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ANTI-TERRORISM INTELLIGENCE TOOLS IMPROVEMENT ACT OF 2003

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

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ON

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ANTI-TERRORISM INTELLIGENCE TOOLS IMPROVEMENT ACT OF 2003

TUESDAY, MAY 18, 2004

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:05 a.m., in Room 2141, Rayburn House Office Building, Hon. Howard Coble, (Chair of the Subcommittee) presiding.

Mr. COBLE. Good morning, ladies and gentlemen. Today the Subcommittee on Crime, Terrorism, and Homeland Security will hold a legislative hearing on H.R. 3179, the "Anti-Terrorism Intelligence Tools Improvement Act of 2003." This bill strengthens existing anti-terror intelligence tools that lack enforcement or contain loopholes.

Congressman Sensenbrenner, the Chairman of the Judiciary Committee, and Congressman Goss, the Chairman of the Select Committee on Intelligence, introduced H.R. 3179 on September 25, 2003.

Viewing this legislation as almost procedural, and having heard no complaints, Chairman Sensenbrenner scheduled the bill for markup a few weeks ago. At that time the American Civil Liberties Union and the American Conservative Union requested that the Chairman delay the markup and hold a hearing. The Chairman granted this request and we are here today for that reason.

The Department of Justice and the FBI will testify as to why we need this legislation, and Mr. Barr, representing the ACU, will explain its concerns.

The concept behind H.R. 3179 is simply the laws of our Nation should be enforced, should not aid and abet terrorists by providing them intelligence-related information, and should assist in the detection and apprehension of terrorists planning to further harm Americans.

This bill works to ensure all three principles, it seems to me. For instance, I am sure that everyone agrees that the Congress and the Federal agencies have a responsibility to ensure that the laws of this country are enforced, whether those laws relate to guns, campaign finance reform, or intelligence and national security.

The current law authorizes the Federal Government to use a National Security Letter, which is basically an administrative subpoena, to make a request for transactional records, such as billing

records. These requests must be related to investigations of international terrorism or clandestine intelligence activities.

The current law, however, has no mechanism to enforce the requests. Furthermore, the current law provides no penalty for an individual who decides to tip off a target of terrorism or an intelligence investigation that the Federal Government has made a National Security Letter request concerning the target. Clearly, we do not want to tip off or alert a terrorist cell that is under investigation. Accordingly, H.R. 3179 attempts to correct these problems.

These are common sense corrections, it seems to me. The stakes are too high to ignore correcting them. These are a few examples of what is contained in the bill, and I look forward to the testimony of the witnesses today.

I am now pleased to recognize the distinguished gentleman from Virginia, the Ranking Member, Mr. Bobby Scott.

Mr. SCOTT. Thank you, Mr. Chairman. I am pleased to join you in convening the hearing on H.R. 3179, "the Anti-Terrorism Intelligence Tools Improvement Act of 2003." I would like to join you in welcoming our witnesses, especially our former colleague, the gentleman from Georgia, Mr. Barr, and our former chief counsel, Dan Bryant, both of whom have gone on to distinguish themselves in other areas. When they were with the Committee, they often got exposure to the Subcommittee of differing points of view on legislation, and I suspect it will be no different today.

H.R. 3179 would now criminalize any resistance to national security reference to administrative subpoenas, regardless of whether the demands of the subpoenas are unreasonable, unduly burdensome, harassing, or for any other purpose. The businessman or other target of the subpoena cannot even consult with his or her attorney or any court, or even the Attorney General of the United States, without subjecting himself or herself to criminal prosecution.

In addition to adding up to 5 years of imprisonment for wilful failure to cooperate, the bill also provides for court enforcement under pain of contempt of court. This latter part is similar to the enforcement of administrative subpoenas in 18 USC 3486 and perhaps could be justified, but I'm concerned that it would also criminalize what may be conscientious objectors by honest businesses or other organizations to administrative subpoenas.

The bill adds a so-called "lone wolf" or "Moussaoui fix" by allowing FISA to be applied to a single individual engaged in international terrorism or preparing to do so. This proposal would seem to undermine the premise of FISA, which allows extraordinary secretive powers to be exercised against foreigners if there is probable cause to believe they are agents of a foreign government organization.

If there is probable cause to believe an individual is engaging in international terrorism, or attempting to do so, why not investigate him or arrest him under the general criminal law provisions rather than dilute further the foundation of FISA? We have already diluted it enough in the USA PATRIOT Act by changing the standard from the primary purpose of being foreign intelligence gathering to that of merely being a "significant" purpose of the use of these extraordinary powers. If foreign intelligence gathering is not

the primary reason, then we need to be worried about what the primary reason is before we dilute this provision further.

Another provision of the bill would take a further bite out of court discretion and undermine the rights of accused persons by requiring the courts to exclude defendants from motions by prosecutors to redact information the prosecution does not wish to divulge based on alleged national security. Currently, there is nothing to prevent the prosecutors from moving the court to hear a motion to redact sensitive information ex parte and in camera, and nothing to stop the court from ordering the same. However, this bill doesn't even allow a judge to make a judgment as to whether it wishes to hear from the defense before deciding on the prosecutor's motion but requires the judge not to hear from the defense.

Moreover, it allows prosecutors to summarize orally his basis for excluding information, whereas currently the law requires a written statement to be provided by the court. It is not clear under this bill whether the defendant will even know that an ex parte hearing is occurring, or ever have a reviewable record of what was said or presented to the court.

Finally, the bill would allow secretive FISA evidence to be used in an ordinary immigration proceeding without even disclosing to the defendant that it is FISA-obtained evidence. These are extraordinary extensions of extraordinary, unchecked powers of the Executive branch, so I look forward to the testimony of our witnesses to learn what justifies such extraordinary requestive powers and what precautions have been made in considering such requests.

Thank you, Mr. Chairman.

Mr. COBLE. I thank the gentleman.

We also have the Ranking Member for the full Committee with us today. Mr. Conyers, did you have an opening statement you wanted to make?

Mr. CONYERS. Thank you, Mr. Chairman.

I'm going to pass on my opening statement, and our colleague from California said that she would reserve hers for later as well.

Mr. COBLE. I thank you, Mr. Conyers.

We have been joined by the gentlelady from California and the gentleman from Virginia.

We have with us today a distinguished panel, three distinguished witnesses. We are glad to have you with us. I would first like to introduce Mr. Daniel Bryant. Mr. Bryant was confirmed as Assistant Attorney General for Legal Policy by the U.S. Senate on October 3, 2003. In this capacity, Mr. Bryant is responsible for planning, developing and coordinating the implementation of major legal policy initiatives.

Prior to working in his current position, Mr. Bryant served as Senior Advisor to the Attorney General, and Assistant Attorney General for Legislative Affairs, and as majority chief counsel for this Subcommittee. Mr. Bryant received his bachelor and juris doctor degrees from the American University, and his masters from Oxford University. Mr. Bryant, it's good to have you back on the Hill.

Our second witness today is Mr. Thomas J. Harrington. In December, 2002, Mr. Harrington was appointed Deputy Assistant Director for Counterterrorism at the FBI. In this capacity, Mr. Har-

rington conducts oversight of the Division, as well as managing the Foreign Terrorist Tracking Task Force, the Counterterrorist Operation Response Section, and the National Threat Center. Mr. Harrington received his appointment as a special agent in the FBI in 1984. He is an alumnus of the Mount St. Mary's College in Emmitsburg, MD, and the Stonier Graduate School of Banking at the University of Delaware. It's good to have you with us, Mr. Harrington, as well.

Our final witness today, as Mr. Scott previously indicated, is our former colleague from Georgia, Bob Barr. It's good to have you back on the Hill.

Mr. BARR. Thank you, Mr. Chairman.

Mr. COBLE. Mr. Barr represented the Seventh District of Georgia in the U.S. House from 1995 to 2003, serving as a senior Member of the Judiciary Committee, including service on our Subcommittee.

Prior to his election, Mr. Barr served as U.S. Attorney for the Northern District of Georgia. He is currently the 21st Century Liberties Chair for Freedom and Privacy and the American Conservative Union, and serves as a board member at the Patrick Henry Center, and is the honorary chair for Citizens United.

It's good to have all of you with us.

I say to the Members on the Subcommittee that I have been told that a vote will likely be scheduled on or about 11 o'clock. As each of you have been told, we like to apply the 5-minute rule here. We have read your testimony and we will reexamine it, but if you all with keep a sharp lookout on that panel that's before you, and when that amber light appears, that's your warning that the ice is becoming thin, and when the red light appears, that is your 5 minute limit.

It's good to have you with us, Mr. Bryant. We will start with you.

STATEMENT OF THE HONORABLE DANIEL J. BRYANT, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY

Mr. BRYANT. Thank you, Mr. Chairman.

Good morning, Chairman Coble, Congressman Scott, distinguished Members of the Committee and Subcommittee. Thank you for the opportunity to appear before you today to discuss this important legislation.

Since September 11, 2001, the Department of Justice has made significant strides in the war on terrorism. We have charged at least 310 individuals with criminal offenses as a result of terrorism investigations, and 179 of these defendants have already been convicted. We have broken up terrorist cells in Buffalo, Charlotte, Portland, and northern Virginia. Due to interagency and international cooperation, nearly two-thirds of al-Qaeda's leadership, worldwide, has been captured or killed.

In the PATRIOT Act, Congress provided the Department with a number of important tools that have enhanced our ability to gather information so that we may detect and disrupt terrorist plots. The act brought down the wall that sharply limited information sharing between intelligence and law enforcement personnel, so that these officials can better connect the dots and prevent future terrorist acts.

But while Congress and the Administration working together have markedly improved the Department's capacity to gather and analyze the intelligence necessary to prevent terrorist attacks, there is still more that needs to be done. This is why I would like to thank Chairman Sensenbrenner and Chairman Goss for their leadership in introducing this bill.

The Department strongly supports this bill, which contains a number of significant reforms that would assist the Department's efforts to collect intelligence keyed to disrupting terrorist plots.

To begin with, the bill would amend the Foreign Intelligence Surveillance Act to allow for surveillance of so-called "lone wolf" international terrorists. While the current definition of "agent of a foreign power" found in FISA includes individuals with ties to groups that engage in international terrorism, it does not reach unaffiliated individuals who engage in international terrorism.

Section 4 of the bill would plug this dangerous gap in FISA's coverage by expanding the definition of "agent of a foreign power" to include a non-United States person who is engaged in international terrorism, or preparing to engage in international terrorism, even if he or she is not known to be affiliated with an international terrorist group. This provision would strengthen our ability to protect the American people against terrorism.

A single foreign terrorist with a chemical, biological or radiological weapon could inflict catastrophic damage on this country. Consequently, there is no reason why the Department should not be able to conduct FISA surveillance only of foreign terrorists whom we know to be affiliated with international terrorist groups.

The bill also includes two important provisions related to the use of National Security Letters. NSLs are used by the FBI to obtain from specified third parties discreet types of information, such as communications records, financial records and credit reports that are relevant to authorized international terrorism or espionage investigations.

In order to safeguard the integrity of these investigations in which NSLs are used, the NSL statutes prohibit persons from disclosing that they have received these requests, but these same statutes contain no explicit penalty for persons who unlawfully disclose that they received an NSL. Section 2 would remedy this defect. The bill further would specify procedures for the Attorney General to seek judicial enforcement of NSLs.

The bill also includes two common sense reforms that would better allow the Department to protect classified information in criminal trials and to safeguard sensitive intelligence investigations in immigration proceedings. First, section 5 of the bill would amend the Classified Information Procedures Act, better known as CIPA, to improve the Department's ability to protect classified information during the course of a criminal trial. Currently under CIPA, district courts have discretion over whether to permit the Government to make a request to protect classified information during the discovery phase of a criminal trial, ex parte, and in camera.

This is problematic, because in cases where the Government is unable to make a request to withhold classified information ex parte and in camera, prosecutors risk disclosing sensitive national security information simply by explaining in open court why the

classified information in question should be protected. Section 5 of H.R. 3179 would solve this dilemma by allowing prosecutors to make such a request ex parte and in camera.

Wrapping up, Mr. Chairman, we believe this bill contains a series of sensible reforms that would enhance the Department's ability to gather intelligence necessary for preventing terrorism.

Thank you for holding this hearing, and thank you for the invitation to be with you today.

[The prepared statement of Mr. Bryant follows:]

PREPARED STATEMENT OF DANIEL J. BRYANT

Good morning, Mr. Chairman and distinguished members of the Subcommittee. Thank you for the opportunity to appear before you today to discuss H.R. 3179, the Anti-Terrorism Intelligence Tools Improvement Act of 2003.

Since the brutal terrorist attacks of September 11, 2001, the Department of Justice has made significant strides in the war against terrorism. We have prosecuted many cases, among them being 310 individuals charged with criminal offenses as a result of terrorism investigations. 179 of these defendants already have been convicted. We have broken up terrorist cells in Buffalo, Charlotte, Portland, and northern Virginia. Due to interagency and international cooperation, nearly two-thirds of Al Qaeda's leadership worldwide has been captured or killed. And we are steadily dismantling the terrorists' financial network: around the world, $136 million in assets have been frozen in 660 accounts.

These successes would not have been possible without the support of Congress in general and this Subcommittee in particular. On behalf of the Department, I would like to thank you for providing us with the tools and resources that have made it possible for the Department to effectively wage the war against terrorism.

As recent events in Madrid and Saudi Arabia remind us, however, our fight against terrorism is far from over. Our nation's terrorist enemies remain determined to visit death and destruction upon the United States and its allies, and we must maintain our vigilance and resolve in the face of this continuing threat. It is for this reason that the Department of Justice's top priority remains the prevention and disruption of terrorist attacks before they occur. Rather than waiting for terrorists to strike and then prosecuting those terrorists for their crimes, the Department seeks to identify and apprehend terrorists before they are able to carry out their nefarious plans.

The success of this prevention strategy depends, however, upon the Department's capacity to detect terrorist plots before they are executed. And the key to detecting such plots in a timely manner is the acquisition of information. Simply put, our ability to prevent terrorism is directly correlated with the quantity and quality of intelligence we are able to obtain and analyze.

Following the terrorist attacks of September 11, Congress provided the Department in the USA PATRIOT Act with a number of important tools that have enhanced our ability to gather information so that we may detect and disrupt terrorist plots. To give just one example, before the USA PATRIOT Act, law enforcement agents possessed the authority to conduct electronic surveillance—by petitioning a court for a wiretap order—in the investigation of many ordinary, non-terrorism crimes, such as drug crimes, mail fraud, and passport fraud. Investigators, however, did not possess that same authority when investigating many crimes that terrorists are likely to commit, such as chemical weapons offenses, the use of weapons of mass destruction, and violent acts of terrorism transcending national borders. This anomaly was corrected by section 201 of the PATRIOT Act, which now enables law enforcement to conduct electronic surveillance when investigating the full-range of terrorism crimes.

But while Congress and the Administration working together have made significant strides in improving the Department's capacity to gather the intelligence necessary to prevent terrorist attacks, there is still more that needs to be done. This is why I would like to thank Chairman Sensenbrenner and Chairman Goss for their leadership in introducing H.R. 3179, the Anti-Terrorism Intelligence Tools Improvement Act of 2003, and to thank this Subcommittee for holding a hearing on this important piece of legislation. The Department of Justice strongly supports H.R. 3179. The bill contains a number of significant reforms that would assist the Department's efforts to collect intelligence key to disrupting terrorist plots and better allow the Department to protect that information in criminal trials and immigration proceedings. In my testimony today, I will briefly review the five substantive provisions

contained in H.R. 3179 and explain why the Department believes that each one of them would assist our efforts in the war against terrorism.

To begin with, H.R. 3179 would amend the Foreign Intelligence Surveillance Act to allow for surveillance of so-called "lone wolf" international terrorists. Currently, the definition of "agent of a foreign power" found in FISA includes individuals with ties to groups that engage in international terrorism. It does not, however, reach unaffiliated individuals who engage in international terrorism. As a result, investigations of "lone wolf" terrorists are currently not authorized under FISA. Rather, such investigations must proceed under the stricter standards and shorter time periods for investigating ordinary crimes set forth in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, potentially resulting in unnecessary and dangerous delays and greater administrative burdens.

Section 4 of H.R. 3179 would plug this dangerous gap in FISA's coverage by expanding the definition of "agent of a foreign power" to include a non-United States person who is engaged in international terrorism or preparing to engage in international terrorism, even if he or she is not known to be affiliated with an international terrorist group.

The Department believes that section 4 of H.R. 3179 would strengthen our ability to protect the American people against terrorism. A single foreign terrorist with a chemical, biological, or radiological weapon could inflict catastrophic damage on this country. Consequently, there is no reason why the Department should be able to conduct FISA surveillance only of foreign terrorists whom we know to be affiliated with international terrorist groups. In some cases, a foreign terrorist may, in fact, be a member of an international terrorist group, but the Department may not be able to establish this fact. In other cases, a foreign terrorist may be a genuine lone wolf. In either of these scenarios, however, it is vital that the Department be able to conduct the appropriate surveillance of such terrorists under FISA so that we are able to effectively and efficiently gather the information necessary to prevent these terrorists from endangering the lives of the American people.

Expanding FISA to reach an individual foreign terrorist is a modest but important expansion of the statute. To be sure, under current law, the Department must show under FISA that a foreign terrorist is a member of an international terrorist group. The House Committee Report on FISA, however, suggested that a "group" of terrorists covered by current law might be as small as two or three persons, and the interests that courts have found to support the constitutionality of FISA are unlikely to differ appreciably between a case involving a terrorist group of two or three persons and a case involving a single terrorist. In addition, it is important to stress that this proposal would not change the standard for conducting surveillance of any United States person but rather would apply only to foreign terrorists.

The Senate has already acted in a strong bipartisan fashion to amend FISA to cover lone wolf terrorists. Section 4 of H.R. 3179 was included in S. 113, which passed the Senate on May 8, 2003, by a vote of 90 to 4. The Department urges the House of Representatives to follow suit and also pass this important proposal in order to plug this dangerous gap in the scope of FISA's coverage to cover "lone wolf" terrorists.

H.R. 3179 also includes two important provisions related to the use of national security letter (NSLs). NSLs are used by the FBI to obtain relevant information from specified third-parties in authorized international terrorism or espionage investigations. NSLs are similar to administrative subpoenas but narrower in scope. While administrative subpoenas can be used to collect a wide array of information, NSLs apply more narrowly to telephone and electronic communication transactional records, financial records from financial institutions, and consumer information from consumer reporting agencies, as well as certain financial, consumer, and travel records for certain government employees who have access to classified information.

In order to safeguard the integrity of the sensitive terrorism and espionage investigations in which NSLs are used, the NSL statutes generally prohibit persons from disclosing that they received these requests for information. *See, e.g.,* 12 U.S.C. § 3414(a)(3); 12 U.S.C. § 3414(a)(5)(D); 15 U.S.C. § 1681u(d); 15 U.S.C. § 1681v(c); 18 U.S.C. § 2709(c); 50 U.S.C. § 436(b). But these same statutes contain no explicit penalty for persons who unlawfully disclose that they have received an NSL. Section 2 of H.R. 3179 would remedy this defect by creating a new statutory provision imposing criminal liability on those who knowingly violate NSL non-disclosure requirements. This new offense would be a misdemeanor punishable by up to a year of imprisonment, but would carry a stiffer penalty of up to five years of imprisonment if the unlawful disclosure was committed with the intent to obstruct an investigation or judicial proceeding.

Oftentimes, the premature disclosure of an ongoing terrorism investigation can lead to a host of negative repercussions, including the destruction of evidence, the

flight of suspected terrorists, and the frustration of efforts to identify additional terrorist conspirators. For these reasons, the FBI has forgone using NSLs in some investigations for fear that the recipients of those NSLs would compromise an investigation by disclosing the fact that they had been sent an NSL. To reduce these fears and thus allow for the gathering of additional important information in terrorism investigations, the Department supports the adoption of the appropriate criminal penalties set forth in H.R. 3179 to deter the recipients of NSLs from violating applicable nondisclosure requirements as well as the heightened penalties set forth in the legislation for cases in which disclosures are actually intended to obstruct an ongoing investigation.

