amendment rights," end quote.

Rather than re-evaluating the underlying investigation based on the Court's First Amendment concerns, the FBI circumvented the Court's oversight and pursued the investigation using National Security Letters that were predicated on the same information contained in the Section 215 application.

This incident reveals the danger of looking at these separate authorities piecemeal. Narrowing one authority might simply lead to abuse of another. There have been many significant changes to our national security laws over the past eight years, and addressing the excesses of the Patriot Act without examining the larger surveillance picture may not be enough to reign in an abusive intelligence gathering regime.

Congress should conduct a comprehensive examination of all the laws regulations and guidelines that permit government surveillance of Americans without suspicion of wrongdoing. The American Civil Liberties Union encourages Congress to exercise its oversight powers fully to restore

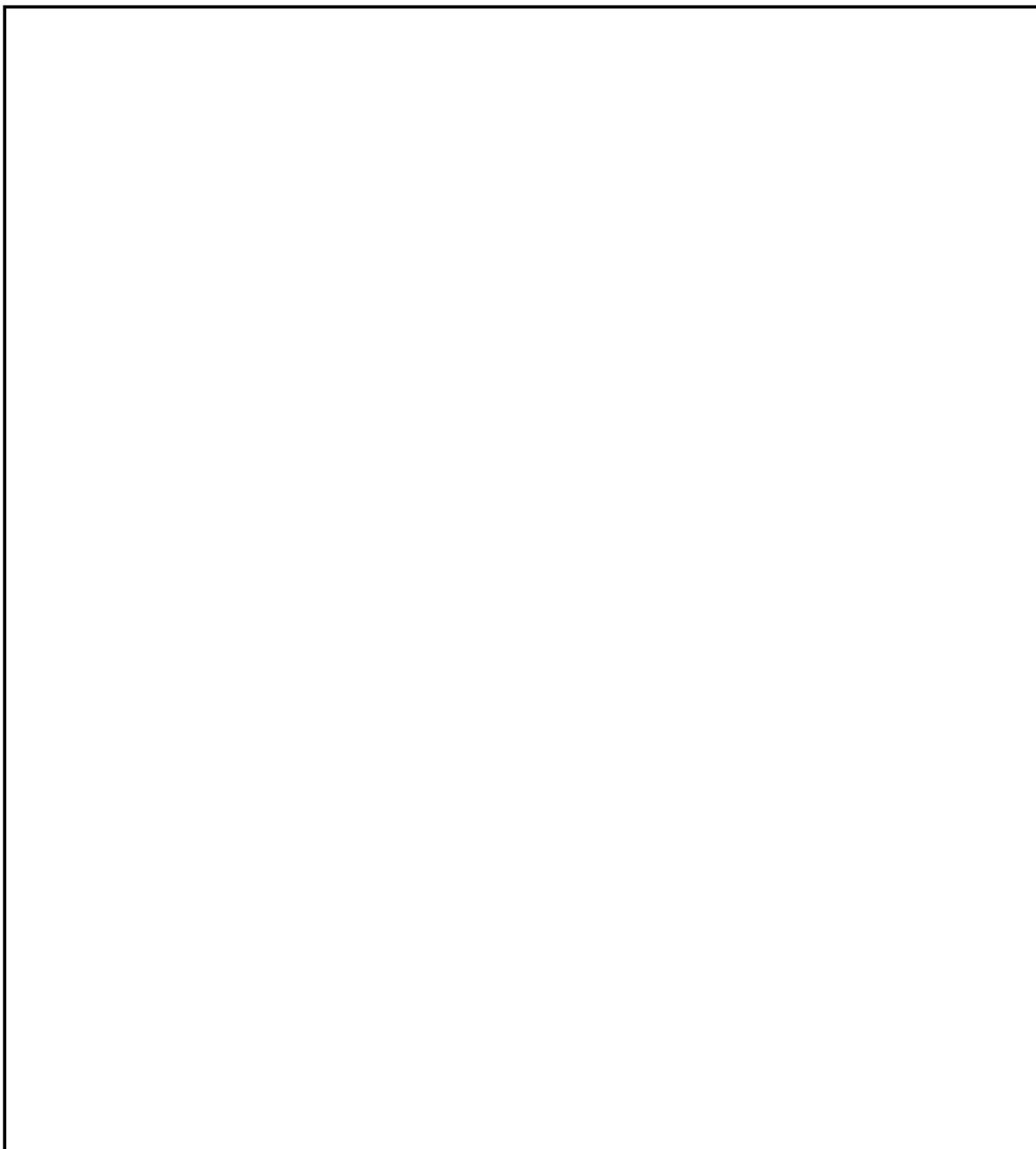
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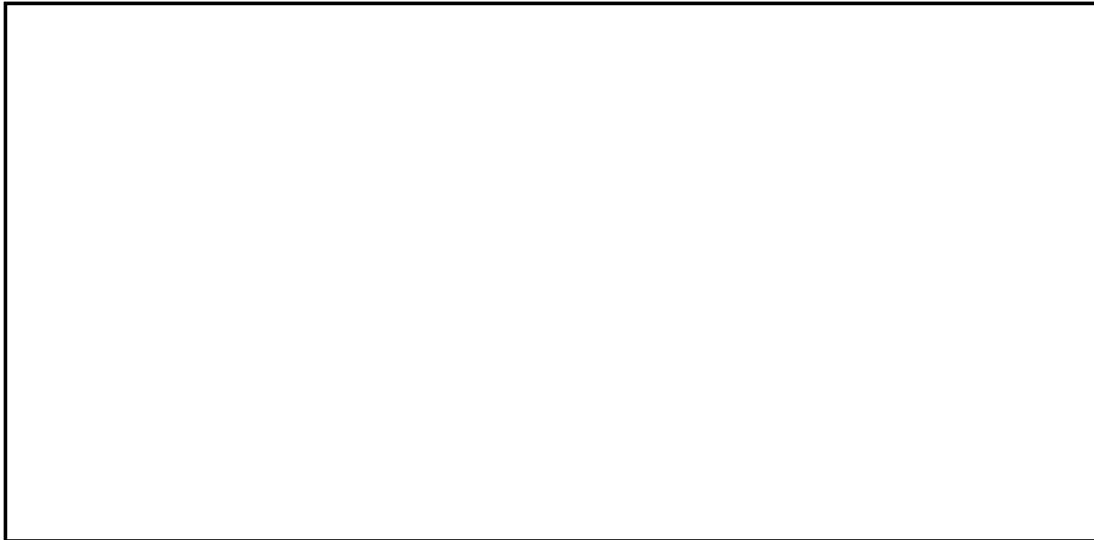
effective checks on these Executive Branch surveillance powers and to prohibit unreasonable searches and seizures of private information without probable cause based on particularized suspicion.