In addition to setting forth an explicit criminal penalty for those violating NSL nondisclosure requirements, H.R. 3179 would also specify procedures for the Attorney General to seek judicial enforcement of NSLs. The NSL statutes currently make compliance with an FBI request for information mandatory. *See, e.g.,* 12 U.S.C. § 3414(a)(5)(A); 15 U.S.C. § 1681u(a)-(b); 15 U.S.C. § 1681v(c); 18 U.S.C. § 2709(a); 50 U.S.C. § 436(c). These statutes, however, do not specify any procedures for judicial enforcement if the recipient of an NSL refuses to comply with the FBI's request. Section 3 of H.R. 3179 would make explicit what Congress indicated implicitly by making compliance with NSLs mandatory: the Attorney General may seek judicial enforcement in cases where the recipient of an NSL refuses to comply with the FBI's request for information. The judicial enforcement provision contained in H.R. 3179 is similar to the existing judicial enforcement provision for administrative subpoenas under 18 U.S.C. § 3486(c) and would help the Department to quickly and discretely obtain vital information in terrorism investigations.

H.R. 3179 also includes two common-sense reforms that would better allow the Department to protect classified information in criminal trials and to safeguard sensitive intelligence investigations in immigration proceedings. First, section 5 of the bill would amend the Classified Information Procedures Act (CIPA) to improve the Department's ability to protect classified information during the course of a criminal trial. Under section 4 of CIPA, a district court, upon the government's request, may authorize the United States to delete specified items of classified information from documents to be made available to a criminal defendant during discovery, to substitute a summary of the information for such classified documents, or to submit a statement admitting relevant facts that the classified information would tend to prove, so long as prosecutors are able to make a sufficient showing, such as that the documents are not discoverable or that the defendant would not be disadvantaged by the substitution of a summary of the information for the classified documents themselves. Currently, however, district courts have discretion over whether to permit the government to make such a request ex parte and in camera.

This is problematic because in cases where the government is unable to make a request to withhold classified information ex parte and in camera, prosecutors risk disclosing sensitive national-security information simply by explaining in open court why the classified information in question should be protected. Section 5 of H.R. 3179 would solve this dilemma by mandating that prosecutors be able to make a request ex parte and in camera to delete specified items of classified information from documents or to utilize the other alternatives for protecting classified information set forth in section 4 of CIPA. This provision would ensure that the Department is able to take appropriate steps to safeguard classified information in criminal proceedings without risking the disclosure of the very secrets that we are seeking to protect. It would also allow the Department to make a request to protect classified information orally as well as in writing.

In addition to understanding what this provision would accomplish, it is equally important to understand what this provision would not accomplish. Specifically, it would not affect in any way whatsoever the showing that the United States is required to make under section 4 of CIPA to obtain judicial authorization to withhold classified information from criminal defendants or to take other steps to safeguard classified information. Simply put, the assertion by some that H.R. 3179 would require a federal judge to permit the United States to turn over to a criminal defendant only a summary of evidence rather than classified documents themselves is demonstrably false. Rather, the bill would only allow the United States to make such a request ex parte and in camera in order to ensure that such information is not disclosed as part of the process of protecting it.

Finally, H.R. 3179 would eliminate that requirement that the United States notify aliens whenever the government intends to use evidence obtained through FISA in immigration proceedings. Current law mandates that the government provide notice to an "aggrieved person" if information obtained through FISA electronic surveillance, physical searches, or pen registers will be used in any federal proceeding. *See* 50 U.S.C. §§ 1806(c), 1825(d), & 1845(c). In 1996, Congress carved out an exception

to this requirement for alien terrorist removal proceedings, *see* 8 U.S.C. § 1534(e), but all other immigration proceedings remain subject to this notification requirement.

Unfortunately, however, this mandate that the government notify an alien that it is using information acquired through FISA surveillance in an immigration proceeding may jeopardize in certain situations sensitive ongoing investigations and thus risk undermining national security. As a result, the government is sometimes faced with the Hobson's choice of not using this information in immigration proceedings, and possibly permitting dangerous aliens to remain in the country, or using the information and undermining its surveillance efforts. When faced with this difficult choice, the United States has decided against using FISA information in a number of instances in an effort to preserve the integrity of ongoing investigations.

Section 6 of H.R. 3179, however, would solve this dilemma by expanding the existing notification exception for alien terrorist removal proceedings to all immigration proceedings. Significantly, the government still would be obliged to disclose to aliens any information it intends to use in immigration proceedings if such disclosure is otherwise required by law. Under H.R. 3179, the government simply would not have to reveal the fact that the information in question was obtained through FISA. The Department supports this provision of H.R. 3179 because it would allow the government to use intelligence in immigration proceedings to safeguard the American people from dangerous aliens without jeopardizing sensitive ongoing investigations.

In conclusion, I would like to thank the Subcommittee again for holding today's hearing on such an important topic. H.R. 3179 contains a series of sensible reforms that would enhance the Department's ability to gather intelligence necessary for preventing terrorism and to protect the integrity of sensitive intelligence investigations. The Department would be happy to work with the Congress in the weeks and months to come on this vital piece of legislation. Thank you once again for allowing me to appear before you today, and I look forward to the opportunity to respond to any questions that you might have.

Mr. COBLE. Thank you, Mr. Bryant.

Mr. Harrington.

STATEMENT OF THOMAS J. HARRINGTON, DEPUTY ASSISTANT DIRECTOR, COUNTERTERRORISM DIVISION, FEDERAL BUREAU OF INVESTIGATION

Mr. HARRINGTON. Good morning, Mr. Chairman, and Members of the Subcommittee. Thank you for the opportunity to appear before you this morning to discuss House bill 3179, the "Anti-Terrorism Intelligence Tools Improvement Act of 2003."

As Mr. Bryant has just explained, the recent successes of the FBI and the Department of Justice as a whole would not have been possible without the support of the Subcommittee and the passage of the USA PATRIOT Act, which provided a number of important tools to enhance our ability to gather information to assist us in detecting, disrupting and preventing terrorist attacks.

Since 9/11, the primary mission of the FBI has been focused on the prevention of future attacks on the U.S. homeland. The FBI has spent the past two-and-a-half years transforming and realigning its resources to meet the threats of the post-September 11th environment. Director Muller has rebalanced our resources among the counterterrorism, intelligence, counterintelligence, cyber and criminal programs. This transformation has been significantly enhanced by the enactment of the USA PATRIOT Act, which has facilitated increased information sharing between the intelligence and law enforcement communities, both internationally and domestically. H.R. 3179, the bill which has brought us here today, contains several significant reforms that will assist the FBI in our efforts to collect the necessary intelligence and information to identify and disrupt future terrorist plots.

Specifically, H.R. 3179 includes two important provisions related to the use of National Security Letters, or NSLs. NSLs are administrative subpoenas that can be used to obtain several types of records related to electronic communications, specifically telephone subscriber information, local and long distance toll billing records, and electronic communication transactional records; financial records from banks and other financial institutions; and consumer reporting records, such as consumer identifying information and the identity of financial institutions from credit bureaus. National Security Letters generally prohibit the recipient of an NSL from disclosing the fact that they have received a request for this information. Section 2 of H.R. 3179 provides for a penalty for persons who knowingly disclose the fact that they received these NSLs.

This penalty provision is important to the FBI, as critical terrorism investigations can be compromised through, for example, destruction of crucial evidence, flight of the suspected terrorist out of the country, and frustrate efforts to identify additional associates or cell members of the suspected terrorist group when a request for information is disclosed.

H.R. 3179 also provides a provision for judicial enforcement if a recipient of a National Security Letter does not comply with the mandatory request for information. The judicial enforcement provision of section 3 of the bill is similar to those already existing for administrative subpoenas and would assist the FBI in maintaining information critical to terrorism investigations.

An example of where this provision would have been helpful is a case where during an investigation into international terrorist activities analysis revealed that several subjects were using a third party Internet service provider as a potential means of communication. NSLs served on the third party service revealed that an associate of the subjects registered for the service using a free, website e-mail service. The NSLs were served on the web-based e-mail service in order to obtain electronic transactional records. The web-based e-mail service has yet to provide the records associated with this request. A judicia enforcement provision, such as the one included in H.R. 3179, would assist by providing a forum for quick resolution of this issue and allow the investigation to move forward more expeditiously.

Thank you for allowing me to appear here this morning to discuss this important act. It contains reforms which the FBI believes are necessary to assist us in gathering the intelligence we will need in the future to prevent terrorist attacks.

I would be happy to answer any questions at the appropriate time.

[The prepared statement of Mr. Harrington follows:]

PREPARED STATEMENT OF THOMAS J. HARRINGTON

Good morning Mr. Chairman and members of the Subcommittee. Thank you for the opportunity to appear before you this morning to discuss House Bill 3179, the Anti-Terrorism Intelligence Tools Improvement Act of 2003.

As Mr. Bryant has aptly explained, the recent successes of the Federal Bureau of Investigation, and the Department of Justice as a whole, would not have been possible without the support of this subcommittee and the passage of the USA PATRIOT Act (USPA) which provided a number of important tools to enhance our ability to gather information to assist us in detecting, disrupting and preventing terrorist attacks.

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This penalty provision is important to the FBI as critical terrorism investigations can be compromised through, for example, destruction of crucial evidence, flight of the suspected terrorist out of the country, and frustrate efforts to identify additional associates or cell members of the suspected terrorist, when a request for information is disclosed.

H.R. 3179 also provides for a procedure for judicial enforcement if a recipient of a National Security Letter does not comply with the mandatory request for information. The judicial enforcement provision in Section 3 of the bill is similar to those already existing for Administrative Subpoenas and would assist the FBI in obtaining information critical to terrorism investigations. An example of where this provision would have been helpful is a case where during an investigation into international terrorist activities, analysis revealed that several subjects were using a third party internet service as a potential means of communication. NSLs served on the third party service revealed that an associate of the subjects registered for the service using a free, web-based email service. NSLs were served on the web-based email service in order to obtain electronic transactional records. The web-based email service has not yet provided the records associated with the request. A judicial enforcement provision, such as the one included in H.R. 3179, would assist by providing a forum to quickly resolve this issue and allow the investigation to move forward more expeditiously.

Thank you again for allowing me to appear before you this morning to discuss the Anti-Terrorism Intelligence Tools Improvement Act of 2003. It contains advantageous reforms which the FBI believes are necessary to assist us in gathering the intelligence that will prevent future terrorist attacks. I would be happy to answer any questions you may have at this time.

Mr. COBLE. Thank you, Mr. Harrington.

Mr. Barr.

STATEMENT OF THE HONORABLE BOB BARR, 21ST CENTURY LIBERTIES CHAIR FOR FREEDOM AND PRIVACY, THE AMERICAN CONSERVATIVE UNION

Mr. BARR. Thank you, Mr. Chairman. It is a tremendous honor to appear before this very distinguished Subcommittee on which I had the honor of serving for many years during my service in the Congress of the United States. I appreciate the Chairman calling this hearing, and the Ranking Member lending his support to this hearing today as well.

I do hope that this will not be the end of the Subcommittee's or the Committee's deliberations on these important issues, but merely the start of a very long and searching comprehensive look at the PATRIOT Act, where we are with it, what it does, what fixes on

the limitations or expansions might be necessary at some point, but that all of us resist the effort to rush into something such as what I worry the Congress may do in this particular case with H.R. 3179.

Both the distinguished Chairman and the distinguished Assistant Attorney General used the word "common sense" in speaking of these proposals. What I would respectfully submit to the Subcommittee and to the Congress is that common sense really requires us, particularly those of us who consider ourselves good strong conservatives, Mr. Chairman, to not allow the Government to obtain more power based on generalized arguments such as those that have been put forward here or those that may appear on the surface to be very sound. But when you look below the surface, such as the so-called "Moussaoui fix," which some of these "lone wolf" provisions are supposed to address, it really falls apart.

This piece of legislation is not a "Moussaoui fix," so to speak. The problem with the Moussaoui investigation, as I know the Chairman and other Members are fully aware, had nothing to do with not having the power that the Government would obtain in H.R. 3179. It had to do with a misreading, a misinterpretation, of the existing FISA law.

I think there are some other instances as well, Mr. Chairman, where the arguments that the Government is putting forward to obtain these additional powers, which again I think, as conservatives, we ought to be very, very hesitant to grant the Government, without hearing from them, and common sense tells us this, without hearing from the Government very specific instances where the powers that they currently have, or had even prior to the USA PATRIOT Act's passage and signing into law in 2001, could not have been if used properly, and according to the proper criteria, could not have given them what they need.

Even if, in fact, at some point the Subcommittee recommends enactment and adoption by the House of H.R. 3179, I would certainly hope that the Subcommittee would require of the Government a much more specific rather than just generalized set of reasons why these provisions ought to be enacted.

These provisions are not mere technical corrections, Mr. Chairman, as with much of the USA PATRIOT Act, which the Administration characterized as technical amendments or technical improvements. They were extremely substantive. In this case, for example, where we look at the so-called "lone wolf" provision, we find that this would reach very, very broadly and affect the fundamental underpinnings of the entire FISA structure that has been built up. By removing it from the nexus "with a foreign power," you lose the entire underpinning and constitutional argument for allowing this exception to the fourth amendment requirements for specific probable cause before electronic surveillance and other types of secret monitoring can occur.

Again, Mr. Chairman, with regard to the "lone wolf" procedures, there has been no instance whatsoever in which the Department of Justice has come forward and explained why the provision is necessary to have, given the extensive power that the Government already has with traditional subpoenas, traditional title 3 taps, and

a whole range of subpoena power and warrant power that the Government already has.

Even on the Senate side, with regard to FISA oversight just last year, I believe Senators Leahy, Grassley and Specter indicated that the Department of Justice, even at that time—and this provision has been sought by the Department of Justice for much longer than that—that the Department had laid out no cases in which existing powers were not sufficient to attack "lone wolfs," and they could have gone after Moussaoui but for a misreading of the statute, not that they didn't have this power.

When one looks also, Mr. Chairman, at the expansion of the secret proceedings, this provision in sections 5 and 6 would set up basically a whole new category of evidence, sort of secret secret evidence, where the individual against whom that secret secret proceeding is being directed doesn't even know that there's a secret proceeding.

I think we would, just as we did in the 107th Congress, Mr. Chairman, in which you and many of us joined in supporting legislation to place limits on secret proceedings, we ought to be looking very carefully at that, particularly as strong conservatives who care deeply about the Constitution, rather than going in the other direction and creating additional secret proceedings.

So I would very much respectfully urge this Subcommittee and, of course, the full Committee, to not pass this or recommend adoption of this legislation at this time. I think it's premature, Mr. Chairman, particularly in light of the lack of specific cases that the Justice Department has been unable to prosecute or investigate that they have come forward with.

[The prepared statement of Mr. Barr follows:]

PREPARED STATEMENT OF THE HONORABLE BOB BARR

Chairman Coble, Ranking Member Scott, and distinguished subcommittee members, thank you for inviting me to testify on H.R. 3179, the "Anti-Terrorism Intelligence Tools Improvement Act of 2003," which expands federal secret surveillance powers under the USA PATRIOT Act.

Until January of 2003, I had the honor to serve with many of you as a 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 now occupy the 21st Century Liberties Chair for Privacy and Freedom at the American Conservative Union (ACU) and in that capacity I am pleased to be speaking on behalf of the American Conservative Union today. I also consult on privacy matters for the American Civil Liberties Union.

As a student and supporter of the Constitution and its component Bill of Rights, I will not concede that meeting this government's profound responsibility for national security entails sacrificing the 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, is taking us in a direction in which our liberties *are* being diminished in that battle against terrorism.

Despite the broad concerns expressed by many grassroots conservative organizations, such as the American Conservative Union, Free Congress Foundation, and Eagle Forum—with whom I continue to work closely—the Administration has pressed on with a ill-considered proposal to prematurely make permanent all of the USA PATRIOT Act. I respectfully submit this would be a serious mistake. Along with many of you, I balked at making the PATRIOT Act's new powers permanent, insisting on a "sunset clause" that would allow Congress to review these new powers. Making those powers permanent now would take away any leverage Congress now has to secure cooperation from the Justice Department in its oversight efforts.

The Administration has also attempted to push forward, on a piecemeal basis, parts of the "Son of PATRIOT" proposal that surfaced last year. H.R. 3179 includes several of the provisions of the Justice Department's draft "Son of PATRIOT" bill,[1] and the Administration is pushing other bills separately that include other provisions.[2] Passing *pieces* of "Son of PATRIOT" this year would be a mistake.

The House Judiciary Committee has yet to convene a series of long-planned hearings to examine how the USA PATRIOT Act is being used. Are its provisions being used widely, in ordinary cases having nothing to do with terrorism? The Attorney General has said he hasn't used some powers. If so, are such powers really needed? These are just a few of the questions that the Justice Department has not adequately answered. While I have faith the Chairman will hold these promised hearings, these questions should be examined *before* the Committee considers new legislation.

The question before us today is whether the USA PATRIOT Act should be expanded this year. In short, the answer is NO. Put simply, Congress should not provide more powers to an ever-growing federal government without carefully and exhaustively reviewing how it is using the powers it already has.

The Fourth Amendment is clear: "The right of the *people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon *probable cause,* supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized" (emphasis added).

Note carefully—"people," not "citizens." The Founding Fathers meant what they wrote. Conservatives do not believe that, more than two hundred years later, we should creatively "interpret" the Bill of Rights when the words don't suit our transitory notions of what is convenient. While the Constitution does reserve some rights exclusively to American citizens, the Founders protected certain fundamental rights for all people, including the right to due process of law and the right to be free from searches—a word broad enough to include the 18th and 19th Century physical variety, the 20th Century telephone variety, and the 21st Century Internet variety—not based on probable cause.

At bottom, the problem with the surveillance powers of the USA PATRIOT Act is that they play fast and loose with clear constitutional commands. Unfortunately, H.R. 3179 takes certain provisions of the USA PATRIOT Act that weaken the Fourth Amendment and other fundamental rights and makes them worse.

CREATING NEW CRIMINAL PENALTIES FOR SECRET FBI LETTER DEMANDS FOR CONFIDENTIAL RECORDS

Sections 2 and 3 of H.R. 3179 add new criminal penalties to enforce a far-reaching and troubling power of the FBI—the power to demand, without a court order, that a business or individual release a broad range of highly confidential records. The records demands are secret and the recipient is barred from informing anyone that the demand has been made or that records have been turned over. Section 505 of the USA PATRIOT Act amended the so-called "national security letter" power to eliminate the need to assert any individual suspicion (much less probable cause) before issuing such a letter. Section 2 of the bill adds a new crime to enforce the gag provisions. Section 3 allows the FBI to invoke a court's aid in enforcing the letter demands—and punish any failure to comply as contempt.

The records subject to these FBI letters include the customer records of "communications service providers"—such as an Internet Service Provider, telephone company, or (according to the FBI) the records of your use of a computer terminal at the local library or Internet cafe. They also include credit reports and the customer records of "financial institutions." The term "financial institutions" was expanded and redefined by last year's intelligence authorization act to include a host of large and small businesses, including casinos, the local jewelry store, post office, car deal-

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[1] The "Domestic Security Enhancement Act of 2003" (DSEA) was leaked early last year. Although never introduced, several of its sections are contained in H.R. 3179. Sections 2 and 3 of H.R. 3179 are identical to section 129 of DSEA. Section 4 of H.R. 3179 is a modified version of section 101 of DSEA (section 101 of DSEA would have eliminated the "foreign power" standard for citizens as well as non-citizens). Section 5 of H.R. 3179 is identical to section 204 of DSEA. Section 6 of H.R. 3179 appears to be new.

[2] These include H.R. 3037, "The Antiterrorism Tools Enhancement Act of 2003," (administrative subpoenas); H.R. 3040 and S. 1606, "The Pretrial Detention and Lifetime Supervision of Terrorists Act of 2003," (presumptive denial of bail); and H.R. 2934 and S. 1604, the "Terrorist Penalties Enhancement Act of 2003" (new death penalties).

ership and pawnbroker's store; as well as any other business the Treasury Secretary sees fit to designate.[3]

The government does not need these records powers, also known as "administrative subpoenas" or "national security letters," to obtain records of suspected terrorists. An ordinary search warrant or grand jury subpoena can be used in the investigation of any crime, including one alleging terrorism. National security letters are used in potentially wide-ranging "foreign intelligence" investigations. These records demands can be used without even the minimal oversight of the secret Foreign Intelligence Surveillance Court or any other court.

There is no right to challenge the scope of a national security letter, and—because it was repealed by the USA PATRIOT Act—no standard for protecting individual privacy. Compliance with a national security letter—and compliance with the gag provision that muzzles a recipient from protesting such a letter—is mandatory under the law, although no specific penalties are listed.

Specific penalties aren't needed for national security letters to serve their intended function of giving cover to businesses and or individuals to cooperate with wide-ranging government intelligence investigations. The recipient can point to a legally-binding national security letter in response to any complaints from customers about turning over their confidential information to the government.

Without specific penalties, the business or individual who receives a letter still has some, albeit very limited, leverage to try to persuade the government to narrow an exceedingly broad or intrusive request. Adding *criminal penalties* to such letters for the first time—and to the gag provision that prevents a recipient from complaining about them—tips the balance decisively in the government's favor and away from the business or individual whose records are being demanded.

Before Congress considers adding criminal penalties to this troubling power—which has already been expanded twice since 9/11—it should hold hearings to find out much more about how these letters work in practice. The government has refused to release even the most general information about national security letters—including the type of records being monitored and whether the government is seeking to obtain entire databases.

At a minimum, Congress should make explicit the right of a recipient to challenge a national security letter—just as a recipient can challenge a grand jury subpoena. Congress should require some individual suspicion before compliance with a national security letter can be ordered by a court. Finally, the recipient should be able to challenge the gag provision in court, and should be allowed to contact an attorney, congressional committee, or the Justice Department Inspector General without fear of being prosecuted for violating the gag provision.

ALLOWING SECRET GOVERNMENT EAVESDROPPING WITHOUT ANY CONNECTION TO FOREIGN GOVERNMENT OR TERRORIST GROUP

Section 4 of H.R. 3179, the so-called "lone wolf" provision, would eliminate the "foreign power" standard for one type of surveillance: non-citizens suspected of involvement in terrorism. The "foreign power" standard serves as a vital protection against overzealous use of the government's "national security" power to wiretap, and otherwise secretly monitor, private communications outside the standards of criminal investigations.

As I discussed earlier, the Fourth Amendment is clear—no searches without a warrant based on probable cause. Yet despite that clear command, the Executive Branch has long claimed an unwritten "national security" exception to the Fourth Amendment that allows secret domestic surveillance for foreign intelligence and counterintelligence outside criminal probable cause standards.

The carefully-crafted, *compromise* law that keeps this exception within reasonable bounds is the Foreign Intelligence Surveillance Act (FISA). The law permits secret surveillance outside normal criminal bounds when approved by the Foreign Intelligence Surveillance Court. The government can appeal any denials (which are exceedingly rare) to another secret court—the Foreign Intelligence Surveillance Court of Review.

One of the most important limitations on FISA surveillance—the requirement that FISA surveillance is only allowed when foreign intelligence is "*the* purpose" of the surveillance—has already been substantially weakened by the USA PATRIOT Act, which allows such surveillance when foreign intelligence is merely "a significant purpose."

[3] Intelligence Authorization Act for FY2004, Pub. L. No. 108–177, at § 374 (providing that definition of "financial institution" at 31 U.S.C. § 5312(a)(2) applies for national security letters).

The Foreign Intelligence Surveillance Court of Review, in its first-ever case, approved this change against a constitutional challenge mainly because the "foreign power" standard remains.[4] Although FISA surveillance may now be used even where the government's main purpose is other than foreign intelligence, the government must still show probable cause that the target of FISA surveillance is a "foreign power or agent of a foreign power." The Court of Review, in line with other courts that have looked at the issue, made clear that the required connection to a "foreign power"—and therefore to the President's national security powers—is a major reason why a separate, secret scheme of surveillance—outside the normal bounds of criminal investigation—is constitutional.

The so-called "lone wolf" provision *eliminates* this "foreign power" standard for wiretapping and other secret surveillance for non-citizens suspected of involvement in international terrorism. Notwithstanding its limitation to non-citizens, the provision violates the Fourth Amendment because the Fourth Amendment protects "people," not citizens. Certainly we can expect that the next request will be to expand this power to citizens, as originally proposed in "Son of PATRIOT." Ultimately, this provision sets a dangerous precedent for all Americans, because it severs secret national security surveillance from its constitutional moorings—the President's constitutional responsibility to defend the nation against foreign powers.

Supporters wrongly call this unconstitutional, unwise and unprecedented provision the "Moussaoui fix." They say it is needed because the government failed to seek a FISA warrant, before 9/11, to search suspected hijacker Zacarias Moussaoui and that, with this "lone wolf" provision, they might have done so.

In fact, this provision is not the "Moussaoui fix." FBI agents did not seek a FISA warrant because—even though Moussaoui was connected to a foreign rebel group—national security bureaucrats said FISA could not be used because the rebel group was not a "recognized" foreign power. They were wrong. Congress' own investigation of the pre-9/11 intelligence problems found those government officials "misunderstood the legal standard for obtaining an order under FISA." The "foreign power" standard requires only that the government show probable cause that the person is an agent for some foreign government, foreign political faction or organization, or group involved in international terrorism—which can be as few as two individuals. A group involved in international terrorism need not be formally designated as a foreign terrorist organization (as these officials mistakenly believed) to be a "foreign power" under FISA. Whether the foreign power is "recognized" is legally both irrelevant and meaningless.

Finally, the investigation found that FBI agents were so quick to leap to FISA in the case of Zacarias Moussaoui, they did not fully consider getting a plain vanilla criminal search warrant. Insofar as these problems involved a misunderstanding of existing federal power, *not* a lack of power, Congress' investigation recommended greater legal training for national security officials.[5]

How, then, should we monitor terrorists who may be acting alone? The answer is simple—with ordinary search warrants and wiretaps, based on probable cause. Criminal warrants and wiretaps have long been available for federal crimes, including terrorism. Rather than distorting foreign intelligence surveillance, the government should use the tried-and-true methods of regular criminal warrants and court orders.

Indeed, while this proposal has been pending in Congress for more than two years, the Justice Department has been unable to explain why criminal powers are not sufficient to deal with individual terrorists. In a February 2003 report on FISA oversight, Senators Leahy, Grassley and Specter said that the Justice Department was unable to provide even a single case, even in a classified setting, that explained why the "lone wolf" provision was necessary. As they said, "In short, DOJ sought more power but was either unwilling or unable to provide an example as to why."

If Congress is determined to go forward with an unnecessary "lone wolf" provision, it should at least adopt a provision that gives the Foreign Intelligence Surveillance Court some discretion to deny a wiretap request where the evidence clearly shows there is no connection to any foreign threat. For example, as Senator Feinstein has proposed, Congress could establish a presumption that a non-citizen is connected to a foreign power based on evidence of involvement in international terrorism.

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[4] *In re Sealed Case,* 310 F.3d 717 (For. Intel. Sur. Ct. Rev. 2002).

[5] Joint Inquiry Into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001, Report of the U.S. Senate Select Comm. on Intelligence and the U.S. House Permanent Select Comm. on Intelligence 321–323 (December 2002).

EXPANDING THE POWER TO USE SECRET EVIDENCE AND SECRET SURVEILLANCE INFORMATION IN CRIMINAL AND IMMIGRATION CASES

Finally, sections 5 and 6 of H.R. 3179 also tip the balance towards the government, and away from the individual, when the government seeks to use secret evidence—classified information—against an individual in legal proceedings *without* revealing the information to the accused.

Section 5 takes away some of the judge's discretion in handling classified information in criminal proceedings under the Classified Information Procedures Act (CIPA). It requires a federal judge to hear a government request to delete classified information from documents made available to the defendant during discovery proceedings *in camera* and *ex parte*—that is, in secret without hearing from the other side. It also allows the government to make this request orally, rather than in writing. While it still permits the judge to deny the government request to delete classified information, or to order a more complete summary, it nevertheless represents an incremental shift of power away from the court and towards the prosecutor. Congress should hear much more from both prosecutors and defense lawyers with experience in this area before making such a change, in order to determine whether the effect may be much larger than intended.

Section 6 of the bill is a major shift *in favor* of greater use of secret information in immigration proceedings. Section 6 amends the Foreign Intelligence Surveillance Act (FISA) to permit the government secretly to use FISA-derived information in immigration cases. Section 6 would amend FISA to eliminate very important safeguards that are designed to ensure that when secret foreign intelligence wiretaps and other surveillance are used to put a person's liberty in jeopardy, he has notice and an opportunity to challenge whether the surveillance was lawful. Under this change, however, a person could face lengthy detention, and ultimately deportation, without *ever* knowing about the government's use of secret surveillance information or having the ability to challenge it.

Mr. Chairman, this issue is, as many of you know, dear to my heart. I firmly believe it is simply un-American for our government to withhold critical information from an individual whose liberty is in jeopardy. Star chamber proceedings have been the hallmark of totalitarian governments, not our own. As a result, when I served in this illustrious body and on this Committee, I worked across party lines to author the "Secret Evidence Repeal Act" (H.R. 1266 in the 107th Congress), which would have ensured that individuals in immigration proceedings had the same access to a summary of classified information as those in criminal proceedings. My bill attracted the support of over 100 cosponsors and after two hearings passed this Committee with a vote of 26–2 in favor of my substitute.[6] Unfortunately, however, the Secret Evidence Repeal Act was not passed by the full House and is not, as a result, the law of the land. While I am certainly gratified that President Bush has pledged publicly not to allow classified information in immigration proceedings, the government still claims the power to do so and a future Administration is free to reverse that policy, as is this one.

The passage of section 6 of H.R. 3179 would seriously undermine this Committee's efforts to reform the use of classified information in immigration proceedings. Put simply, section 6 goes beyond allowing the use of secret evidence. It allows the *secret use* of secret surveillance information. Not only would the defendant have no right to see the classified information, derived from FISA surveillance, that is being used against him in the immigration case, he would not even have the right to be notified that such information was going to be used, and obviously would have no ability to challenge it.

Amending FISA to allow the *secret use* of such secret surveillance information in immigration cases is an idea that simply flies in the face of the House Judiciary Committee's commendable efforts to reform the use of classified information and end the use of secret evidence.

There is also some dispute about whether the amendment would really affect only immigration proceedings, or would affect a wide range of civil proceedings, including asset forfeiture, tax, and regulatory proceedings. I understand the drafters intended to limit the amendment to immigration proceedings. However, even with a clarification, I caution you that allowing the *secret use* of secret surveillance in one type of civil case—in this case, immigration proceedings—can *and will* be used as a precedent when the Justice Department comes back to you and asks for this exception in other types of civil cases.

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[6] H.R. Rep. No. 106–981, Secret Evidence Repeal Act of 2000, 106th Cong., 2nd Sess. (Oct. 18, 2000). The bill, as amended, passed on a voice vote. Three members filed dissenting views.

CONCLUSION

As a former CIA official and federal prosecutor, 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 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.

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, new and privacy-invasive programs and activities.

According to a growing number of reports, as well as a GAO 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 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, not as tools to be employed in garden-variety domestic criminal investigations.

With conservatives expressing these serious doubts about the reach of the USA PATRIOT Act, it is time to go back and review the law, hold oversight hearings and consider corrections. It is certainly not the time to consider making it permanent or expanding it.

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.

Mr. COBLE. Thank you, Mr. Barr, and thanks again to all the witnesses.

Gentlemen, we apply the 5-minute rule to ourselves as well, so when we question you, if you can limit your answers as succinctly as possible.

Mr. Bryant, under FISA, a specially designed court may issue an order authorizing electronic surveillance of a physical search upon probable cause that the target of the warrant is a foreign power or an agent of a foreign power. Mr. Barr claims that this bill would eliminate the probable cause requirement.

What do you say to that?

Mr. BRYANT. That would be an inaccurate characterization, Mr. Chairman, of the effect of this bill as it relates to the provision calling for amending FISA, so as to allow FISA to be used in connection with so-called "lone wolf" terrorists or terrorists for whom the affiliation with an international terrorist group is unknown.

The bill would in no way affect the current FISA standards in current law. That is to say, the probable cause required with respect to the identity of the subject being an international terrorist or a spy, a foreign power or an agent of a foreign power, is in no way changed by this law. So I think that would be my initial response, Mr. Chairman.

Mr. COBLE. Mr. Barr and I were talking prior to the hearing commenced, and we agreed that the PATRIOT Act is going to be

sputtering around for a long time, as well it should. So with that in mind, Mr. Barr, let me put a question to you.

In your testimony you clearly expressed concern that the Department of Justice may well abuse its authority. Senator Feinstein pointed out at a recent oversight hearing that the ACLU could not provide her with a single instance of abuse as far as PATRIOT Act provisions are concerned.

What do you say in response to that, or do you have specific evidence of abuses?

Mr. BARR. I think, Mr. Chairman, as the cases that are being investigated and prosecuted by the Federal Government under provisions of the PATRIOT Act start to now, after a couple of years working their way through our court system, start to manifest themselves publicly in hearings and court orders and so forth—there is a case that reaches from, I think, out of D.C. or Northern Virginia all the way down to Georgia, which has to do with the scope and applicability of nationwide subpoena power under the PATRIOT Act. That case is now moving forward and I think has established a pretty clear record of abuse in that area, the use of these expanded subpoena powers for fishing expeditions. So I think we're going to see more of that as these cases finally work their way through the system.

Of course, as the Chairman is well aware, one of the reasons why it's so difficult to answer that question is because the proceedings are secret, so we don't know when, for example, a FISA warrant is served on a repository of records, perhaps a pawn shop which engages in second amendment transactions, or a doctor's office. They are gagged and they are prevented from disclosing that, so we don't know how often these powers have been used or the extent to which they may have been abused.

I think this also is a reason to conduct a great deal more oversight before we move to even seriously consider enactment of this and other similar legislation.

Mr. COBLE. Thank you, Mr. Barr.

Mr. Harrington, the bill before us amends the law to add enforcement mechanisms for compliance with National Security Letter requests and against illegal disclosure of such a request. Explain in a little more detail why we need to enforce these requests.

Mr. HARRINGTON. Well, as I stated a little bit earlier, there have been several rare occasions where we have not had compliance with an NSL, an administrative type subpoena. In those cases we have no recourse currently to have that resolved in a quick and timely fashion. It becomes a protracted negotiation between the Government and the recipient of the NSL.

Of course, the work that we do must be kept quiet and secret, as we try to investigate enterprises. These are cells, these are groups that work together. There are relationships that are formed. By doing it in a public venue, it would alert other subjects or other coconspirators and would, of course, be detrimental toward our investigation in the long run.

Mr. COBLE. Let me get one more question in before the red light comes to either of you.

Do NSLs violate the fourth amendment because we don't inform the terrorist or the target that they're under investigation? Any of you.

Mr. BRYANT. I would be pleased to respond, Mr. Chairman. They don't. Terrorists have no such fourth amendment right. NSLs are akin to administrative subpoenas. As you know, Mr. Chairman, Federal law currently provides for 335 different administrative subpoenas to use in a wide variety of crimes, crimes that don't rise to the magnitude of terrorism or espionage. NSLs, National Security Letters, can only be used in connection with an investigation of an international terrorist or a spy. That's it.

Mr. COBLE. Mr. Barr, do you want equal time on that?

Keep in mind my red light is on, so make it quick, if you will.

Mr. BARR. Yes, sir, Mr. Chairman.

The problem is, of course, that the fourth amendment applies to persons, not just citizens, and it applies to people who have not yet been convicted. Certainly from the Government's standpoint, they may believe that these people are terrorists, but until they are proven as such through judicial proceedings, they are persons under the fourth amendment.

Insofar as provisions of the PATRIOT Act and provisions of H.R. 3179 would prevent them from knowing that there is evidence going to be used against them that has been gathered under FISA, as opposed to the standard applicable under the fourth amendment, yes, it would result in, could result in, a violation of their fourth amendment rights.

Mr. COBLE. My time has expired. I recognize the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

One hardly knows where to begin. I heard a colloquy about the terrorist. That assumes the terrorist was convicted or that he was being tried to determine whether he was a terrorist. A kind of important consideration, wouldn't you think? I mean, we're saying the terrorist and what his rights are, as if there had been a trial that determined he had committed acts of terror.

Anyway, let's begin with the recognition that right now FISA applies to immigration cases, right?

Mr. BRYANT. It applies—if I might, Mr. Chairman, it applies in investigations in connection with international terrorists and spies. Put differently, it applies in connection with investigations of foreign powers or agents of foreign powers. The FISA surveillance tools——

Mr. CONYERS. Yes or no?

Mr. BRYANT. Is the question does FISA apply in immigration proceedings?

Mr. CONYERS. Yeah.

Mr. BRYANT. It is the case that——

Mr. CONYERS. Yes or no?

Mr. BRYANT. The law allows FISA-derived information to be used in immigration cases.

Mr. CONYERS. Mr. Harrington, FISA applies to immigration cases?

Mr. HARRINGTON. I would have to defer. I'm not an attorney.

Mr. CONYERS. Okay.

Mr. Barr, welcome to the Committee again. FISA applies to immigration cases?

Mr. BARR. It can apply to immigration cases.

Mr. CONYERS. And what this bill is doing is going beyond the present application of FISA to immigration cases, right, Mr. Bryant?

Mr. BRYANT. No, sir, that's not——

Mr. CONYERS. It isn't going beyond?

Mr. BRYANT. No, sir. It does not affect, in any respect, the requirement——

Mr. CONYERS. Well, what does it do, then, if it's not going beyond the existing law?

Mr. BRYANT. It's improving existing law. I thought your question was, is it extending FISA in the immigration setting?

Mr. CONYERS. It's not going beyond the law; it's improving the law?

Mr. BRYANT. It's not increasing the application of FISA information in immigration——

Mr. CONYERS. And this isn't PATRIOT II. This is just enhancing PATRIOT I, right? Right?

Mr. BRYANT. This does not——

Mr. CONYERS. Yes or no.

Mr. BRYANT. No.

Mr. CONYERS. Oh, it doesn't enhance PATRIOT I?

Mr. BRYANT. No. It is not specific to the PATRIOT Act, Mr. Conyers. These are additional provisions which speak to important counterterrorism tools.

Mr. CONYERS. It's not doing anything to the PATRIOT Act?

Mr. BRYANT. It is not——

Mr. CONYERS. Okay.

Mr. Barr, can you help us out here?

Mr. BARR. I certainly don't want to get crosswise with my friend and Assistant Attorney General, but I think that, very clearly, the intent of H.R. 3179 is to grant additional powers to those already granted under the PATRIOT Act, in the very same areas addressed by the PATRIOT Act.

Mr. CONYERS. Of course.

Now, since we're into this semi-denial mode, let me ask you about the PATRIOT Act II that's been widely known to have been drafted in the Department of Justice for months. Mr. Bryant?

Mr. BRYANT. Yes, sir.

Mr. CONYERS. Yeah. What? What is the response?

Mr. BRYANT. I'm sorry. I didn't understand the question, Mr. Conyers.

Mr. CONYERS. I said what about the widely-known fact that PATRIOT II was being drafted in the Department of Justice for months?

Mr. BRYANT. We have not——

Mr. CONYERS. You don't know anything about it?

Mr. BRYANT. We have been working with Congress extensively over the last 2 years to——

Mr. CONYERS. Well, I'm in Congress.

Mr. BRYANT.—to provide additional——

Mr. CONYERS. They haven't been working with me.

Mr. BRYANT. We stand ready to, sir.

Mr. CONYERS. Well, let me ask you this.

Good night, man. I'm spending a lot of time on ancient history. Everybody knows that in town. I mean, read the Washington Post. They have been drafting FISA, redrafting FISA, re-redrafting FISA.

Let me ask you this. Did you know that the PATRIOT bill that came out of this Committee was substituted by the Department that you work in the night before it went to Rules? Did you know that? You didn't know that, either?

Mr. BRYANT. No, sir.

Mr. CONYERS. And you worked in the Judiciary Committee.

Mr. BRYANT. Of course, we can't substitute legislation that this Committee——

Mr. CONYERS. Well, it happened. What do you mean you can't do it?

Mr. BRYANT. We don't have a vote on this Committee, sir.

Mr. CONYERS. Please help me control myself.

What do you mean you can't do it? You did it. The bill that we sent to the Rules Committee was replaced by another bill that nobody had seen. Was that at your request?

Mr. BRYANT. The substitution?

Mr. CONYERS. Yes.

Mr. BRYANT. If the question is, did we support the substitution, then the answer is yes.

Mr. CONYERS. That's the question. Was it at your request?

Mr. BRYANT. Were we urging that the bill reported out of Committee be further improved? We were.

Mr. CONYERS. Right. So don't give me this business about you never can do this or—You're the one that did it.