Thank you.

REP. NADLER: I thank the witnesses.

I will recognize myself to begin the questioning for
five minutes. Outside the Scope





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

MR. : Could you ask that question again? I don't have a hearing aid.

REP. NADLER: I'm sorry. I asked her, why -- Ms. Spaulding had said in her testimony that it is important that we should consider requiring the government to set forth in the initial application the grounds upon which it believes the disclosure of a Section 215 order would be harmful. In other words, why to get the gag order? Why do we need the gag order?

I am asking Ms. Spaulding, why do you believe that this consideration is important? And when you answer the question, comment in the NSL context as well as the Section 215 context, please.

MS. SPAULDING: Thank you, Mr. Chairman. I think it's important for a number of reasons. And it is particularly relevant in the Section 215 and NSL letters when they are delivered to third-party record holders, delivered to a business, asking for the records of a third party, of another individual.

Because they really have very little incentive to challenge the gag order, to challenge the underlying order itself or to challenge the gag order, it is not in their best interest to have it publicized that they are handing over to the government customer information.

And so putting the burden on the recipient of the order to challenge that requirement not to disclose really dramatically reduces the likelihood that it's going to be challenged.

And in fact, with regard to challenging underlying order, the Department of Justice letter acknowledges that no recipient, no business recipient of a 215 request has ever challenged the order, which I think is pretty compelling evidence that they --

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

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

REP. NADLER: Thank you. I just have one more question.

Mr. German, the 2008 IG report on the FBI's use of Section 215 orders noted that the FBI issued national security letters, and the chairman alluded to this, after the FISA Court denied requests of Section 215 orders to get the same information. The FISA Court said this implicates First Amendments concerns. You can't get the orders, so they just went and issued NSLs for themselves. The court based this denial on First Amendment concerns.

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

MR. GERMAN: I don't know if I can say in the context of my experience as an FBI agent, because I didn't work with the --

REP. NADLER: In the context of all your experience.

MR. GERMAN: Certainly, the facts that were relayed in that inspector general report reflected that there was court concern about the First Amendment violations that were occurring in this request for documents. So the fact that the FBI continued and ignored the court's advice I think does show abuse. And you know, clearly, the report details considerable abuse of national security letters.

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

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

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

MR. WAINSTEIN: Well, I think you have to take a sort of broader view of it. First, this is not the only administrative subpoena authority out there. There are 300-some administrative subpoena authorities on the criminal side, used every day, every minute of every day around this country by federal authorities. And they have different requirements, but essentially the same idea, that they're issued directly by the agency to people who possess third-party records. So this is not an anomaly here. The NSLs are not an anomaly. They're actually a tried and true part of the tool kit that law enforcement and intel have used for years.

Secondly, keep in mind, this is one incident that was highlighted by this IG report that otherwise --

REP. NADLER: Two -- go ahead.

MR. WAINSTEIN: There was one other one, right, but this is the one that sort of got the most attention, that looked

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at, you know, a lot of activity. And they found this one concern. I don't believe that this is symptomatic of a broader problem, that the FBI is going out to try to subvert the First Amendment.

Keep in mind, these are different investigative authorities. Two fifteen has a different standard it has to meet. The FISA Court found that the information was thin and didn't want to issue the order and said that it thought that it might -- I can't remember the language -- but that the investigation might be based on First Amendment activities.

I'm quite confident that the General Counsel's Office did not just lightly blow off the FISA Court opinion, that they did go back and look at this and decide that under the different standard for NSLs that it was appropriate.

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

REP. SENSENBRENNER: Thank you very much, Mr. Chairman.

I'm very curious, the fact that most of the discussion and the question and answers has been on national security letters. And I want to make it clear again that national security letter authority was not one of the expanded authorities given to law enforcement by the Patriot Act. The national security letter law was passed in 1986, 15 years before the Patriot Act, under legislation sponsored by Senator Leahy of Vermont.

And much of the adverse legal decisions on this entire issue have been relative to the Leahy national security letter law rather than the Sensenbrenner Patriot Act. And I do take a little bit of a pride of authorship in the fact that with the Sensenbrenner Patriot Act, 15 of the 17 expanded law enforcement provisions either went unchallenged as to their constitutionality in almost eight years. Or in one case, there was a constitutional challenge that was withdrawn.

The two sections of the Patriot Act that were held unconstitutional in the Mayfield case by the District Court in Oregon, which is currently on appeal, involved whether FISA orders violate the Fourth Amendment. And there is a string of cases from other courts that have reached the

opposite conclusion that FISA orders do not violate the Fourth Amendment. And I think the Supreme Court is going to end up deciding that issue definitively when the case gets up there.

So all of this hyperbole that the Patriot Act has been a blatantly unconstitutional enactment of Congress that tramples on civil rights is simply not borne out by the litigation that has occurred in the almost eight years that the Patriot Act has been law.

And I really would admonish people, both in this room and out of this room, to look at the fact that 15 of those 17 expanded authorities of law enforcement, nobody has bothered to challenge.