Mr. COBLE. Mr. Conyers, your time has expired.

Mr. CONYERS. Okay.

Mr. COBLE. If you want to wrap up, Mr. Conyers——

Mr. CONYERS. No, no. I need another round.

Mr. COBLE. All right. Very well.

The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. Barr, welcome. We are very pleased to have your participation, as well as the representatives of the Justice Department.

Quite frankly, when we wrote the PATRIOT Act the first time, regardless of some view of the process, we gave it very intense scrutiny. There were a number of things requested by the Justice Department that we did not agree to and took off the list right away. Most everything else was very closely and carefully discussed and in some sense negotiated amongst Members of this Committee.

I think that the final product is a good product. The fact of the matter is, when you do something like this and you change things in a very sensitive area—and I'm sensitive to both civil liberty concerns and law enforcement concerns—you don't necessarily know the impact that you're going to get. So we added what I'm in favor of doing with more legislation, and that is sunset provisions on a great many of the provisions of the PATRIOT Act. A number of the other provisions are very much common sense, simply provisions to

update things that were needed in the law, and I think that is the same approach that we should take to any new requests for changes in the law.

Mr. Barr, I'm wondering if that's your philosophy as well. In reviewing your statement, I notice that toward the end of page 1, you state, as I recall—you did, you voted for the PATRIOT Act—"with the understanding that the Justice Department would use it as a limited, if extraordinary power needed to meet a specific extraordinary threat."

Yet earlier in your statement, you say that the Attorney General has said he hasn't used some of the powers, which I am absolutely certain is true. This is a very lengthy piece of legislation and includes many, many provisions, some of which may not have been exercised, and quite frankly, if law enforcement doesn't need to exercise something, I don't think they should. You then question whether those powers were needed.

I'm just wondering, if the Attorney General has not, in fact, used the powers, is that good or bad that he hasn't used them?

Mr. BARR. Well, we don't know until we have more information. I think the gentleman's question goes to the heart of the need for additional oversight so that we can get answers to those questions, the answers which lie only in the breast of the Department of Justice.

I think it's important to recognize or to conclude that if, in fact, some of these extraordinary provisions which at the time the PATRIOT Act was submitted and defended by the Administration when it was brought up to the Hill were portrayed as absolutely essential to fight terrorism have not, in fact, been used, then I think there ought to be, particularly from a conservative standpoint, a presumption that they are not needed and that they ought to be taken from the Government and given back to the people, and at such time as the Government feels and can demonstrate the need for those powers, to then at that time come back to the Congress and ask for them and justify them.

Mr. GOODLATTE. Are these particular powers amongst those that would expire at the end of next year?

Mr. BARR. Some of them, but as the gentleman from Virginia knows, unfortunately, despite our joint efforts to have the number of provisions of the USA PATRIOT Act sunsetted much broader than we wound up with, a lot of the problematic provisions such as the "sneak and peak" and the 215 provision are not sunsetted. This is a problem.

Mr. GOODLATTE. But the examination—and I fully agree with you, that we need to exercise a considerable oversight over the use of the PATRIOT Act to make sure that it is being used as intended, and certainly one of the questions, as always, whether something is, indeed, needed. But there have been those who advocated that we pass legislation, I think prematurely, to lift those sunset provisions and make the PATRIOT Act permanent, and on the other hand, there are those who would like to take steps to repeal portions of it, what I also think are premature. I think we ought to allow it to operate for the amount of time that the Congress designated, and then, as it approaches the sunset provisions for some of the provisions, use that as an opportunity to examine all of the

provisions in the act. While some may not automatically sunset, we certainly have the ability and the authority to examine those that do not sunset and determine whether they aren't used or are not necessary or have been abused, in which case we can do that.

But I so far have not seen a tremendous amount of evidence from anybody regarding misuse of the PATRIOT Act. I wonder if you would want to comment on that, if Mr. Chairman would allow that, since my red light is on. And then I would also ask if Mr. Bryant could respond as well.

Mr. BARR. Again, in the interest of time, not to repeat my answer to a question that the distinguished Chairman raised earlier, we don't really know at this point because of the secrecy attendant to so many of these provisions and the use of these provisions by the Government. The Committee, through vigorous oversight, and the Subcommittee, certainly can get to the bottom of it, and I think should.

But, of course, ultimately the question of whether or not a provision of the law, including those that bring us here today, are constitutional has nothing to do with how many times they are used or whether they've been abused. They are unconstitutional ab initio. That, I think, is a problem with some of what is going on here.

Mr. COBLE. The gentleman put his question before the red light appeared, Mr. Bryant, so you may answer briefly, if you will.

Mr. BRYANT. Yes, sir.

Mr. Goodlatte, in response to the question is it good or bad that certain sections haven't been used, I think we reflect on and ask the same question, is it a good or bad thing that a law enforcement officer has a firearm but doesn't have to use it. The fact that discretion is shown, restraint is shown, in connection with utilizing authorities or powers that are granted law enforcement or counterterrorism capability, we think is a good thing.

In terms of the question of the sunsets, we think Congress did a very good job in passing PATRIOT. We think the sunsets should not be realized; that is to say, we think the sunsetted provisions should not, in fact, sunset but should be continued. We support their reauthorization. We stand ready to continue working with this Committee and Congress to ensure careful oversight of how all of the authorities, including the sunsetted authorities, are being used.

We think with PATRIOT the angel is in the details, not the devil is in the details. We think that you all deserve the details, the American people deserve the details, and that that will——

Mr. COBLE. The gentleman's time has expired. Thank you, Mr. Bryant.

The gentleman from Virginia.

Mr. SCOTT. Thank you, Mr. Chairman.

I noted, Mr. Bryant, you said that these investigations and National Security Letters were in conjunction with the investigation on terrorism, and terrorists don't have rights that others might have.

Do I understand that once you get a letter, the investigation is in connection with the terrorist investigation but they can be served on anybody?

Mr. BRYANT. NSLs can be used by the FBI in connection with duly authorized investigations of international terrorism or espionage, and can be served on third parties—specified certain congressionally-articulated third parties—who have relevant information to that investigation, that's correct.

Mr. SCOTT. Like law-abiding citizens?

Mr. BRYANT. To designated institutions, such as financial institutions or credit reporting agencies——

Mr. SCOTT. Under the bill, a pawn shop?

Mr. BRYANT. Yes, a pawn shop, which has become——

Mr. SCOTT. A law-abiding pawn shop can be subject to one of these things. They get issued not by the Attorney General but get issued by the local guys?

Mr. BRYANT. This is a request for information that, under statute, can be issued by the FBI.

Mr. SCOTT. The local guys can do this?

Mr. BRYANT. No, it has—Congress has designated how it can be delegated, and I believe it can be delegated to the special agent in charge——

Mr. SCOTT. Local?

Mr. BRYANT. Yes, who is sometimes local, is in the region.

Mr. SCOTT. And once the local guy issues one of these things and you get one, you have to comply, you can't tell anybody, and if it's abusive, how do you complain?

Mr. BRYANT. A couple of points, Congressman. This is important, so I would like to try to get it right.

With respect to not being able to tell anybody, it is the position of the Department that the recipient of an NSL can confer with counsel, with a lawyer, with an attorney. We believe that's an implied exception in the law, and we would be pleased to work with you as this legislation is——

Mr. SCOTT. So you are pleased to put that in the bill, that consultation with an attorney does not violate the disclosure from——

Mr. BRYANT. That's correct.

Secondly, with respect to compliance, the sanctions that currently don't exist, that this bill would call for, only apply to breaching the nondisclosure requirement. In order for there to be sanctions in connection with not complying with the request, the Justice Department would have to enforce the National Security Letter in court, and the penalty then would be sanctions applied by the court in connection with the failure to comply.

Mr. SCOTT. If you're complaining or protesting, you know, you explain it to a judge and you're on the barrel end of a 5-year sentence if you happen to lose.

Let me move on to these ex parte proceedings. How many ex parte requests have been denied by judges?

Mr. BRYANT. I don't know the answer to that, Congressman.

Mr. SCOTT. Do you know if any have been denied?

Mr. BRYANT. It's my understanding that ex parte in connection with CIPA, the Classified Information Procedures Act, that requests for CIPA authorizations are denied.

Mr. SCOTT. Some are denied?

Mr. BRYANT. Yes, sir.

Mr. SCOTT. If this bill passes, will the defendant know that an ex parte proceeding went on?

Mr. BRYANT. The defendant might have reason to know that an ex parte in camera proceeding has occurred. The defendant wouldn't, by definition, know necessarily or would not know what occurred in that proceeding.

Mr. SCOTT. Would he necessarily know that it went on?

Mr. BRYANT. No.

Mr. SCOTT. Would there be a reviewable record of what went on?

Mr. BRYANT. The proposed change in this bill would allow the requested CIPA authorization to be made orally, so as to expedite the request and judicial determination.

Mr. SCOTT. So if the information was misleading, you know, kind of confusing, there wouldn't be anything to review; is that right?

Mr. BRYANT. I'm unaware that there would be a record to review.

Mr. SCOTT. There wouldn't be a transcript.

Mr. BRYANT. That's correct.

Mr. SCOTT. So if the judge was allowed to, there wouldn't be any transcript.

If the judge decides that he really doesn't agree that it ought to be ex parte and he would like to hear from the defendant, under this bill he can't do it, is that right?

Mr. BRYANT. Well, under current law a judge is not free to discuss any and all classified information with the defendant, absent provisions specifically made for that.

Mr. SCOTT. Or defense counsel?

Mr. BRYANT. That's correct.

Mr. SCOTT. If he decides that he would like to discuss with counsel who has a security clearance, this bill would prevent him from involving the defense counsel in the decision, is that right?

Mr. BRYANT. That's my understanding.

Mr. SCOTT. I had one quick technical question, Mr. Chairman. Do you have the bill before you?

Mr. BRYANT. I do.

Mr. SCOTT. On page 4, line 15.

Mr. BRYANT. Mine might not have the same pages, Congressman Scott.

Mr. SCOTT. Section 6, the first sentence.

Mr. BRYANT. Uh-huh.

Mr. SCOTT. Where it says in parenthesis "other than in civil proceedings or other civil matters under the immigration laws," I'm assuming that it means civil proceedings under immigration laws or other civil matters under immigration laws.

Mr. BRYANT. Yes, that's our reading of the meaning of the text of the bill.

Mr. SCOTT. Okay.

Mr. COBLE. I thank the gentleman.

The gentleman from Indiana, Mr. Pence.

Mr. PENCE. I thank the Chairman. Thank you for holding this hearing. I want to thank the witnesses, and I apologize for arriving a little bit late. I have a couple of questions.

It's good to see Mr. Bryant here. I real with great relish the story of 310 individuals charged and 179 convicted, terrorist cells broken up in Buffalo, Charlotte, Portland, and Northern Virginia. Mr. Bry-

ant, I would just say—and I hope you convey to your colleagues at the Department of Justice—the gratitude of the people I represent.

Mr. BRYANT. I'll be pleased to, Congressman.

Mr. PENCE. We appreciate you. I do not consider it luck that we have been without a major terrorist event on American soil in the days since September 11th.

Also, I am grateful to see my good friend and former colleague, Congressman Barr, here. I think I may actually be physically occupying what many of us call on the Committee the "Bob Barr" chair in the upper shelf. I appreciate your passion for civil liberties.

Mr. BARR. If you are, Mr. Pence, be aware that there's a trap door underneath, which my colleagues wanted to use frequently. [Laughter.]

Mr. PENCE. I honestly find myself, I would say to the panel, somewhere between my good friend, Mr. Barr, and the Department of Justice on this. So I have a couple of quick questions.

I would really echo Mr. Barr's statement, prepared statement. I literally was added to this Committee, unlike some of my distinguished colleagues, I was added to this Committee 1 week before the PATRIOT Act was passed. I haven't crammed for a test like that since my law school days.

But it was axiomatic to me at that time that we were creating temporary powers and focused on confronting a specific threat to our country, so I do want ever to have Congress hold to that theory in force the temporary elements of the PATRIOT Act, where possible, and where it's prudent to do so. I also want to be very careful about expanding even in the area of, to use Mr. Barr's language, the PATRIOT Act.

But I am also intrigued, Mr. Bryant, and I would like you to speak to this "lone wolf" idea. It seems to me that in the days since September 11th we have gotten to know our enemy better through hard labors and confrontations, I think, of the circumstances that occurred prior to the elections in Spain, where in testimony before the International Relations Committee John Bolton told me that he did not believe al-Qaeda today was operating from a central command but rather from disparate groups and individuals.

I just would like to ask you a fairly open-end question, Mr. Bryant. Could you explain to me how the instant bill addresses that "lone wolf" whole, where we are relegated to dealing with issues under essentially domestic criminal law? What is the benefit in this bill for us when we can't establish a direct nexus to a terrorist organization or group of terrorists?

Mr. BRYANT. Yes, sir. The question that we have sought to address in thinking about this "lone wolf" or unaffiliated terrorist circumstance is whether or not the benefits, the strengths of the FISA regime, and the protections that are built into the FISA regime, should be brought to bear in connection with a terrorist whose affiliation with a foreign terrorist organization is unknown.

We think the answer is yes, because the potential catastrophic consequences of an international terrorist—and this provision would only apply to non-U.S. persons—whether or not an international terrorist perpetrating or seeking to perpetrate a terrorist incident should be able to be pursued with the FISA tools that are

currently deployable against an international terrorist whose affiliation with an international terrorist organization is known.

Mr. PENCE. Let me interrupt before my time runs out.

Mr. Barr, could you speak to that? Does the "lone wolf" style of terrorism, does it give you pause? Is your concern here with haste, or is it with the substance of that specific proposal?

Mr. BARR. It's with the substance. I don't think that, in my experience as a prosecutor and as a Member of this Committee engaging in oversight of the Justice Department for 8 years, I'm not aware of any instance in which failure of judges to operate quickly if the Government related to them exigent circumstances was a problem.

What we have here, though, is the fact that—I think one thing, from a practical standpoint, Mr. Pence, that is important is the instance of a true "lone wolf." That is, a suspected terrorist with absolutely no ties to anybody, that he manufactured the so-called—whatever the device was in his basement, he didn't deal with anybody outside of his own house and so forth—I think that's unrealistic. So what we're talking about from a realistic standpoint, when we talk about a "lone wolf," is a person that, while perhaps the Government isn't able to link them to a formal organization, they do have contacts. And under existing FISA standards, without removing the nexus to foreign power, the Department of Justice can go after that person if they show as little as there is one other person with whom they are dealing as part of their conspiracy or their activities.

This provision is simply unnecessary to break that important link between the President's national security power and the extraordinary power of gathering evidence outside of the fourth amendment. That's why I think it's so important that we not do this, and certainly not until the Government has come forward and laid out a much stronger need for it.

Mr. COBLE. The gentleman's time has expired.

Did you have another question, Mr. Pence?

Mr. PENCE. It just appeared to me, Mr. Chairman, that Mr. Bryant wanted to react to that. I would be grateful to have him do so, if the chair would permit it.

Mr. COBLE. Is there further response? Mr. Bryant.

Mr. BRYANT. I would be pleased to respond to Mr. Pence, Mr. Chairman, if you would permit.

Mr. COBLE. Why don't you suspend for a moment. We'll have a second round, so we will do that on the second round, Mr. Pence.

The gentlelady from California, Ms. Waters.

Ms. WATERS. Thank you very much, Mr. Chairman.

I am almost stunned at what we have already done, invading the privacy of American citizens with the PATRIOT Act, and violating the Constitution of the United States. I am absolutely amazed that we keep pushing further to do it and that the American people are not responding in a profound way.

I suspect that it is just a matter of time before this will backfire on us, just as the interrogations in Iraq are backfiring. In the name of terrorism, we have given ourselves permission to violate the Constitution, to violate privacy, to basically violate human beings in some extraordinary ways. For those who were so heady that

they felt they could do interrogations and not have to think about the Geneva Convention and all of that, I think we're traveling down the same road with PATRIOT Act II, with no oversight and expansion.

Let me ask Mr. Bryant to describe to us—and you probably did it already and I'm sorry if I'm asking you to repeat. Describe to me the gag provision of the National Security Letters. Describe as accurately as you possibly can what that gag provision mandates, what does it say, what does it allow or not allow someone to do or not to do?

Mr. BRYANT. Under current law, Congresswoman Waters, the recipient of a National Security Letter, which is akin to an administrative subpoena, limited to the context where there's a duly authorized investigation of an international terrorist or a spy, the recipient of an NSL, a National Security Letter, is obligated, under current law, not to disclose the fact that they have received that NSL.

The reason that Congress has found compelling and caused Congress to provide this nondisclosure requirement is that to not require nondisclosure is to allow the recipient to talk about the fact that the NSL, pursuant to an international terrorism investigation, has been received, to tip off others, to tip off associates.

Ms. WATERS. Okay, that's good. Let me just stop you for one moment so that I can understand.

The recipient of one of these letters could or could not be someone involved in terrorism? Anybody could get one?

Mr. BRYANT. Anyone who has been designated within the category of third parties that are eligible to receive them, so it's a limited category. Financial institutions, it's communications transactions, communications providers, it's credit bureaus——

Ms. WATERS. Libraries?

Mr. BRYANT. Yes, they fall under the definition.

Ms. WATERS. Okay. So——

Mr. BRYANT. That is, they fall under the definition if they provided Internet services.

Ms. WATERS. So describe to me, so I can really understand, if a library receives one of these letters and they ask them for extensive information related to the checking out of books, materials, and other kinds of activities of individuals in that library, then you're saying that that library, no one associated with it, can tell anybody, they can't raise any questions about it, they can't do anything; is that correct?

Mr. BRYANT. The request has to be for relevant information. There is no——

Ms. WATERS. Who decides relevant?

Mr. BRYANT. Well, in the first instance, the FBI, which is issuing. But there is no sanction for this library in this hypothetical for not complying. The only sanction is if they disclose the receipt of it. What that means is they do not have to immediately comply with the request, in terms of its scope. They can respond to the FBI that the scope of that NSL is unreasonably broad. They are not going to be sanctioned for having that as a response. The FBI and the recipient can then discuss the proper scope of the request to ensure that it is only for relevant materials.

The only sanction that could be brought to bear against the recipient is if the FBI sought to judicially enforce the NSL and the court were to enforce it at that point, if the recipient were to still not agree to comply, then there could be sanctions imposed by the court.

Ms. WATERS. You're asking for penalties now?

Mr. BRYANT. For nondisclosure, that's right.

Ms. WATERS. Not simply for nondisclosure.

Mr. BRYANT. The penalties would be, in the first instance, for knowing violation of the nondisclosure requirement, a 1-year penalty for a knowing violation, a 5-year penalty for a knowing violation with the intent to obstruct the ongoing investigation. Those are the two sanctions.

Ms. WATERS. Tell me about that aspect of it, where the librarian, what not, could not call an attorney, could not call in anyone to say "what is this? What have I got here? Do I have to comply with this?" Would that be a violation of any kind?

Mr. BRYANT. It is the position of the Department that the recipient of an NSL can confer with their attorney in connection with the receipt of that NSL.

Ms. WATERS. Who is it they cannot confer with?

Mr. BRYANT. They can confer only with counsel in connection with the receipt of the NSL. So they would be prohibited from conferring more broadly.

Ms. WATERS. What about a relative? What about a wife? What about anybody else?

Mr. BRYANT. I think it's important to remember that we're talking about only two kinds of investigations here: an international terrorism investigation or an espionage——

Ms. WATERS. The librarian is not a terrorist. The librarian is being asked to disclose information on other people who have used that library, who have access information in some way.

What you're telling me is, in addition to failure to disclose or nondisclosure, that this gag order says you've gotten this request and you can't talk about it with anybody. You're saying they can confer with an attorney, is that what you're saying?

Mr. BRYANT. A recipient can confer with an attorney, but this is a terrorism investigation, and broadly communicating the receipt of such an NSL poses real risks to national security. So Congress, going back to 1986, when NSLs were first passed, has seen appropriate to impose——

Ms. WATERS. So what if this librarian talks with his wife about it? Then what could happen to that librarian?

Mr. COBLE. If the gentleman will suspend, Ms. Waters, if you would wrap up, we need to hear from the gentlelady from Texas before we go to vote.

Mr. Bryant, you may respond to that.

Ms. WATERS. I appreciate that.

Mr. BRYANT. The only exception, Congresswoman, that is implicit in the statute, or that is provided for, has to do with——

Ms. WATERS. Just what would happen to the librarian if he talked to his wife.

Mr. BRYANT. If a recipient of an NSL speaks to someone other than counsel, that would be viewed as a violation of the nondisclo-

sure requirement. Currently, there is no sanction in the law in connection with——

Ms. WATERS. So the gag would give him 5 years, could cause him to be convicted and 5 years in prison?

Mr. BRYANT. Under this bill, a recipient—we've been discussing this in the context of a librarian, but only libraries which provide Internet services could conceivably——

Ms. WATERS. I don't care who it is. I'm talking about a human being who gets one of these letters, who talks about it with a wife, a family member, a close friend, another colleague, they could go to prison for 5 years; that's what you're telling me. Is that right?

Mr. BRYANT. Under this bill, there is a 1-year prison term, up to 1 year, provided for the knowing disclosure in violation of——

Ms. WATERS. And what triggers the 5 years?

Mr. BRYANT. The 5 years, it has to be of the wilful intent to obstruct an ongoing investigation——

Ms. WATERS. Thank you, Mr. Chairman. This is so outrageous, I don't need to hear any more. Thank you very much for the extended time.

Mr. COBLE. Folks, we are going to have a vote in just a minute, and I want to recognize the gentlelady from Texas. But did the Ranking Member of the full Committee want to be heard?

Mr. CONYERS. I would like——

Mr. COBLE. Before I recognize the gentlelady from Texas.

Mr. CONYERS. Oh, no. By all means, the gentlelady from Texas may proceed me almost always.

Mr. COBLE. The gentlelady from Texas is recognized for 5 minutes.

Ms. JACKSON LEE. The Ranking Member ranks, and if the Ranking Member seeks to clarify and/or speak?

Mr. CONYERS. I will wait.

Ms. JACKSON LEE. I thank the Chairman very much, and I thank the Chairman of the Subcommittee.

Let me first of all thank the witnesses. Mr. Barr, welcome. It is a pleasure to see you, and I am going to start with you, and if I might, I'm not sure if you took your testimony verbatim, but I'd like to read it into the record again.

"As a student and supported of the Constitution and its component Bill of Rights, I will not concede that meeting this Government's profound responsibility for national security entails sacrificing the right given us by God and guaranteed in that great document."

Would you share in your own words, even though your testimony might have been so, your assessment of the expanse of what we have been doing in the name of national security? You might allude to the present bill before us, but as you well know, I'm going to have some other questions, so if you can just get us right to the jugular vein, if you will, on this issue.

Mr. BARR. I think it can be answered with two basic statements, Ms. Jackson Lee. One is we are making everybody a suspect until they can prove themselves otherwise. Secondly, we are essentially moving in the direction of gutting the fourth amendment with all of these exceptions, exceptions if you travel, exceptions if you have records that the Government believes are somehow related, how-

ever indirectly, to a terrorism or national security investigation, we are allowing so many ways, sort of reverse loopholes, for the Government to secure evidence to be used against people, including citizens in criminal proceedings, without laying a foundation that they have probable cause to suspect that person has engaged in criminal behavior, that if we go much further—and that's what we're doing today, going further in that direction—the fourth amendment will be rendered essentially meaningless.

Ms. JACKSON LEE. You took the words out of my mouth, loopholes and the expanse being gutting of one constitutional provision and that's a right of reasonable search and seizure.

My next question to you then, and taking into account this Committee's posture when we worked in a bipartisan way to produce I think a PATRIOT Act that we all could have lived with and would have been a very effective tool of fighting terrorism. You recall those days after 9/11 the unity that was in this House was probably more than we had ever seen. The unity in this congressional Judiciary Committee was superior, but of course, that did not prevail.

Can you tell me what light this particular legislation brings to the question of fighting terrorism? Following along the lines of my colleague's inquiry, which is my concern, this looks like a fishing net, not a fishing pole, but a fishing net, where we are throwing out a net, and we may gather in it a number of innocent persons who through their own sense of freedom, meaning that we are used to being free in this country and may offer a conversation that is not in any way undermining national security, but is this legislation before us the kind of legislation that can in essence be a fishing net drawing in innocent persons, leaving them with little defense mechanisms in terms of their own defense?

Mr. BARR. I think the gentlelady is correct. And in addition to that, for example, following on the discussion that the gentlelady and the gentlelady from California were just having with the distinguished Assistant Attorney General about the gag order and the penalties and so forth, if the Government of course is able to extract penalties, that is, prosecute criminally people who have disclosed beyond their attorney, which is very limited disclosure certainly, then there's no incentive whatsoever and no way to hold the Government to narrow its requests under the FISA provisions.

Secondly, such a provision that the Government seeks is unnecessary. The Government can under existing law, long-established existing law, seek a subpoena under seal if it believes that disclosure to third parties, that is other than the recipient of the subpoena to secure the evidence, would harm national security or would harm an ongoing investigation, they already have a tool to do that. That's why it's somewhat mystifying to me why the Government is now saying that it has to have this additional power, which they were not granted in the initial PATRIOT Act, and one reason they weren't is because they already had the power then and they have it now.

Ms. JACKSON LEE. Interestingly enough, I remember your debate in this Committee, and a number of times you recounted, with your past experience, the fact that the Government already had some of the powers that we were even discussing at that time. That's why

we tried to balance that bill at the time that we were discussing it.

Mr. Bryant, welcome back, and I thank you for your leadership. Thank you very much, Mr. Barr.

He makes a very valid point, and I would just like to explore it with you very briefly. Section 5 of this legislation takes away a defendant's right to challenge secret evidence that the Government has against either—against him. My concern is can you provide an example, one example where a defendant has jeopardized a case because he or she was allowed to just petition the court to have access to this secret evidence. I say that in the context again of the idea of a fishing net and the idea that this Committee, this Congress, and I think the Government, should be problem solvers. We should not, if you will, undo or to make wrong what is already okay and right.

In this instance it appears to me that the Government is coming forward with advocacy for a position where there has not been sufficient problems that have been discovered, and/or that you have presented to this Committee, or as I understand, to anyone.

so what is the basis of having—thwarting a defendant's right to understand what is going on and to give them an able defense? It seems to be a simple right that we have.

Mr. BRYANT. Thank you, Congresswoman. CIPA, the Classified Information Procedures Act, sets up a mechanism whereby the Government can seek to protect classified information in a trial setting by petitioning the Court to explain ex parte and in camera why that information should not be disclosed. The judge is then in a position to redact or summarize that information for purposes of trial.

To not allow the Government to seek that ex parte in camera opportunity with the judge and to not allow redactions or summaries of that information, is to risk disclosing classified, sensitive, national security information in an open court setting. That's the concern that CIPA for many years has addressed and that this bill further addresses.

Ms. JACKSON LEE. Do we have examples of defendants who have misused any access to secret evidence if they've ever gotten access to it? Do you have a record of such?

Mr. COBLE. Mr. Bryant, if you would be brief, the gentlelady's time has expired, but you may answer.

Ms. JACKSON LEE. I thank the Chairman.

Mr. BRYANT. I am aware of examples where Government has had real struggles in a trial setting presenting information, given the fact of it being classified, and what this does is it allows the Government simply to get to a judge, who can then decline the request to seek redactions or summaries of that classified information.

Ms. JACKSON LEE. Mr. Chairman, if you will just yield for me to have a final sentence, I would just say that justice and democracy is a struggle, and the problem is, is that the struggle seems to be heavily burdening the defendant who is now increasingly not having the opportunity for a fair trial under this new legislative initiative and certainly the PATRIOT Act.

Mr. COBLE. I thank the lady.

We have been joined by the gentleman from Ohio, Mr. Chabot. Do you have any comment to make?

Mr. CHABOT. No.

Mr. COBLE. Colleagues, let me think aloud for a minute. We have proposed three votes upcoming, and you are talking about close to an hour. So what I propose to do is to start a second round, and when that bell rings we will adjourn for the day, but the record will remain open for 1 week, so if Members have questions to put to the witnesses that they have not had a chance to orally submit, if all are in agreement with that.

Mr. CONYERS. Mr. Chairman, could we ask for a 2-week response on the questions that might be sent to any of the witnesses?

Mr. COBLE. Two-week response, without objection, 2-week response will be in order.

I will start a second round now.

Mr. Harrington, we have gone here, there and yonder, and appropriately so. Let me put two questions to you that can maybe bring us back into the deep water away from the shoals and the rocks. What is a national security letter? When can it be used and who can use it, (A)? (B) Why is a national security letter preferred over other types of subpoenas or court orders? These are two rather simple questions.

Mr. HARRINGTON. I think Mr. Bryant's laid it out very nicely a little while ago, but the national security letters can only be used in a counterterrorism or an intelligence investigation, a spy type investigation. Those letters are directed toward three groups primarily for electronic communication response, financial records, and consumer reporting records. Those are the only three areas that it can be used in.

Why NSLs versus others? Our whole approach has changed since 9/11. The walls between criminal and intelligence investigations have basically been taken down, as the Congress has worked with us to do that. All of our investigations now in counterterrorism start off as an intelligence investigation. Criminal provisions are just one tool in our tool belt basically to attack the particular organization or terrorist group that we're trying to pursue. Certainly is it easier for the investigators to be able to go locally to their Special Agent in Charge, show that they have a pending investigation and that the NSL is warranted to obtain this information. It's an abbreviated process.

Mr. COBLE. Mr. Barr, I will give you a chance since you are on the, quote, other side of this issue. You want to respond to that?

Mr. BARR. Thank you very much, Mr. Chairman. I think it's important to recognize that the PATRIOT Act, in Section 505, dramatically weakened the—or dramatically strengthened the ability of the Government to secure information without that individualized suspicion, those specific and articulable facts that are so vitally important to ensure that the fourth amendment's mandate is kept in mind. That's why the Government is relying more and more on national security letters as opposed to judicial subpoenas or grand jury subpoenas, one, because they're so easy to get, and especially with a gag order there's no check whatsoever on what the Government is doing. And all they have to do, contrary to the traditional fourth amendment standard which requires that specific

link for the Government to show between the information and the individual against whom the information is being sought, it removes that. That's why we ought to tread so very carefully in seeking to or granting the Government the power to expand that. They already gained a tremendous expansion of power already under the PATRIOT Act section 505.

Mr. COBLE. I thank you.

The gentleman from Virginia. The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman. Now that I am feeling much better and have digested Mr. Bryant's comments earlier, let us continue on.

Mr. Bryant, how long have you served on the Judiciary Committee before your ascension to the Department of Justice?

Mr. BRYANT. It would have been for a period of approximately 6 years.

Mr. CONYERS. Six years. Okay. Now, has there, to your knowledge, been any oversight of the PATRIOT Act?

Mr. BRYANT. Extensive, sir.

Mr. CONYERS. Oh? Well, would you enlighten us? Did the Judiciary Committee conduct it?

Mr. BRYANT. I think both the House and the Senate Judiciary Committees have had the Attorney General testify before them since the passage of the PATRIOT Act——

Mr. CONYERS. That is not the same thing.

Let me ask the Chairman of the Subcommittee. Have we conducted any oversight, sir, of the PATRIOT Act, to your knowledge?

Mr. COBLE. I think we have, Mr. Conyers. There was——

Mr. CONYERS. Well, when?

Mr. COBLE. June the 5th of 2003, May the 20th of 2003. That was the Subcommittee on the Constitution. Witnesses for—those 2 days come to mind, John.

Mr. CONYERS. We will clear this up. Let me get to the point. I notice that nobody, none of the witnesses, or at least my favorite witnesses, have used the term "libraries" or "bookstores." You prefer the euphemism "communications providers." And I think I know why you do that. But here's the problem that we're having. We do not feel that there is any necessity to go beyond where we are now. You mentioned 179 convictions, Mr. Bryant, right? and what were those convictions for?

Mr. BRYANT. A variety of terrorism-related offenses including material support for terrorism.

Mr. CONYERS. Oh, yeah? Well, would it be offensive to the secrecy of the Department of Justice that the nature of those convictions be revealed to the Subcommittee that has jurisdiction over this subject?

Mr. BRYANT. They're a matter of public record. We'd be pleased to pull it together and make sure the Subcommittee has it.

Mr. CONYERS. Right. But what about all the ones—weren't there more people convicted for petty offenses and minor immigration violations and other things than there were for terrorist offenses, if there were any terrorist offense convictions?

Mr. BRYANT. Respectfully, Mr. Conyers, I think that's a false dichotomy. Immigration law is an essential tool in our effort against terrorism.

Mr. CONYERS. I see. So Immigration procedures of any kind that result in convictions like not having a green card could be terrorist related, right?

Mr. BRYANT. It could be if the individual was involved in terrorism.

Mr. CONYERS. Which is why we took the Immigration and Naturalization Service and put it in Homeland Security, right?

Mr. BRYANT. I don't follow the question, sir.

Mr. CONYERS. Well, it was pretty simple, a sentence with a subject and a verb and—I mean what's the problem with what I asked you? What don't you understand?

Mr. BRYANT. The agency historically known as the INS is now part of the Department of Homeland Security.

Mr. CONYERS. Yes. You understand that. Isn't it true?

Mr. BRYANT. That's correct.

Mr. CONYERS. Well, then what was so hard about that? Now, how many people have received letters since September 11, 2001, national security letters have been issued?

Mr. BRYANT. I'm unaware of the number, Mr. Conyers.

Mr. CONYERS. What about Mr. Harrington? You are the one that issues them.

Mr. HARRINGTON. Yes, sir, and we do report to Congress routinely as far as——

Mr. CONYERS. Yeah. How many?

Mr. HARRINGTON. I believe that number's classified, sir.

Mr. CONYERS. Classified?

Mr. HARRINGTON. Just as the number of FISAs are classified, yes.

Ms. WATERS. Put him under oath.

Mr. CONYERS. Well, he's already under oath. I mean when you testify you're under oath here.

Ms. WATERS. Make him raise his hand.

Mr. CONYERS. No, that's all right.

You can't tell us because that's classified. Well, let me ask you, when you hold a trial on terrorism, is that information classified too?

Mr. HARRINGTON. No, sir.

Mr. CONYERS. Has anybody over there been thinking about classifying the trials where this kind of information is routinely sought and answered under oath in public, just like you are?

Mr. COBLE. Mr. Conyers, if you will spend just a bit—Mr. Bryant, if you will answer that, and then there is a vote on, so we need to—if you want to respond to that, Mr. Bryant.

Mr. CONYERS. What do you know about that, Mr. Harrington?

Mr. COBLE. Oh, Mr. Harrington.

Mr. HARRINGTON. Yes, sir. There's—of course in a trial it's open to the public and it is a public record.

Mr. CONYERS. In other words, this Committee would have to go into a secret hearing to get the answer to my question from you.

Mr. HARRINGTON. I believe so.

Mr. CONYERS. Would you provide it then?

Mr. HARRINGTON. Yes, sir.

Mr. CONYERS. All right. Mr. Chairman, I would like to seek immediately, next week, a hearing in which I could get a civil response to this question.

Mr. COBLE. Well, I cannot give you assurance on that right now, John. I will talk to you after we adjourn here.

Mr. CONYERS. All right.

Ms. JACKSON LEE. Will the gentleman yield for one moment, please?

Mr. CONYERS. Yes.

Ms. JACKSON LEE. Mr. Chairman, I would like for you to give the gentleman another opportunity to answer Mr. Conyers. He said that the pure number was classified information. Is he sure about that? Does he want to leave this Committee with that as a fact?

Mr. HARRINGTON. I believe I am correct, that this is a classified number, and that we would be happy to make it available to Congress——

Mr. CONYERS. Okay, Mr. Harrington. Are there any numbers we can ask you about, the letters being sent that you could tell us about? I mean like if I ask you how many people work over there in your department, is that a classified number?

Mr. HARRINGTON. Yes, it is.

Mr. CONYERS. It is?

Mr. HARRINGTON. Yes, sir.

Mr. CONYERS. If I ask you who the head of the department was, would that be classified?

Mr. HARRINGTON. No, it would not.

Mr. CONYERS. Well, we are making progress.

Mr. COBLE. The gentleman's time has expired. I hate to cut you off, John, but we have to go vote.

I thank the witnesses for your testimony. The Subcommittee very much appreciates your contribution.

This concludes the legislative hearing on H.R. 3179, the Anti——

Ms. JACKSON LEE. Mr. Chairman, I have something to put in the record.

Mr. COBLE. Let me finish, and then I will recognize you.

The record will remain open for 2 weeks.

The gentleman from Virginia.

Mr. SCOTT. Two letters.

Mr. COBLE. For the record, without objection.

The lady from Texas?

Ms. JACKSON LEE. Yes, I have, I would like to submit an article in USA Today, dated May 17, 2004, "The Ordeal of Chaplain Yee." I'd like to submit that into the record.

Mr. COBLE. Without objection.

The Subcommittee stands adjourned, and thank you again, gentlemen, for your appearance.

[Whereupon, at 11:35 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

LETTER CLARIFYING HEARING RESPONSES FROM THE HONORABLE DANIEL J. BRYANT

U.S. Department of Justice

Office of Legal Policy

Office of the Assistant Attorney General

Washington, D.C. 20530

June 15, 2004

The Honorable Howard Coble
Chairman
Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Thank you for the opportunity to testify at the Subcommittee on Crime, Terrorism, and Homeland Security's May 18, 2004 hearing on H.R. 3179, the Anti-Terrorism Intelligence Tools Improvement Act of 2003. The Department of Justice appreciates your leadership in holding a hearing on this important piece of legislation.

I would like to clarify for the record two of my responses to questions posed at the hearing by members of the Subcommittee. These answers relate to questions about section 5 of H.R. 3179, which would amend the Classified Information Procedures Act (CIPA) to allow prosecutors to make a request ex parte and in camera to delete specified items of classified information from documents or to utilize the other alternatives set forth in section 4 of CIPA for protecting classified information during the discovery process. This section would also allow prosecutors to make such a request orally as well as in writing.

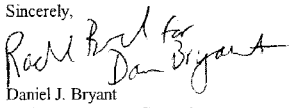
At the hearing, Representative Scott asked whether there would be a record or transcript to review if a request for a CIPA authorization were to be made orally, and I responded that I was "unaware that there would be a record to review" and then confirmed Congressman Scott's statement that "[t]here wouldn't be a transcript." To clarify the record, however, it is important to note that the Department requests as a matter of general practice that a court reporter be present to transcribe the proceeding when prosecutors make an oral request for a CIPA authorization ex parte and in camera, and that the Department does not anticipate changing this practice in the event that H.R. 3179 is enacted into law. Furthermore, the last sentence of section 4 of CIPA states, "If the court enters an order granting relief following such an ex parte showing, the entire text of the statement of the United States shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal," and this requirement would be unaltered by H.R. 3179.

Congressman Scott also asked whether, if H.R. 3179 were to be enacted into law, a defendant would know if prosecutors filed a request for a CIPA authorization ex parte and in

camera. In response, I indicated that while a defendant "might have reason to know" that such a proceeding had occurred, he wouldn't necessarily know of such a proceeding. To supplement the record, I would like to add that while the Department is under no legal obligation to notify a defendant when it requests an authorization from the court under CIPA, prosecutors often do provide defendants with notice that they are invoking CIPA on an ex parte basis. In other cases, however, prosecutors do not provide notice when it is determined that such notification might threaten national security. Moreover, it is important to recognize that even absent such notice from prosecutors, defense counsel would often be able to figure out that prosecutors have successfully made a request for a CIPA authorization ex parte and in camera when they are given redacted documents, summaries of information contained in classified documents are substituted for the documents themselves, or a statement admitting relevant facts that classified information would tend to prove is substituted for the information itself. In addition, the court will typically enter a one-line order on the public record indicating that it has granted or denied a request submitted by the Department pursuant to section 4 of CIPA, providing the defendant with an additional source of notification.

I hope that this information will assist the Subcommittee in its consideration of H.R. 3179, and I look forward to working with you and other members of the Subcommittee on this important bill.

Sincerely,



Daniel J. Bryant
Assistant Attorney General

cc: The Honorable Robert C. Scott

LETTER FROM LAURA W. MURPHY

WASHINGTON LEGISLATIVE OFFICE
Laura W. Murphy
Director

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Friday, May 14, 2004

Howard Coble, Chairman
Robert C. Scott, Ranking Member
Subcommittee on Crime, Terrorism and Homeland Security
House Judiciary Committee
Cannon House Office Building, Room 207
Washington, DC 20515

Re: ACLU's views on H.R. 3179, expanding USA PATRIOT Act surveillance powers (revised)

Dear Reps. Coble and Scott:

On behalf of the American Civil Liberties Union's nearly 400,000 members, we write to explain our opposition to H.R. 3179, the "Anti-Terrorism Intelligence Tools Improvement Act of 2003."