Now, if it isn't unconstitutional and it's working, then, really, I don't think that we should break something that doesn't need fixing. And I'm afraid that that's where we're at.

So I would like to, at this time, ask unanimous consent to include in the record a lengthy letter from Robert F. Turner, associate director of the Center for National Security Law at the University of Virginia Law School, that talks about the three expiring provisions of the Patriot Act, which is what we ought to be talking about here, none of which have been even challenged.

REP. NADLER: Without objection.

REP. SENSENBRENNER: I yield back the balance of my time.

REP. NADLER: I thank the gentleman.

I now recognize the distinguished chairman of the full, the gentleman from Michigan.

REP. CONYERS: Thank you, Mr. Chairman.

I want to commend all of our witnesses here today, including Mr. Wainstein, who has been very forthcoming.

And I want to commend former Chairman Sensenbrenner, too. He mentioned the Sensenbrenner Patriot Act.

REP. CONYERS: Of course, I mentioned the Sensenbrenner-Conyers Patriot Act that got doused in the Rules Committee.

That was a very mysterious activity in which nobody ever found out --- there were no fingerprints on the new bill that the Sensenbrenner Patriot Act, which I suppose Mr. Sensenbrenner wrote that night and got it up there, because nobody ever saw it in the Judiciary Committee.

But it's one of those mysteries in the legislative process that have not been fully examined. And maybe someday we'll get a Judiciary Committee chairman --- or maybe even a Constitutional Subcommittee chairman --- that will step up to the plate and find out how a several-hundred page bill could be substituted for another in the middle of the night! The Rules Committee was meeting after midnight when this was acted upon.

And I only digress to show you that there has been bipartisanship on the Judiciary Committee. There are very few important bills in which every Republican and every Democrat votes in its favor and that's what happened to Sensenbrenner-Conyers. But then whatever else happened to it is one of those problems that need further investigation.

Now, the witnesses have raised --- I think I stopped counting at about 11. There are a number of small problems that need to be cleared up about reissuing the three provisions that have an expiration date.

Now, I set that aside from the re-consideration of the rest of the Patriot Act that doesn't have any expiration date. And I'm sure our chairman is going to be --- has got a fix or a feel for that. I'll yield to him if he wants to tell me what it is, but I go along with him.

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

REP. CONYERS: Yes. Could I ask the witnesses --- the members of the --- the witnesses before us today what

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further --- after having heard each other's testimony here --- what else would you add to any of each other's comments or what would you want this committee to know about everything?

Here is our former colleague heading a bipartisan committee; here is probably the most experienced lawyer on intelligence law before the committee. We have the American Civil Liberties Union, which has participated in more privacy cases, civil liberties cases, civil rights cases than anybody else; and also, a distinguished member of the bar who has some very profound experience himself.

What do each of you think about --- I don't want to put it this way --- each other's testimony?

MR. EVANS: It's a great thing to have this oversight responsibility that you've accepted on this committee.

And I would like to make one point and that is the challenges --- the limited number of challenges to the various provisions.

It would take --- if you're an innocent person, it would take a very courageous man or woman to make that challenge, because of the image that's created. And so I think that's the reason there have not been more challenges.

REP. CONYERS: Yeah. Also, the bill they get from their lawyers too would be another preventive --- would dissuade a lot of people.

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

What about it, Wainstein? You're a partner, full-fledged.

MR. WAINSTEIN: We're just looking for righteous cases, Sir. That's all. (Laughter.) Give us a righteous case; that's all we want.

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

Mr. German?

MR. GERMAN: You know, as I mentioned in my testimony, one of the problems with these authorities is that they're exercised in secret. And I think having more facts in the debate would be very helpful to everybody --- especially members of the public --- in trying to understand the arguments on both sides.

And I commend the Department of Justice for their letter where they actually revealed the number of times these authorities were used. But I think how they are used and when they are used is also very important. And you know, obviously, there's a need to protect some national security interests, but I think the excessive secrecy is really harming the public debate on this issue.

REP. CONYERS: (Audio break.)

REP. KING: Well, thank you, Mr. Chairman.

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

REP. CONYERS: Would the gentleman --- distinguished gentleman from Iowa yield?

REP. KING: Of course, I'd yield.

REP. CONYERS: This was before your time, sir! You weren't even here.

REP. KING: And that would be why I don't remember it?
(Laughter.)

REP. CONYERS: Well, apparently!

REP. KING: Well, thank you, Mr. Chairman. Now I don't feel so badly for not being completely tuned into the history.

It, however, did trigger my memory of how the bankruptcy cram down bill came out of the committee with the King amendment and didn't arrive on the floor with the King amendment on it.

So I thought it'd be useful to bring the subject up so we could both be refreshed on the history of this Judiciary Committee, Mr. Chairman.

REP. NADLER: Will the gentleman yield?

REP. KING: I'd yield.

REP. NADLER: I would point out that whatever the merits of that situation, that was one amendment. We held in this committee I think five days of markup on the Patriot Act and achieved unanimity with many amendments from both sides of the aisle being approved --- not on party-line votes. We achieved a unanimous vote and then the bill just disappeared --- completely disappeared --- and we had a new several-hundred page bill.

The Patriot Act we have today was a new several-hundred page bill that appeared fresh from the head of Zeus -- or the Rules Committee --- and voted on literally the next day hot from the printer that nobody had a chance to read. That was unfortunate.

REP. KING: Well, reclaiming my time and perhaps even resetting the clock, I would wonder if maybe the chairman of the subcommittee and the full committee might wish to join me in my endeavor to move the Rules Committee to the floor of the full House, because the business of this Congress takes place up there in the hole in the wall rather than out in front of the light of the public eye.

Does anyone care to respond to that while we're having this dialogue?

REP. NADLER: I'll simply respond by saying I'm not sure what you mean by "move the Rules Committee to the floor of the House" and it's not before this committee anyway, but we should certainly discuss it --- whatever it is.

REP. KING: I appreciate that response. And maybe we could just move the light of day up to the hole in the wall.

REP. KING: And now I'll turn my attention to the panel who is here to testify and enlighten all of us, and by the way, everybody that's watching these proceedings. And I'm curious, as we look back on the history -- and I'll direct my first question to Mr. German.

I'm curious about the position of the ACLU -- during that period of history in the immediate aftermath of September 11, as the bill that was crafted in this committee, and the long markup that was had and the one that came to the floor. Did you have a position on the overall base bill, on the amendments, and a position on the bill as it came to the floor for a vote, in support or in opposition, Mr. German?

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

REP. KING: But perhaps not in opposition to the Patriot Act as it came to the floor for final passage? .

MR. GERMAN: I'm --

REP. KING: I'd be curious and yield.

REP. NADLER(?): Would the gentleman yield? I don't remember what the ACLU said about the bill that came out of this committee, but they were most certainly in opposition to the bill on the floor.

MR. : Yeah.

REP. KING: On the floor?

REP. NADLER(?): Yes.

REP. KING: Thank you. I appreciate that clarification. That's little tumbler of analyzing history that are helpful to me. And the discussion that we have on the reauthorization of these three particular sections of the Patriot Act that I'd asked Mr. German, have you or your organization been involved in drafting alternative legislation that you've put together that's useful for this committee to be aware of?

MR. GERMAN: Have we been involved in --- we've been offering suggestions, yes.

REP. KING: Conceptually or a specific language?

MR. GERMAN: I'm sure, over time, yes, specific language, often.

REP. KING: Well, thanks for that clarification, too. That's not a zone that I work in very much, so I didn't have a feel for that.

But do you have examples of individuals whose constitutional rights have been, you believe, violated under any of the three sections that we're considering re-authorizing?

MR. GERMAN: No, because we don't know who they've been used against.