While we welcome Chairman Sensenbrenner's decision to delay consideration of this bill until legislative hearings can be held in the Crime, Terrorism and Homeland Security Subcommittee, we remain concerned that without substantial modifications, H.R. 3179 could have a serious impact on the civil liberties and privacy rights of ordinary people.

H.R. 3179 enhances the government's secret power to obtain personal records without judicial review, limits judicial discretion over the use of secret evidence in criminal cases, eliminates important foreign intelligence wiretapping safeguards, and allows the use of secret intelligence wiretaps in immigration cases without notice or an opportunity to suppress illegally-acquired evidence.

If passed without substantial modifications, the bill would be a major and unwarranted expansion of the government's secret surveillance powers under the USA PATRIOT Act and would have a detrimental impact on the ability of the federal courts to oversee government powers. H.R. 3179:

- **Provides substantial criminal penalties for secret "national security letters" that allow the FBI to obtain personal records without any judicial oversight.** Under current law, the FBI's has the power secretly to obtain, without any judicial review and without any individual suspicion, a long and

growing list of highly personal records by issuing "national security letters." The records that can be obtained include the customer records of (1) "financial institutions" - which has now been broadened to include a myriad of businesses including travel agents, casinos, and pawnbroker shops, (2) "communications service providers" - which the government says includes libraries and bookstores with public Internet terminals, and (3) credit reports. As a result of section 505 of the USA PATRIOT Act, the FBI need not assert any suspicion that the records belong to a terrorist, spy or other foreign agent - merely that they are wanted for an investigation. Gag provisions prohibit the recipient of such a letter in all cases from informing anyone of the government's demands. H.R. 3179 would give the FBI the explicit authority to prosecute criminally any business or person that receives such a letter and violates the secrecy provision, and would give the FBI the power to obtain a court order to require production of such records or face penalties for contempt. For example, if a bookstore owner complained at a local Chamber of Commerce meeting about a broad FBI national security letter demand for the names of persons using Internet terminals with Arabic last names, or if a travel agency told a local reporter of a national security letter demand for information about all clients traveling to Canada as part of a crackdown on travel to Cuba, the bill would impose criminal penalties, including a prison sentence, for doing so.

- **Limits judicial discretion over use of secret evidence in criminal cases.** The Classified Information Procedures Act (CIPA) gives federal judges the option, in criminal cases, of permitting the government to substitute a summary of classified information rather than disclose that information in open court. The use of such a summary is an extraordinary exception to the Constitution's demand that the accused be allowed to confront the prosecution's evidence in a criminal case. H.R. 3179 would tie the judge's hands by requiring the judge to consider a judge's request for a summary of evidence *in camera* and *ex parte*, that is in secret and without the benefit of hearing from the other side. Consider the example of a case involving an exporter of video games, accused of violating regulations regarding the export of "dual use" technologies, in which the government wishes to use classified information. Under current law, the judge would have the discretion whether to hear a government request to use the classified information secretly based on the circumstances of the case. Under the bill, however, the judge would have no choice but to hear the government's request in secret.

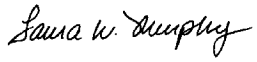
- **Allows secret foreign intelligence wiretaps of persons who have no connection to a foreign government or terrorist group.** The Foreign Intelligence Surveillance Act (FISA) allows secret government surveillance (including physical searches or wiretaps) where criminal "probable cause" standards cannot be met but there is probable cause that a target is acting on behalf of a foreign power. By eliminating this foreign power requirement, this so-called "lone wolf" provision would violate the Fourth Amendment and allow secret wiretaps of non-U.S. persons outside criminal "probable cause"

standards and without the government having to show they are connected to a foreign government or terrorist group. While some have argued the "lone wolf" provision is needed to respond to the government's failure to obtain a FISA warrant in the case of Zacarias Moussaoui, Congress's own joint 9-11 inquiry specifically rejected that conclusion, finding that government agents "misunderstood the legal standard for obtaining an order under FISA." The Joint Inquiry recommended greater training of FBI and other government lawyers to ensure proper understanding of existing legal authorities, not an amendment to FISA. The "foreign power" standard is integral to FISA's constitutionality and forms the basis for the rationale given by the Foreign Intelligence Surveillance Court of Review in its opinion upholding FISA surveillance against a constitutional challenge.

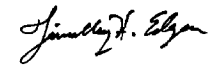
- **Allowing the use of secret FISA-derived evidence in immigration (and possibly other) cases without notice or an opportunity to suppress illegally-acquired evidence.** FISA contains important procedural safeguards for the use of secret intelligence surveillance information acquired by the FBI. These include the requirement that the government must give notice before using such information in court (50 U.S.C. §§ 1806(c), 1825(d), 1845(c)), that allows the person against whom evidence is to be used to file a motion to suppress on the basis that the evidence was acquired illegally (50 U.S.C. §§ 1806(e), 1825(f), 1845(e)), and that requires an in camera, ex parte review of the surveillance application and other materials by a federal judge where requested by the Attorney General to safeguard classified information (50 U.S.C. §§ 1806(f), 1825(g), 1845(f)). The bill would exempt civil immigration proceedings (and possibly other civil proceedings) from these important judicial safeguards. In so doing, the bill would allow secret use of secret information - which the government says may legally be withheld from the accused in immigration cases. This would be a step towards greater use of secret information in immigration cases, and a major setback for the efforts of members of Congress to reform the use of such information through legislation such as the Secret Evidence Repeal Act.

Six weeks after September 11, 2001, the Congress passed the complex and highly controversial USA PATRIOT Act without holding any public hearings at which organizations from across the political spectrum could explain their concerns about the Act. Many members of Congress, noting public anxiety about the erosion of basic civil liberties, have urged searching review and oversight of the law.

Instead of engaging in such oversight, the House Judiciary Committee is pressing forward with expanding the USA PATRIOT Act. While we welcome the decision to hold a legislative hearing on H.R. 3179, we still urge you to defer consideration of H.R. 3179 until the House judiciary and intelligence committees have undertaken comprehensive oversight of existing USA PATRIOT Act powers.



Sincerely,



Laura W. Murphy
Director, ACLU Washington National Office

Timothy H. Edgar
Legislative Counsel

cc: Members of the House Judiciary Committee
Members of the House Permanent Select Committee on Intelligence

LETTER FROM THE AMERICAN CIVIL LIBERTIES UNION (ACLU), ET AL.

The Honorable F. James Sensenbrenner
2449 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Sensenbrenner:

We, the undersigned organizations, commend you for your diligent oversight of the USA PATRIOT Act and for your caution in approaching further expansions of government surveillance powers. In that regard, we are writing to express our concerns with H.R. 3179, the "Anti-Terrorism Intelligence Tools Improvement Act of 2003," and to urge you, before any mark-up, to hold a legislative hearing to examine the bill's impact on privacy and other civil liberties.

While H.R. 3179 may appear narrow, we are concerned that it will impinge on civil liberties in that it enhances the government's power to secretly obtain personal records without judicial review under National Security Letters, limits the ability of judges to deal appropriately with classified information in criminal cases, eliminates important safeguards by allowing the Foreign Intelligence Surveillance Act (FISA) to be used against individuals acting alone, and allows the use of secret intelligence wiretaps and searches in immigration cases without even informing the targets that they were the subject of wiretaps or searches so that they can seek to suppress illegally-acquired evidence. Such changes merit a hearing, so that Members can fully evaluate their implications and their relationship with the Committee's ongoing efforts to conduct full oversight and review of the USA PATRIOT Act.

We are also concerned with incremental amendments that expand FISA and USA PATRIOT Act authorities without addressing accountability and oversight issues. For example, there may be a need for reporting requirements on the use of National Security Letters.

Therefore, we respectfully urge you to defer consideration of H.R. 3179 until the Committee has held a hearing on the proposals in the bill and had an opportunity to consider the bill in light of the need for accountability and oversight of FISA and National Security Letter authorities.

Sincerely,

American Civil Liberties Union
American Conservative Union
American Library Association
Free Congress Foundation
Center for Democracy and Technology
Center for American Progress
The Rutherford Institute

Center for National Security Studies
Electronic Frontier Foundation
Electronic Privacy Information Center
National Asian Pacific American Legal Consortium
People for the American Way

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

SHEILA JACKSON LEE
18TH DISTRICT, TEXAS

COMMITTEES
SELECT COMMITTEE ON HOMELAND SECURITY
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SUBCOMMITTEE
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MEMBER
DEMOCRATIC CAUCUS POLICY AND STEERING COMMITTEE
1ST VICE CHAIR
CONGRESSIONAL BLACK CAUCUS

Congress of the United States
House of Representatives
Washington, DC 20515

WASHINGTON OFFICE
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WASHINGTON, DC 20515
(202) 225-3816

DISTRICT OFFICE
1919 SMITH STREET, SUITE 1180
THE GEORGE "MICKEY" LELAND FEDERAL BUILDING
HOUSTON, TX 77002
(713) 655-0050

ACRES HOME OFFICE
6719 WEST MONTGOMERY, SUITE 204
HOUSTON, TX 77019
(713) 691-4882

HEIGHTS OFFICE
420 WEST 19TH STREET
HOUSTON, TX 77008
(713) 861-4070

CONGRESSWOMAN SHEILA JACKSON LEE

COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON CRIME, TERRORISM, & HOMELAND SECURITY

LEGISLATIVE HEARING ON

H.R. 3179, THE ANTI-TERRORISM INTELLIGENCE TOOLS IMPROVEMENT ACT OF 2003

10:00 A.M., 2141 RAYBURN

MAY 18, 2004

Chairman Coble and Ranking Member Scott, I appreciate the work that you have done to hold this

legislative hearing for purpose of considering H.R. 3179, the Anti-Terrorism Intelligence Tools Improvement Act of 2003. Even more impressive is the fact that while this bill had been listed on the items to be marked up by the Full Committee last week, it had been pulled off in order to give us an opportunity to make it better and hopefully more bi-partisan. Any legislation that derives from the law enforcement-expanding PATRIOT Act deserves full Committee and Subcommittee attention to ensure compliance and comportment with the U.S. Constitution with respect to individual rights, civil liberties, and fundamental freedoms.

For example, relative to the issuance of national security letters (NSL's) relative to individuals to investigate financial information, once an NSL has been issued to

search an individual's financial records, the company is prevented by law from notifying the person being investigated. The purpose of this expansion of law enforcement, when it was passed into law, purportedly was to give law enforcement agents more flexibility and expediency. Nevertheless, we must keep in mind the affect that this legislation had on the need to balance civil liberties in that the Federal Rules of Evidence (FRE) and the First, Fourth, and Fifth Amendments to the U.S. Constitution are curtailed or at minimum conditioned without judicial review.

Section 2 of the instant legislation creates a criminal penalty for the violation of the disclosure provision that bars the target of a NSL from "disclos[ing] to any person that the Federal Bureau of Investigation has sought or

obtained access to a customer's or entity's ... records." The target guilty of such disclosure could be imprisoned for a year for any disclosure, whether intentional or not, and for five years if it is found to be "with the intent to obstruct an investigation or judicial proceeding."

This provision is very troublesome. First of all, the issuance of the NSL, as a threshold matter, is based only on the FBI's initiation of an investigation. It would not be a difficult task for an agent to provide an investigatory nexus for *any* NSL request. Notwithstanding the overwhelming due process concerns that can be raised with respect to the person whose records are investigated, the target of the NSL can be prosecuted for something substantially *less than* an inchoate crime *alleged* against a third or fourth party! Therefore, the due process implications are that

much more severe relative to the target of the NSL in Section 2. This provision will require serious analysis for potential amendment prior to markup.

Furthermore, Section 5 of the proposed legislation that would amend the Classified Information Procedures Act (CIPA) raises significant procedural and evidentiary concerns. In connection with a criminal case involving a violation of the provisions of this Act, Section 5 limits a presiding judge's discretion during the discovery process. First of all, the government prosecutors would have the automatic and absolute right to make its request for redaction or exclusion of any amount of a summary of sensitive information used as evidence against the defendant ex parte and out of the presence of defense counsel. Secondly, the provision would give the

government prosecutors the right to make its request orally and not in written form. Clearly, a law that would give the government prosecutor the absolute right to limit evidentiary matter has an effect on the creation of a record for appeal and thus the defendant's right to an appeal. Given the sensitive nature of the crimes involved within this Act and, more importantly, the fact that we as a government and lawmaking body are *still working on a good and reliable definition of "terrorist offense,"* court records are very important and provide the sole source of protection for a potential defendant. This provision, put simply, strips the defendant of her right to a complete and fair appeal by means of unfairly limiting the creation of a court record. In addition, the discretion of the judge presiding over this kind of matter should not be limited in favor of the government prosecutor.

This legislation carries serious due process, civil liberties, evidentiary, and logistic problems.

LETTER FROM THE HONORABLE BOB BARR, INCLUDING THE CASE OF MAR-JAC POULTRY, INC.

BOB BARR
Member of Congress, 1995 – 2003

June 16, 2004

The Honorable Howard Coble
U.S. House of Representatives
Committee on the Judiciary
Chairman, Subcommittee on Crime, Terrorism, and Homeland Security
207 Cannon House Office Building
Washington, DC 20515

IN RE: Mar-Jac Poultry v. United States

Dear Chairman Coble:

It was an honor and a pleasure appearing before your Subcommittee. In compliance with your letter dated June 3, 2004, the case to which I referred in my testimony is In the Matter of the Search of Mar-Jac Poultry, Inc., pending in the United States District Court for the Northern District of Georgia, as case number 2:03-M.-12. The essence of the problem to which I referred in my testimony, regarding abuse of the nationwide subpoena power contained in the USA PATRIOT Act, is best noted in pages 21 through 25 of the Memorandum from the above-cited case, which is copied and attached hereto.

As I noted during my testimony, I strongly urge the Subcommittee to hold further, extensive hearings on the matters contained in H.R. 3179, and on related pieces of legislation seeking to expand powers the government already possesses under the USA PATRIOT Act and other laws. I do not believe the Justice Department has come close to justifying the need for these additional powers; which themselves raise very troubling constitutional questions.

255 East Paces Ferry Road, Suite 350 • Atlanta, Georgia 30305 • 770/836-1776 • 877/465-6080 • Fax 678/904-5600

The Honorable Howard Coble
June 16, 2004
Page 2

However, if the Subcommittee moves forward with the legislation, I would respectfully urge the full Committee hold additional hearings before considering whether to mark-up the bill.

With warmest regards, I remain,

very truly yours,

BOB BARR
Member of Congress, 1995-2003

BB:jc

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

FILED IN CLERK'S OFFICE
U.S.D.C. Gainesville
NOV - 6 2003
LUTHER D. THOMAS, Clerk
By: Deputy Clerk

In the Matter of The
Search of Mar-Jac Poultry, Inc.
Gainesville, Georgia

Misc. No. 2:03-m-12

MEMORANDUM AND POINTS OF AUTHORITY IN SUPPORT OF MAR-JAC POULTRY, INC.'S, MOTION FOR RETURN OF PROPERTY

COMES NOW, Mar-Jac Poultry, Inc., by and through its counsel, and files this Memorandum and Points of Authority in Support of its Motion for Return of Property and shows this Court as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

On March 20, 2002 United States government agents identifying themselves as agents of the United States Customs Service ("USCS") (k/n/a Bureau of Immigration and Customs Enforcement) ("ICE") and Internal Revenue Service ("IRS") unexpectedly entered at approximately 11:00 a.m. the administration offices of Mar-Jac Poultry, Inc. ("Mar-Jac") located at 1020 Aviation Boulevard, Gainesville, Georgia. On entering and identifying themselves they announced that they were present to execute a federal search warrant. Thereafter, over the next 13 hours Mar-Jac was subjected to a federal search and seizure of its property. The

agents left at Mar-Jac a copy of the warrant. (Exh. A) The agents seized hundreds of items, books, records and files. (Exh. B)[1]

Mar-Jac, a Georgia corporation, is a poultry processing plant employing in excess of 1200 people. At peak capacity Mar-Jac can process approximately 20,000 chickens per hour. As may be noted from the search warrant (Exh. A) its unusual and distinguishing features are (1) it was issued by a United States magistrate judge sitting in the Eastern District of Virginia, Alexandria Division; and (2) it authorized agents to search Mar-Jac for evidence allegedly proving Mar-Jac and/or others provided material support for terrorist organizations and engaged in money laundering.

Recently, although for months it had successfully litigated against the media in support of the maintenance of the sealing order of the search warrant affidavit, the Government on October 14, 2003 filed a pleading in support of a renewed unsealing effort for the private litigants (hereinafter "Kane Affidavit"). (Exh. C) Therein, the Government stated:

> As we have stated before, we understand the law to be that this Court is required to determine whether sealing of the affidavits is still "essential to preserve higher values and is narrowly tailored to serve that interest." *Baltimore Sun v. Goetz*, 886 F.2d at 60, 65-66 (4th Cir. 1989). In essence, for the duration of the time

[1] Originally, the search warrant affidavit submitted in support of the Government's request to search Mar-Jac was sealed by the magistrate judge.

> that the affidavits are sealed, the Court is required continually to balance the values furthered by sealing (including the protection of ongoing criminal investigations) against the values furthered by unsealing (including the enhancement of the public's ability to evaluate the performance of the investigators).
>
> Earlier this year, we moved the Court to balance these values anew because one of the factors that was considered by the Court in its balancing of these values last year has changed. In response, this Court ordered the unsealing of certain of the information previously sealed. In light of the motion of Dow Jones and the new facts brought to the Court's attention, the Court is required to again balance the competing interests for and against unsealing.
>
> At this time, unsealing the entire Kane Affidavit will harm the ongoing investigation in this case. Nevertheless, most of it can be unsealed without hampering the investigation. Whether disclosure of these significant portions would violate a due process right of individuals named in those portions of the Kane Affidavit is an issue best left to be litigated by the parties involved. That being said, it appears to us that, where the targets of an investigation are using the law as a sword against other private litigants who accuse them of involvement with terrorist financing, they should not be able to prevent the unsealing of evidence connecting them to terrorist financing on the grounds that to do so would violate some due process right. Accordingly, except for limited reservations, we support the motion of Dow Jones.

In light of the Government's joinder in the substantial unsealing of the Kane Affidavit, the magistrate judge unsealed it. (Exh. D filed under separate cover and incorporated herein.)

The litigation referred to by the Government (Exh. C) includes that of *Mar-Jac Poultry, Inc. v. Rita Katz, et al.*, C.A. No.: 2:03-CV-0092 (WCO) (N.D. Ga., Gainesville Division), a defamation, negligence and product disparagement case brought by Mar-Jac against Rita Katz, CBS and others for alleged defamatory statements broadcast by CBS on May 4, 2003 in its *60 Minutes* program. Therein, Mar-Jac was prominently identified by Ms. Katz and CBS as a Georgia poultry plant laundering money to support the terrorist organizations al Qaeda, Hamas and Islamic Jihad.

Rita Katz, identified in the *60 Minutes* broadcast as the "Terrorist Hunter", has also claimed through her book (also depicted in the *60 Minutes* program) to have aided and abetted ICE agent David Kane in procuring the search warrant executed against Mar-Jac. *See*, Lake Declaration originally filed in the defamation case and attached as Exh. E hereto. Agent Kane likewise identified in his affidavit speaking with a confidential informant ("CI") believed to be Rita Katz. *See*, Exh. D, ¶117. Thus, Mar-Jac asserts that the Government intentionally caused the Kane Affidavit to be unsealed to assist Rita Katz, a CI, in her litigation against Mar-Jac, among others. Having now placed in the public domain the allegations contained in the Kane Affidavit, the Government should now be required to defend its conduct in obtaining a search warrant and executing same against Mar-Jac's premises.

II. ARGUMENT AND CITATION OF AUTHORITIES

A. This Court Has Jurisdiction

"... [F]ederal district courts have the power to order the suppression or return of unlawfully seized property even though no indictment has been returned and thus no criminal prosecution is yet in existence." Hunsucker v. Phinney, 497 F.2d 29, 32 (5th Cir. 1974) (citing cases). Accordingly, this Court may exercise jurisdiction in this matter under either Rule 41 of the Federal Rules of Criminal Procedure and/or under the general equitable principles of the federal courts. Id. at 33; accord Richey v. Smith, 515 F.2d 1239, 1244 (5th Cir. 1975) (holding that district court had "anomalous" jurisdiction over motion for return of property by plaintiffs, whose business records were seized by the IRS, despite the fact that no criminal proceedings had been initiated against plaintiffs).