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

MR. GERMAN: I'm not sure they would know. The vice authorities usually don't alert the target of their surveillance.

REP. KING: Let me submit that we've had as a subject of the various subcommittees of this Judiciary Committee, subjects who were before us anonymously because of certain allegations that were made about their history, and about, let's say, I want to keep them anonymous so I won't define it any further.

And it would strike me that if there were some significant constitutional violations that it would take individuals to bring those kind of cases, we could go beyond the hypothetical, and then just simply deal with a defined personality rather, whether it be an individual or not. Why don't I hear about that? Why don't I hear about even a hypothetical individual beyond the generalities that we've discussed here? Why isn't it more specific if there are constitutional rights that are in play here?

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

So --

REP. KING: But a person has to have standing?

MR. GERMAN: Well, because the person doesn't know, and nobody in the public knows. Only the government knows who these authorities are being used against.

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

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

REP. KING: But one of those obligations ---

REP. NADLER(?): Would the gentleman yield for a second?

REP. KING: I'd yield.

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

REP. KING: And I understand that explanation. I just don't quite accept how, if constitutional rights have been violated and no one knows it, if there's actually been an effect of a violation, if it can't be identified. I would

come in, I'll take you off this hypothetical path, and I'd turn then to Mr. Wainstein.

And are you aware of any individuals whose rights have been violated, and are you aware of cases that have been resolved and American people that have been protected because of the utilization of the Patriot Act, and I'll just leave that there and open the question to your response.

MR. WAINSTEIN: Well, sure. The Patriot Act has been tremendously helpful. And Director Muller has testified on countless occasions how it's really --

REP. KING: And within these three sections, if you could.

Outside the Scope

MR. WAINSTEIN: Oh, in these three sections, I know that it has been used. I watched it --- two of the three sections. One has not been used. But two of the provisions, I watched them get used, watched how the information was then integrated into the investigation, how important it was.

REP. NADLER: Thank you.

The gentleman from Georgia is recognized for five minutes.

REP. JOHNSON: Thank you, Mr. Chairman.

If we were to, if the appropriate committee were to look at the proceedings of the rules committee and decide to require that those committee meetings be held on the floor of the House, as has been suggested, I believe the number one smoking gun piece of evidence would be the Sensenbrenner Patriot Act Bill, the 700-page one.

That is an intriguing issue as to how that occurred. That's one of the big mysteries of our time, kind of like the beginning of the earth and how big is the solar system. Or are there any other solar systems? You know, those kinds of things.

But let me ask this question with respect to Section 215, wherein the FISA order can also require or contain a gag order. How long does the gag order last? Is there any limits on how long it lasts, or the scope of the gag order?

MR. WAINSTEIN: Sir, I'm not sure if that question's to me but I'll --

REP. JOHNSON: Sure.

MR. WAINSTEIN: -- take a crack at it. There is a gag, a nondisclosure order that comes along with a 215 order, similar to in the NSL context. And it does say that the person who receives that order is not to disclose it to anybody else.

But then there are exceptions. You're allowed to disclose the fact of the order to your attorney, if you're seeking counsel from a lawyer. You're allowed to disclose to somebody, if you're a bank and you need to go to a clerk to try to get assistance to get the records the government wants, you can disclose the fact of the order to that person.

But then, you're allowed to challenge it. There's also a process that was put in place and was carefully crafted in the context of the FISA Reauthorization -- I'm sorry, the
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Patriot Act Reauthorization back in 2005, 2006. Congress put in place an elaborate mechanism for challenging, not only the validity of the order itself, as to whether the 215 order is oppressive or otherwise unlawful ---

REP. JOHNSON: Well let me stop you here. And I appreciate those answers. Does the act itself put any limitations on the length of time that the gag order would be in effect, assuming there would be no challenge by the third party to it?

MR. WAINSTEIN: A person, a recipient can challenge it after a year. So after it's in place for a year, a person who has received the order --

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

MR. WAINSTEIN: You know, I believe that's the case. I'm not aware of it expiring at any time.