Rule 41(g) provides, in pertinent part, that:

> A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. (emphasis added)

Fed. R. Crim. P. 41(g). The suit is treated as a suit in equity. Id. at 1245 (citing Hunsucker, *supra*, 497 F.2d at 33). The property taken from Mar-Jac by the Government (Exh. B) was taken from its offices located in the Gainesville Division of the Northern District of Georgia. Pursuant to Rule 41(g) Mar-Jac must initiate this action in the Northern District of Georgia.

Mar-Jac clearly has standing to bring this motion for the return of its property. "[A] plaintiff in a civil action for the return of property has a sufficient proprietary interest in copies of documents which have been seized to demand their return as well as the return of the originals." Richey, *supra*, 515 F.2d at 1243 (citing Hunsucker, *supra*, 497 F.2d at 35; Goodman v. United States, 369 F.2d 166, 168 (9th Cir. 1966)). The items seized by the Government (Exh. B) constitute property of Mar-Jac. Mar-Jac has standing in this matter.

In determining whether to exercise jurisdiction, a court must consider whether, in seizing the property, the government displayed "... 'a callous disregard for the constitutional rights of the taxpayer.'" Richey, *supra*, 515 F.2d at 1243. Another factor is "...when the legality of the seizure is to be adjudicated." Hunsucker, *supra*, 497 F.2d at 35. The alleged facts within the Kane Affidavit purportedly supporting probable cause to search Mar-Jac are wholly insufficient as a matter of law. The search of Mar-Jac by the Government was unlawful and unconstitutional.

The Government in it's response (Exh. C) indicated that the substantial unsealing of the Kane Affidavit was appropriate to enhance "...the public's ability to evaluate the performance of the investigators." In this matter the unsealing of the Kane Affidavit was done by the Government to impermissibly assist Rita Katz and CBS in defending themselves against private litigants (Mar-Jac). Ms. Katz is

the very person who claims to have caused the Government to search Mar-Jac's premises (Exh. E); a search which Mar-Jac now claims was unconstitutional. Having invited scrutiny of its search warrant affidavit and by implication its judgment in seeking search warrants based on the Kane Affidavit the Government should not be heard to avoid litigating the merits of its search of Mar-Jac.

The search was in clear violation of Mar-Jac's right to be secure from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution. U.S. Const. Amend. IV because the Kane Affidavit is entirely devoid of any probable cause that any evidence of criminality would be found on Mar-Jac's premises. Specifically, the Kane Affidavit states no facts to support a finding of probable cause to search Mar-Jac's offices for evidence of money laundering much less knowingly providing material support to terrorist organizations, the only alleged wrongful acts in which Mar-Jac is possibly implicated in the Kane Affidavit.[2] This Court has jurisdiction to adjudicate the unlawful search and seizure conducted by the Government against Mar-Jac.

---

[2] The Kane Affidavit also alleges various facts in support of claims that certain individuals committed various tax offenses. The gravamen of these claims as detailed in the Kane Affidavit involves alleged failures to identify on IRS Forms 990's filed on behalf of charities certain "relationships" or alleged failure to file accurate personal IRS Form 1040's. But, there are no allegations of any tax improprieties regarding Mar-Jac's tax returns.

B. Federal Agents Unlawfully Seized Mar-Jac's Property

(a) No Probable Cause to Search Mar-Jac

i) Background

S/A Kane alleged that since December 2001 he, together with other agents of ICE, IRS and FBI "have been investigating a group of individuals that are suspected of providing material support to terrorists, money laundering, and tax evasion through the use of a variety of related for-profit companies and ostensible charitable entities under their control, most of which are located at 555 Grove Street, Herndon, Virginia." (Exh. D., ¶3) S/A Kane refers throughout his affidavit to "the web of companies and charities controlled by these individuals as the "*Safa Group*" (sic)." Id. Mar-Jac is subsequently identified as "a *Safa Group* company controlled by the individuals that are the subject of this investigation." (Exh. D, ¶6(d))[3] S/A Kane stated that "[t]he Administration Building at *Mar-Jac Poultry* (sic) contains the business's financial records." Id.[4]

[3] While claiming that individuals under investigation "controlled" Mar-Jac, S/A Kane limited his conclusory assertion by stating that only Dr. Omar Ashraf, Dr. Jamal Barzinji, Dr. M. Yaqub Mirza and Dr. Hishan Al-Talib were associated with Mar-Jac. (Exh. D., ¶95) Members of Mar-Jac's Board of Directors at all times relevant hereto in addition to the above men, were Douglas E. Carnes, Mahmoud Mohamed and J. Pete Martin.

[4] Special Agent Kane clearly identified the Administration Offices of Mar-Jac to be located at 1020 Aviation Boulevard, Gainesville, Georgia. (Exh. D., ¶¶6(d), 245.)

Nowhere in S/A Kane's affidavit does he allege that any activities of Mar-Jac, business or otherwise, were conducted from 555 Grove Street, Herndon, Virginia. At all times S/A Kane stated Mar-Jac was located and operated from 1020 Aviation Boulevard, Gainesville, Georgia. [Mar-Jac's Board of Directors met and conducted business in Gainesville.]

The question thus presented to the reviewing magistrate judge was what facts did S/A Kane allege to permit a finding of probable cause that "business records" of Mar-Jac located at 1020 Aviation Boulevard, Gainesville, Georgia would evidence "material support to terrorists, money laundering and tax evasion." The short answer is there were none.

In determining whether probable cause exists for a search, the issuing magistrate must make:

> ... [A] practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that... evidence of a crime will be found in a particular place.

Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317 (1983). "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; *his action cannot be a mere ratification of the bare conclusions of others.*" Id. at 239 (emphasis supplied).

Hearsay information from an informant satisfies the veracity prong of the probable cause determination where "... 'corroboration through other sources of information reduced the chances of a reckless or prevaricating tale,' thus providing 'a substantial basis for crediting the hearsay.'" Gates, *supra*, 462 U.S. at 244 (quoting Jones v. United States, 362 U.S. 257, 269, 271, 80 S.Ct. 725 (1960)).

A description of the property to be seized is "... acceptable if it is as specific as the circumstances and nature of the activity under investigation permit." United States v. Moody, 977 F.2d 1425, 1432 (11th Cir. 1992). There is no evidence in S/A Kane's Affidavit establishing probable cause that the items identified in the search warrant were likely to be found at Mar-Jac. Indeed, there is absolutely NO EVIDENCE in the body of S/A Kane's Affidavit referring to Al-Qaida, Usama Bin Laden or any terrorist allegedly responsible for the horrific events of September 11, 2001. Yet, into the search warrant those names were placed. (Exh. A., Attachment 13(c)) This unlawful act appears to have provided a basis for plaintiffs in the New York and Washington 9/11 cases to sue Mar-Jac.

S/A Kane early in his Affidavit candidly admitted his and the Government's abject lack of knowledge as to use of monies "controlled" by the so-called *Safa Group*:

> The FBI, USCS, and IRS agents involved in this investigation at various times since 1998 suspect that, as a result of the 1995 searches in Tampa, the *Safa Group* engaged in the money laundering tactic of "layering" to

> hide from law enforcement authorities the trail of its support for terrorists. There appears to be no innocent explanation for the use of layers and layers of transactions between *Safa Group* companies and charities *other than* to throw law enforcement authorities off the trail; this inference is strengthened by the *Safa Group*'s repeated failure to disclose on tax forms as required the connections between various members of the *Safa Group*. Accordingly, I and the other agents involved in this investigation believe that some of the moneys that move overseas are destined to the *PIJ* and other terrorist organizations; at the least, the money is being used for other than tax-exempt purposes in violation of the tax laws. (emphasis added) (Exh. D., ¶11)

It must be emphasized that S/A Kane professed a "belief" ("I believe that some of the monies that move overseas are destined to the *PIJ* and other terrorist organizations...). (Exh. D., ¶11)

Three primary observations are made regarding this assertion. First, belief is not knowledge. S/A Kane doubted that the *Safa Group* was funding terrorist organizations because he waffled, saying "...at least the money is being used for other than tax-exempt purposes." Second, the clear focus of the Government investigation, contrary to traditional money laundering investigations (18 U.S.C. §§ 1956(a)(1), 1957), was not the source of money, but its ultimate destination ("I...believe that some of the monies that move overseas...".) Third, the only monies at issue were monies "that move overseas," as contrasted to domestic transfers of monies. There was no allegations that Mar-Jac was used by the so-

called *Safa Group* to transfer monies overseas. There was no money identified as coming from Mar-Jac which was suspicious in nature or origin.

(ii) Nexus Element

"The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." Zurcher v. Stanford Daily, 436 U.S. 547, 556, 98 S.Ct. 1970 (1978).

> It is true that the nexus between the objects to be seized and the premises searched can be established from the particular circumstances involved and need not rest on direct observation. [Cit.]. It is equally true that a search will be upheld if "the facts described in the affidavits warrant a reasonable person to believe that the objects sought would be found." [Cit.]. Nevertheless, there still must be a "substantial basis" to conclude that the instrumentalities of the crime will be discovered on the searched premises. [Cits.].

United States v. Lockett, 674 F.2d 843, 846 (11th Cir. 1982).

In Lockett, *supra*, at 845, an explosive device consisting of dynamite was found at a South Central Bell Telephone ("SCB") building in Washington County, Alabama. An agent for ATF executed an affidavit to search the defendant's residence in Marengo County, Alabama. Id. at 844. The agent stated in the affidavit that Lockett had been fired from SCB and had filed several legal actions against SCB. Id. at 845. Lockett allegedly had several conversation with SCB's attorneys in which he made implied threats, mentioning explosives. Id. The affiant

further stated that Lockett had purchased one case of dynamite from an explosives dealer. Id. Finally, the agent stated that he had observed Lockett's residence from the road and had seen "... no structures which would indicate proper storage facilities on the premises for storing high explosives." Id. The affiant provided a handwritten statement to the effect that he believed that dynamite could be found on the premises. Id. The Court reversed Lockett's conviction, holding that the warrant was improperly issued and the fruits of the search should have been suppressed:

> The affidavit here discloses no facts from which the magistrate could reasonably infer that dynamite was located on the Marengo County property. The fact that Lockett may have placed a bomb next to a building some 60 miles from [the property] is not enough.[Fn.]. Without some showing that dynamite was being stored at [the property], the evidence is insufficient to support a finding of probable cause.

Id. at 846 & 47.

In United States v. Rios, 881 F.Supp. 772, 773 & 75 (D.Conn. 1995), an FBI S/A submitted a sixty-nine page affidavit in support of a search warrant to search defendant's residence. While the affidavit contained factual support for the conclusion that Rios was involved in the criminal activities of the "Latin Kings" drug cartel, the district court observed that the only allegations in the agent's affidavit which suggested that evidence of alleged criminal activity might be found in Rois' home were contained in the agent's general averments, based on her

training and experience, that "... large scale drug traffickers tend to keep records, receipts, documents, contraband, paraphernalia associated with drug trafficking, large amounts of cash, weapons, and ammunition in a secure place to which they have ready access, such as their homes or businesses." Id. at 774-75. The court concluded that:

> Considering the affidavit as a whole and based on the totality of the circumstances, [cit.]... [the agent's] general averments based on her training and experience do not, standing alone, constitute a "substantial basis" for the issuance of this search warrant... [and] that the search warrant for Rios's residence lacked probable cause.

Id. at 775-76 (citing Gates, *supra*, 462 U.S. at 238 & 39); see also United States v. Lalor, 996 F.2d 1578, 1582 (4th Cir. 1993) (finding that search warrant was invalid for lack of probable cause to search where "[t]he affidavit does not describe circumstances that indicate such evidence was likely to be stored at [the defendant's] residence); Greenstreet v. County of San Bernardino, 41 F.3d 1306, 1309 (9th Cir. 1994) (holding that mere fact that a member of a drug ring was surveilled visiting the plaintiff's residence was insufficient to establish probable cause to support a warrant to search the plaintiff's residence); United States v. Gomez, 652 F.Supp. 461, 462-63 (E.D.N.Y. 1987) (fact that the drug records found in the possession of a defendant referred to a second defendant did not furnish probable cause to believe that drug records or evidence of criminal activity would be found in second defendant's apartment).

(a) Allegations Against Mar-Jac

The Kane Affidavit by S/A Kane's own admission is long "[b]ecause the factual context of this case is so complicated, and the legal context may be one with which the Court is relatively unfamiliar." (Exh. D., ¶5) In order to assist this Court, attached hereto as Exh. F is a redacted version of the Kane Affidavit highlighting those paragraphs of S/A Kane's affidavit identifying references to Mar-Jac Poultry, Inc., together with certain "conclusory paragraphs" to put the Mar-Jac references in context. As may be readily determined, the Kane Affidavit is devoid of any facts establishing a nexus between any so-called money laundering, knowing promotion of terrorist organizations, and the business records of Mar-Jac located at 1020 Aviation Boulevard, Gainesville, Georgia. Id.

Referring to Exh. F, the specific paragraphs of the Kane Affidavit which explicitly mention Mar-Jac are 6(d), 6(f), 6(g), 88, 95 (chart), 115, 116, 121, 122, 128, 151, 162, 164, 245, 250, 251 and 261. Of these, only paragraphs 115, 116, 121, 122 128, 151, 161 and 164 relate in any manner whatsoever to a "financial transaction", as defined by 18 U.S.C. § 1956(c)(4). Of those eight paragraphs there is absolutely no allegation that any proceeds (monies) or wealth purportedly from Mar-Jac constituted specified unlawful activity (SUA) as defined In 18 U.S.C. § 1956(c)(7). This is not surprising as S/A Kane stated:

> Funds involved in traditional money laundering transactions usually are the proceeds of some prior-in-

> time, specified unlawful activity, as defined by 18 U.S.C. 1956(c)(7). With the exception of the funds generated by traditional crimes for profit, funds used or intended to be used to finance particular acts of terrorism or to be sent to a designated foreign terrorist organization generally will not be related to a prior-in-time, specified unlawful activity. Rather, such funds will acquire their criminal "taint" from their involvement in a transaction intended to assist in or promote an act of terrorism or to fund a designated foreign terrorist organization. As a result, the money laundering charge that is most applicable to financiers of terrorism is 18 U.S.C. § 1956(a)(2)(A), which prohibits the international transfer of money to promote a "specified unlawful activity." (Exh. D., ¶16)

This assertion epitomizes the Government's "reverse" money laundering theory of criminality, i.e., lawful proceeds used to finance illicit activities. The problem however with this approach is that there is no evidence in the Kane Affidavit of any monies from Mar-Jac being used to promote any SUA; much less any allegation that Mar-Jac monies were transferred "overseas" to promote terrorism.

(b) Smoke and Mirrors

S/A Kane as reflected in ¶¶ 103, 104 and 109 indicated that a complete accounting had been conducted. "This investigation *has* (sic) followed the complex trail and determined, as stated above, that of the funds whose recipients can be identified, virtually the only monies disbursed by the *Safa Charities* are monies disbursed *either* to the *Safa Charities*, or transferred to the name of offshore entities in tax havens." (Exh. D., ¶103) S/A Kane admitted he could not identify the disposition of monies transferred to the Isle of Man. (The movement

of funds into entities in the Isle of Man, a known tax haven, makes it difficult to verify whether these funds were used for terrorist financing or some other non-exempt purpose.") (Exh. D., ¶110) The monies referenced are all identified as being from one or more alleged *Safa Charities*, not Mar-Jac.

S/A Kane speculated, "I suspect that monies ultimately are transferred directly to terrorist organizations from the *Safa Group* entities on the Isle of Man, or that funds are otherwise expended for purposes which do not further the *Safa Charities* exempt purposes." (Exh. D., ¶125) It must be noted that once again S/A Kane expressed his doubts that he had any knowledge that any monies allegedly controlled by the so called *Safa Group* were used to fund terrorists ("I suspect ...or that funds are otherwise expended for purposes which do not further the *Safa Charities* exempt purposes.") Id. Rank speculation does not constitute a "substantial basis" to issue a warrant to search for evidence of terrorism financing; it does not establish probable cause that monies were so used.[5]

In Boim v. Quaranic Literacy Inst. And Holy Land Foundation for Relief and Development, 291 F.3d 1000 (7th Cir. 2002) parents of a victim, a U.S. citizen killed in Israel, sued an alleged "front" organization who purportedly engaged in fund raising for Hamas which claimed responsibility for the victim's death. The Seventh Circuit in affirming the lower court's denial of the defendant's motion to

[5] There is absolutely no evidence that any monies from Mar-Jac were ever transferred to the Isle of Man!

dismiss noted that Congress in intending through §§ 2339A and 2339B to impose criminal liability for funding violent terrorism, also intended to impose civil liability for funding terrorism under § 2333. Id. at 1015. The Court found that liability under § 2333 may be imposed "...on those who knowingly and intentionally supply the funds to the person who commit the violent acts." Id. at 1021. In order to show that a defendant aided and abetted an act of terrorism pursuant to § 2333, 2339A and 2339B a plaintiff is required to "prove that the defendant knew of [the terrorist organization's] illegal activities, that they desired to help those activities succeed, and they engaged in some act of helping the illegal activities." Id. at 1028. There no evidence in the Kane Affidavit even remotely proving any of these requirements.

Notwithstanding his suspicious and abject lack of knowledge as to the use of monies, S/A Kane boldly asserted:

> All of these financial activities listed above are indicative of money laundering. The layering and pass through activities that occur are designed to disguise the origin and ultimate destination of the moneys. I suspect that moneys ultimately are transferred directly to terrorist organizations from the *Safa Group* entities on the Isle of Man, or that funds are otherwise expended for purposes which do not further the *Safa Charities*' exempt purpose(s). Due to bank secrecy laws in such tax havens, it is very difficult for investigators to have access to bank account information. I expect evidence related to these money laundering, terrorist support activities and tax fraud to be found at the subject addresses of this affidavit. (emphasis added) (Exh. D., ¶125)

It is utterly preposterous for S/A Kane to claim the so-called "layering and pass through activities are designed to disguise the origin and ultimate destination of the moneys." There was a complete paper trail. One which S/A Kane was able to follow. One that he easily traced to the Isle of Man. In no way is there any allegation that these monies were proceeds of SUA. Here again S/A Kane stated "I suspect that moneys..." or "I expect evidence related to these money laundering, terrorist support activities and tax fraud to be found at the subject addresses of this affidavit." Expectations are not knowledge; expectations do not constitute a "substantial basis" to issue a search warrant; and because expectations are inherent in any investigation for anything, the use of such language negates the Fourth Amendment.

(c) No Evidence For Mar-Jac Records

There is no evidence alleged in the Kane Affidavit providing a nexus between any alleged money laundering, terrorist financing and business records of Mar-Jac. S/A Kane yet again admitted that he did not know whether the so-called *Safa Group* provided money to terrorists. ("...even if the *Safa Group* is not sending money to HAMAS (sic) and PIJ...") (Exh. D., ¶201) Nonetheless, S/A Kane claimed:

> In my experience, and as shown in this affidavit, providing support to terrorists through layered transactions, and/or tax evasion accomplished through

> misuse of charitable status, results in the production and maintenance of records. Records relating to the acquisition and disposition of the money transferred to overseas money laundering havens, as well as to terrorists, are produced and likely to be maintained in residential and business locations used by the conspirators of these crimes. Accordingly, records relating to transfers of money to, from, and between companies and charities in the *Safa Group* are likely to be maintained in the business and residential locations used by the individuals controlling the *Safa Group*.

S/A Kane continued to make conclusory assertions in paragraph 214, ending with the statement "[a]ccordingly, regardless of whether the individuals connected with the *Safa Group* engaged in material support to terrorists or merely tax evasion, there is probable cause that they maintain records relevant to the offenses described in this affidavit in their business premises or in their homes." S/A Kane was absolutely wrong. There is no probable cause that Mar-Jac business records have any nexus to determining whether or not monies sent to the Isle of Man were ultimately used to knowingly fund any terrorist organization.[6]

Yes, Mar-Jac was and is an ongoing business. Yes, Mar-Jac maintains and keeps records at 1020 Aviation Boulevard, Gainesville, Georgia. But not one allegation in the Kane Affidavit supports probable cause that any Mar-Jac financial transactions were involved in money laundering. There is absolutely no, I repeat NO, evidence of any financial transaction of Mar-Jac involving proceeds of any

[6] The very bank accounts reviewed by S/A Kane regarding transfers of monies to the Isle of Man were not Mar-Jac's. (Exh. D., ¶239)

SUA. There is absolutely no, I repeat NO, evidence of any financial transactions of Mar-Jac being used to knowingly provide support to any terrorist organization.