REP. JOHNSON: And what happens if FISA order is not responded to by the third party -- a third party from whom tangible evidence, if you will, tangible things has been requested from? Suppose they just turn their nose up?

Suppose it was, let's say the ACLU. And, you know, the ACLU receives a FISA order and -- I mean, so they would be, first of all, they would be on the hook if they did not challenge it for an indefinite time; and secondly, what would happen if they decided to not respond or refused to turn over some information based on, say, a privilege? What would happen there? Anybody can answer.

MR. WAINSTEIN: That's why our Liberty and Security committee -- that is a bipartisan group, by the way, all of us act on a pro bono basis, and I do everything on a pro bono -- (laughs) -- basis -- but we believe that there should be some reasonable limitation, like 30 days, so that you could then go out publicly and talk about it.

But I go back to what the chairman initially said, and what I had added, you know, you've got to have awful deep pockets these days to bring challenges, and --

REP. JOHNSON: But suppose there is a non deep-pocketed third party who -- from whom tangible documentation has

ACLU Sect. 215-1803

been ordered under a FISA order, and that third party decides to violate the gag order? What happens in that kind of scenario?

MR. WAINSTEIN: Refer to the former assistant attorney general.

MR. GERMAN: These orders can be enforced. They are orders of the court. So if you defy the order, the order --

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

MR. WAINSTEIN: For the 215 orders, yes, in the NSL context or the grand jury subpoena context, it would be a regular district court. That's my understanding.

REP. JOHNSON: So it's possible that a person can be locked up secretly for violating the FISA order. They can be -- it can be a, you know, an indefinite detention, if you will?

MR. WAINSTEIN: You know, I'm not sure about that, sir. What it would, the FISA statute -- I mean, yeah, the FISA statute, as amended by the Patriot Act reauthorization, lays out a process by which you can challenge -- you, as a recipient, can challenge that FISA court order.

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

REP. WATT: Can you appeal that FISA order ruling by the FISA court?

MR. WAINSTEIN: Yes. You can appeal FISA court rulings to the FISA court of review.

REP. JOHNSON: Who would it be appealed to? What entities?

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

REP. JOHNSON: Thank you, sir.

And thank you, Mr. Chairman.

REP. NADLER: Thank you.

And our final -- finally, the gentleman from Texas.

REP. GOHMERT: Thank you, Mr. Chairman.

And I appreciate the panelists and your input.

It is a tough issue. And it was back, apparently when it was first passed as a bill, and then five years ago when we took it up I was one of the, I guess, couple of people -- on the day that we passed out of committee on the Republican side, that was adamant about the need for sunsets. So we would have people come in and talk to us about how these powers have been used.

The one provision regarding cell phones -- and you make great points, I mean, how do you use conventional methods when we have throw-away cell phones? Those were never anticipated in the original methods of pursuing the bad guys. And in looking at the September 21st story about -- the headline here is, "Terror Probe Prompts Mass Transit Warning," but I see the words cell phones mentioned a number of times in the story.

Do we know if any of the powers granted under the Patriot Act were utilized in bringing to light this alleged terror plot? Anybody know?

MR. : I don't believe there's been a reference in the press to any specific tools that were --

REP. GOHMERT: That were used.

MR. : -- not that I've seen.

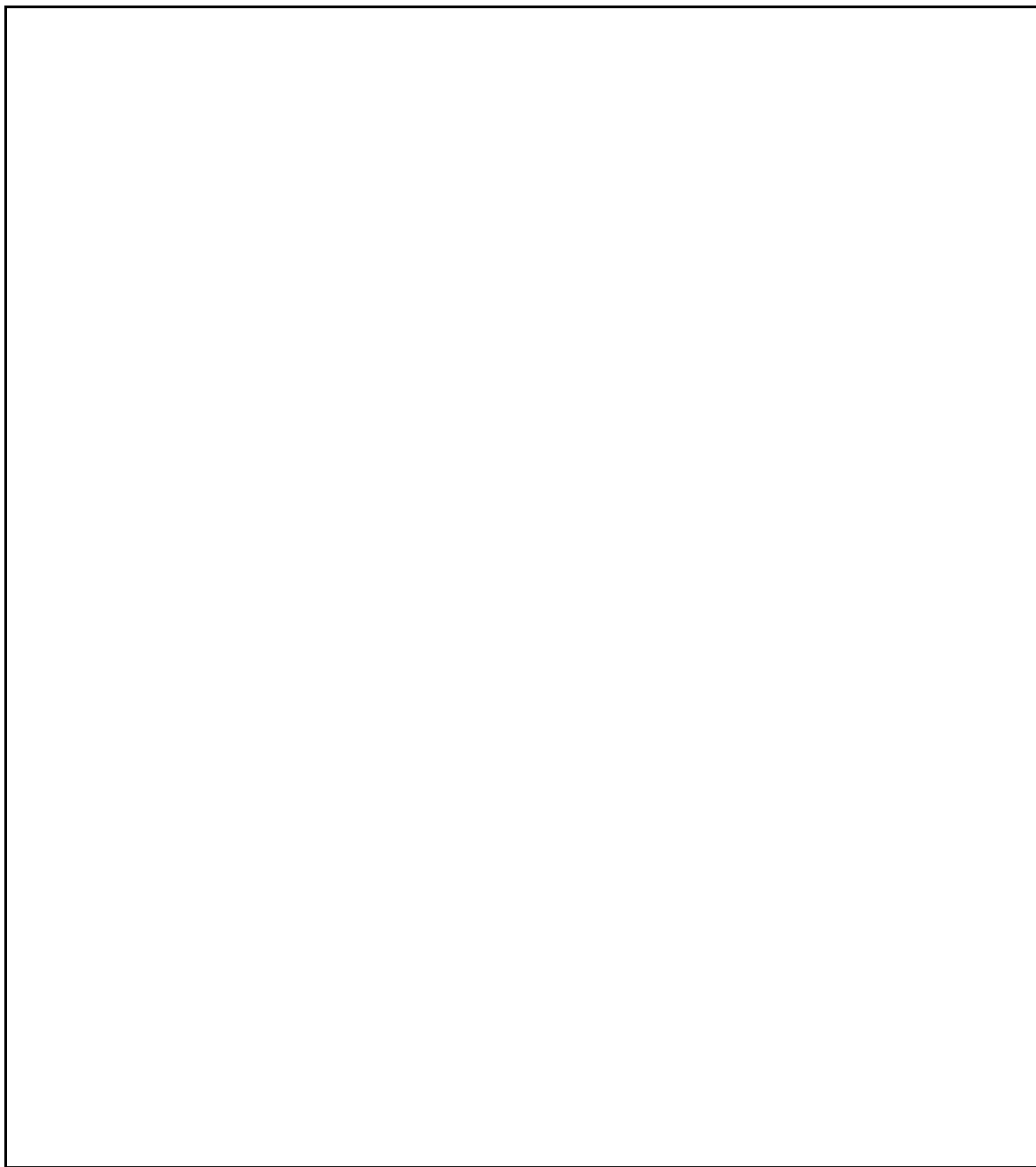
REP. GOHMERT: Okay.

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

REP. GOHMERT: Okay.

MS. SPAULDING: -- were or were not.

REP. GOHMERT: I'll wait to read how we did that in The
New York Times. Outside the Scope





REP. NADLER: I thank you.

I thank all the witnesses. .

Without objection, all members will have five legislative days to submit to the chair additional written questions for the witnesses, which we will forward, and ask the witnesses to respond as promptly as they can so that their answers may be made part of the record. Without objection, all members will have five legislative days to submit any additional materials for inclusion in the record.

Again, I thank the witnesses.

And, with that, this hearing is adjourned. (Sounds gavel.)

END.

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