The focus of the Kane Affidavit was on activities allegedly conducted from 555 Grove Street, Herndon, Virginia. Mar-Jac did not conduct business from that location. Mar-Jac was not the Government's focus, nor were any of the activities conducted at 1020 Aviation Boulevard, Gainesville, Georgia their focus. There is no allegation in the Kane Affidavit that any officer of Mar-Jac conducted any Mar-Jac business transaction from its offices in Gainesville that in any manner is relevant to international transfers of money to the Middle East. There is no allegation in the Kane Affidavit that any alleged conspirator "used" Mar-Jac to commit any crime. There is no nexus proven, or even one which may be inferred, between the non-money laundering, non-terrorist financing alleged activities of the *Safa Group* and the business records of Mar-Jac. There was no probable cause to search Mar-Jac and certainly no probable cause to seize any Mar-Jac records. The search of Mar-Jac was unconstitutional.

(b) <u>Virginia Judge Not Authorized to Issue Warrant</u>

The warrant authorizing Mar-Jac to be searched was unlawfully issued by a magistrate judge in the Eastern District of Virginia. Rule 41(b)(1) authorizes a search warrant to be issued by a magistrate judge of the district where the property is located. There is a new exception as a result of the USA PATRIOT ACT which

provides that a judge, outside the district where the property to be searched is located, may issue a search warrant if it relates to a domestic or international terrorism investigation as defined by 18 U.S.C. § 2331. In this case it appears that the Mar-Jac warrant was issued on such a basis. It should not have been.

S/A Kane's assertion that his investigation involved terrorism was predicated on his attempts to link the Sami al-Arian allegations with the so-called *Safa Group*. The lynchpin for such linkage was an alleged letter S/A Kane referred to found in a search of Al-Arian's business and/or residence. (Exh. D ¶¶67-70) The letter, allegedly written in 1991 pre-dates any enactment of 18 U.S.C. § 2339A and § 2339B, as well as any formal Presidential designation that Hamas and PIJ are terrorist organizations. The point is not that the letter is even relevant to the Government's claims, but that at the time it was purportedly written there were no laws S/A Kane now claims it evidences violating.

S/A Kane acknowledged that "[a] substantial portion of the terrorist funding comes from contributors, some of whom know the intended purpose of their contribution <u>and some of whom do not</u>... Their funds may be derived from <u>outwardly innocent contributors</u> to apparently legitimate humanitarian, social and political efforts..." (Exh. D., ¶15(d). What evidence proves that any member or entity of the so-called *Safa Group* had any knowledge that any monies paid to al-Arian would be used for any terrorist purpose? <u>Boim</u>, *supra*. What evidence is

asserted that any such money was so used? The answer is none. Just reading the passages referenced of the Al-Alwani letter provides the reader with an unclear, ambiguous understanding as to just exactly what was being said. These passages certainly do not provide one with an unambiguous knowledge that anyone in the so-called *Safa Group* knowingly supported terrorists. Boim, *supra*.

S/A Kane in that portion of his affidavit entitled "Conclusion Regarding Offenses Committed" stated, *inter alia*:

> e. After the search warrants were executed in 1995, the members of the *Safa Group* continued to idealogically support HAMAS and PIJ but generally did not provide overt financial support to those organizations.
>
> f. After the search warrants were executed in 1995, the members of the *Safa Group* stopped providing open support to HAMAS and PIJ. Instead, they concentrated on routing financial support to those same organizations by layering financial transactions through charities and businesses within the *Safa Group* to conceal and disguise the fact that they were continuing to send money from the United States to the Middle East to fund international terrorism, in violation of 18 U.S.C. § 1956(a)(2), 18 U.S.C. § 2339A, and 18 U.S.C. § 2339B. (emphasis added) (Exh. D., ¶200)

Nowhere in S/A Kane's affidavit is there any evidence supporting the assertion "after...1995, the members of the *Safa Group* continued to idealogically support HAMAS and PIJ...". As detailed previously, *infra*, there is no evidence within the Affidavit that the so-called *Safa Group* "[r]out[ed] financial support to those same organizations by layering financial transactions through charities and businesses

within the *Safa Group* to conceal and disguise the fact that they were continuing to send money from the United States to the Middle East to fund terrorism." S/A Kane's conclusory assertions are wholly unsupported.

Furthermore, regardless of ones interpretation of the Al-Alwani letter, one cannot argue that it was allegedly written in November 1991, over ten years before the search warrants were sought. Also S/A Kane stated that "[a]fter the search warrants were executed in 1995...the *Safa Group*...did not provide overt financial support to [terrorists]." (Exh. D., ¶200(C)) It is "...a fundamental principal of search and seizure law that information furnished in an application for a search warrant must be timely, and that probable cause must be found to exist "at the time the warrant issues." United States v. Bascaro, 742 F.2d 1335, 1345 (11th Cir. 1984) ("it is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time"). A warrant based upon stale information is insufficient "... because it fails to create probable cause that similar or other improper conduct is continuing to occur." Id.

S/A Kane's failure to identify specific current facts from which the reviewing magistrate judge could independently conclude that S/A Kane's investigation was, in fact, one of domestic or international terrorism, as defined by 18 U.S.C. § 2331 rendered the issuance of the Mar-Jac warrant unlawful and invalid. Clearly, by referencing 18 U.S.C. § 2331, Congress required facts to be

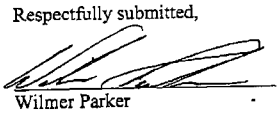
presented within the affidavit which a reviewing magistrate could find to comply with § 2331. S/A Kane did not meet this statutory test.

Furthermore, S/A Kane failed to allege any activities which relate to international terrorism "as having occurred within the Eastern District of Virginia" in order that the magistrate judge from that district could lawfully issue a warrant to be served in the Northern District of Georgia. There is no evidence alleged to have occurred within Virginia which proves an element found in 18 U.S.C. § 2331. The search of Mar-Jac based on a Virginia warrant was an unlawful search.

III. CONCLUSION

The search of Mar-Jac was both unconstitutional and unlawful. It is requested that this Court so find.

Respectfully submitted,



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PREPARED STATEMENT OF KATE MARTIN

This Statement is being submitted on behalf of the Center for National Security Studies, a a civil liberties organization, which for 30 years has worked to ensure that civil liberties and human rights are not eroded in the name of national security. The Center is guided by the conviction that our national security must and can be protected without undermining the fundamental rights of individuals guaranteed by the Bill of Rights. In our work on matters ranging from national security surveillance to intelligence oversight, we begin with the premise that both national security interests and civil liberties protections must be taken seriously and that by doing so, solutions to apparent conflicts can often be found without compromising either.

The Center has worked to protect the Fourth Amendment rights of Americans to be free of unreasonable searches and seizures, especially when conducted in the name of national security for more than twenty years. For example, the Center, then affiliated with the American Civil Liberties Union, was asked to testify before Congress when the Foreign Intelligence Surveillance Act was first enacted. In 1994, when Congress amended the Act to include physical searches, Kate Martin, Director of the Center was again asked to testify about the civil liberties and constitutional implications of the legislation. Since September 11, 2001, the Center has been actively involved in evaluating the many changes to these authorities.

SUMMARY.

This Committee is currently considering H.R. 3179, the Anti-Terrorism Intelligence Tools Improvement Act of 2003. The bill contains two amendments to the Foreign Intelligence Surveillance Act ("FISA") 50 U.S.C. §§ 1801–1863, which amendments raise the most serious civil liberties concerns in the bill and which will be the focus of this Statement. Both amendments are of dubious constitutionality and would be counter-productive in the fight against terrorism. Both amendments must be analyzed in light of the USA Patriot Act's substantial expansion of FISA authorities, in particular the Patriot Act's elimination of the requirement that secret FISA surveillance be limited to circumstances where the government's primary purpose is the gathering of foreign intelligence and not making a case against an individual. We commend this Committee for its commitment to vigorous oversight of the effect of those Patriot Act changes and urge that consideration of further expansions of FISA authority, such as are contained in HR 3179, await the Congress' examination of those sunsetted provisions of the Patriot Act next year.

A. LONE WOLF AMENDMENT (HR 3179 SEC. 4).

The first such amendment would authorize FISA surveillance against non-US persons with no showing that they are acting on behalf of a foreign terrorist organization or government. This amendment tracks the first section of the leaked draft of the Justice Department's Domestic Security Enhancement Act of 2003 (Patriot II), although that draft would extend the provision to citizens. The provision is unconstitutional and unnecessary. While this provision has been described as the "Moussaoui fix," that rationale has been discredited by the Joint Inquiry of the Intelligence Committees. Nor is the amendment needed to allow surveillance of "lone wolf terrorists." As FBI officials have admitted, the government already has all the authority it needs to conduct surveillance of the individuals described as "lone wolf" terrorists.

Eliminating the foreign power nexus will render FISA surveillance unconstitutional. The amendment is fundamentally inconsistent with the Constitution because it would authorize FISA surveillance against individuals with no showing that they are acting on behalf of a foreign terrorist organization or government. In doing so, the amendment would eliminate the constitutional requirement that the lesser standards and privacy protections authorized for FISA surveillance be limited to use against foreign powers and their agents.[1] *See In re Sealed Case No. 02–001,* slip op. at 42 (Foreign Intelligence Surveillance Ct. of Rev. Nov. 18, 2002). While FISA requires no showing of probable cause of crime, it is constitutional in part because it provides "another safeguard . . . that is, the requirement that there be probable

[1] "Such (FISA) surveillance would be limited to a 'foreign power' and 'an agent of a foreign power.'" Senate Report (Judiciary Committee) No. 95–604 (I and II), November 15, 22, 1977 [To accompany S. 1566], at 16.

cause to believe the target is acting 'for or on behalf of a foreign power.'"[2] Indeed, adoption of the amendment could undermine criminal prosecutions of terrorists because the information obtained from a FISA surveillance under these procedures may well be ruled inadmissible.

Not a "Moussaoui Fix" or otherwise necessary. This amendment has been described as necessary to provide a so-called "Moussaoui fix." Zacarias Moussaoui was detained three weeks prior to September 11 on suspicions of terrorist activity, but FBI field agents were rebuffed by headquarters in their efforts to obtain a FISA warrant to search his computer. Initially, the FBI claimed that they were not able to obtain a warrant because of the requirement to demonstrate a link to a foreign power. However, the Joint Inquiry of the Intelligence Committees concluded that the failure to seek a warrant to search Moussaoui's computer was the result of FBIHQ personnel misunderstanding the law.[3] Since the problems that the FBI experienced during the FISA application process resulted from "misunderstanding" the law, there is no need for a legislative "Moussaoiu fix." Current law does not require that an individual be connected to a recognized terrorist group, but only to at least one other individual engaged in planning terrorist activities in order to meet constitutional standards. Even if a legislative clarification of the "agent of a foreign power" requirement were deemed advisable, this amendment performs surgery with a butcher knife instead of a scalpel.

As pointed out by Senators Leahy, Grassley and Specter, the Justice Department has not provided a single case, even in classified form, where the absence of this provision resulted in the FBI being unable to conduct necessary surveillance. As those Members said, "In short, DOJ sought more power but was either unwilling or unable to provide an example as to why."[4]

Lone Wolf Terrorists Can Be Investigated With Existing Criminal Authority. Lone wolf terrorists are a problem that can be handled by the criminal justice system. If investigators possess reliable information that an individual is preparing to commit an act of terrorism, they have all the authority they need to get a criminal surveillance warrant. There is no need to use FISA. As Senator Rockefeller has pointed out:

> "If we know for certain a person really has no foreign connections, if he or she is a true 'lone wolf'—a foreign 'Unabomber,' for example—then it is a straightforward criminal investigation. There is no foreign intelligence to be gotten at all, and that person is not a valid target under FISA."[5]

Indeed, the FBI has admitted that that they do not need this change to get the warrants they need to protect against lone wolf attacks.[6]

This violation of Fourth Amendment standards could soon be made applicable to citizens. The Fourth Amendment's protections apply to searches and seizures in the U.S. and protect those who are voluntarily here without regard to their citizenship.[7] If the lesser standards for secret searches and surveillance embodied in this amendment were to be deemed constitutional by the Congress and the Executive, they would be deemed constitutional when applied to citizens. Indeed the Justice Department proposed applying the lone wolf amendment to citizens in the draft of Patriot II.

Treating "Lone Wolfs" as National Security Threats is Counter-Productive. Finally, encouraging the use of valuable and already scarce investigative resources under FISA to target individuals acting alone increases the risk not only of increased surveillance based on religious or political activities, but also that once again, the FBI

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[2] This holding was essential to the review court's holding that "FISA as amended is constitutional because the surveillances it authorizes are reasonable." *In re Sealed Case No. 02–001,* slip op. at 56. Even a court with the broadest view of the government's surveillance power has found the requirement that the government show probable cause that a target is acting for a foreign power to be constitutionally based.

[3] "However, personnel at FBI Headquarters . . . misunderstood the legal standard for obtaining an order under FISA." Final Report, Inquiry of the Joint Intelligence Committees, Finding 5f.

[4] Sens Leahy, Grassley and Specter, Interim Report on FBI Oversight in the 107th Congress by the Senate Judiciary Committee: FISA Implementation Failures, Feb. 2003 at 11 n. 4.

[5] Consideration of S. 113, United States Senate, May 8, 2003.

[6] "In private briefings, even FBI representatives have said that they do not need this change in the law in order to protect against terrorism. They are getting all the warrants they want under the current law." Senate Report 108–40, at 12, Additional views by Senators Leahy and Feingold. See also exchange between FBI Deputy General Counsel Bowman and Senator Graham, Hearing of Senate Select Intelligence Committee, July 31, 2002.

[7] See *Abel* v. *United States,* 362 U.S. 217 (1960), in which the Supreme Court applied the Fourth Amendment to the government's search of a KGB colonel, who came to the U.S. as a Soviet spy.

will miss those truly dangerous individuals, who because they act in concert with other terrorists are thereby capable of inflicting grave damage to our national security, rather than ordinary, even though murderous crimes.

Alternative amendment. In the Senate, Senators Feinstein and Rockefeller, introduced an amendment, that would, in our view, address the concerns that have been raised by the government, while leaving in place the agent of a foreign power requirement that is essential to the constitutionality of the statute. The Feinstein-Rockefeller substitute states that when considering an application for surveillance of a non-US person, "the court may presume that a non-United States person who is knowingly engaged in sabotage or international terrorism, or activities that are in preparation therefor, is an agent of a foreign power under section 101(b)(2)(C)." This language would preserve the requirement that the FISA only applies to agents of a foreign power and provide the court with some discretion regarding the designation of individual terrorists as agents of a foreign power.

B. SECTION 6: ALLOWING SECRET USE OF THE FRUITS OF SECRET SURVEILLANCE IN IMMIGRATION PROCEEDINGS.

The second amendment to FISA included in HR 3179 would allow the government to introduce in evidence or otherwise use the fruits of secret FISA surveillance in any immigration proceeding without telling the individual that he had been overheard or subjected to a secret search, in violation of basic due process requirements. The government already has this authority in cases of alleged "alien terrorists" per the 1996 Alien Terrorist Removal Proceedings provisions. This proposed amendment would extend those provisions—deemed constitutionally suspect by this Committee in the past—to all immigration proceedings against anyone including permanent residents and others lawfully here.

Section 6 would eliminate the current requirement in FISA that the government notify individuals whenever it intends to use evidence obtained through FISA in immigration proceedings. It would allow the government to use the fruits of secret electronic surveillance, physical searches or pen registers to deport individuals without ever informing them that they have been subject to such surveillance or searches, without allowing any opportunity to challenge the legality of the surveillance, and most importantly deprive individuals of the right to challenge the veracity and validity of the information through cross-examination. The government already has the authority to do all this in the case of individuals alleged to be alien terrorists, under the 1996 amendments establishing the Alien Terrorist Removal Proceedings. 8 U.S.C. sec. 1531–1537. HR 3179 would extend this authority, of dubious constitutionality even when applied against suspected terrorists, to any individual, including legal permanent residents, without even the minimal safeguards provided in the 1996 law.

In doing so, the amendment would violate fundamental due process rights. As the Judiciary Committee recognized in passing the Secret Evidence Repeal Act in 2000, the Supreme Court has ruled that "There are literally millions of aliens within the jurisdiction of the United States. The fifth amendment, as well as the 14th amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary or transitory is entitled to constitutional protection." *Matthews* v. *Diaz,* 426 U.S. 67, 77 (1976).[8]

It is important to note that current law already provides only minimal procedural protections whenever the government intends to "enter into evidence, or otherwise use or disclose" information obtained from FISA electronic surveillance or physical searches in any court proceeding against a person whose conversations were overheard or whose house or office was searched pursuant to FISA, 50 U.S.C. sec. 1806(c), 1825(d) and as noted above, these minimal protections are only available to individuals *not* alleged to be "alien terrorists." 8 U.S.C. sec. 1534(e).

Indeed, rather than further eroding existing minimal due process protections, especially in light of the Patriot Act's substantial expansion of FISA authorities to allow secret surveillance when the government's primary purpose is *not* foreign intelligence gathering, but making a case against an individual, Congress should consider how to bring the use of FISA information in line with basic due process requirements in all proceedings, both civil and criminal. One way to do this would be to insure that FISA information is treated like all other kinds of classified information and make the provisions of the Classified Information Procedures Act applica-

[8] See H.R.Rep. No. 106–981, Secret Evidence Repeal Act of 2000, 106th Cong., 2nd Sess. (Oct. 18, 2000).

ble to FISA information, instead of the much less protective provisions currently in FISA.

But, allowing the government to introduce in evidence or otherwise use the fruits of FISA surveillance in any immigration proceedings without telling the individual that he had been overheard on electronic surveillance or subjected to a secret search, as proposed in HR 3179 would be a fundamental violation of both the Fourth Amendment and constitutional due process requirements. FISA wiretaps and physical searches are at the core of the Fourth Amendment's protection against unreasonable searches and seizures and that protection applies to all persons found within the U.S.[9] The law has never permitted the government to conduct secret wiretaps or searches of individuals and then secretly use the fruits of such secret surveillance and searches against him without even informing him that he has been overheard or searched.

There is no need to exempt immigration proceedings from the current rules regarding the use of FISA information because those rules already protect against the disclosure of sensitive information, even in proceedings not involving alleged alien terrorists. Current FISA law requires the government to notify an individual that he has been targeted under FISA only when it seeks to use the information against him. The government is not required to disclose anything more than the existence of the FISA surveillance unless it either seeks to introduce FISA information into evidence or the information is required to be disclosed to the defendant under the Brady exculpatory evidence rule. Even then, of course, all the government provides to the defendant is a record of his own telephone conversations or a copy of his own papers. The government is not required to disclose and, it appears, has never disclosed the application for a FISA warrant to anyone. Indeed, information obtained under FISA is accorded much greater secrecy than any other kind of classified information is accorded under the Classified Information Procedures Act (or, in our view, than is consistent with constitutional due process requirements).

It is especially important that the existing minimal protections are available when the government seeks to use FISA information to deport an individual. There are many fewer due process protections available in immigration proceedings than in criminal proceedings, even though immigration proceedings may result in substantial deprivations of liberty. Given the relaxed hearsay and due process requirements already existing in immigration proceedings, this amendment would enable the government to use FISA information against an individual with no check as to whether the information was illegally obtained and, even more significantly, absolutely no check as to the accuracy or reliability of the information itself.

[9] See *Abel* v. *United States,* 362 U.S. 217 (1960), in which the Supreme Court applied the Fourth Amendment to the government's search of a KGB colonel, who came to the U.S. as a Soviet spy.

ARTICLE SUBMITTED BY THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

The Ordeal of Chaplain Yee
Date: Thursday, May 20 @ 10:00:00 EDT
Topic: Law

By Laurie Parker
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May 17, 2004

Last fall, he was the Muslim chaplain who had betrayed America.

Accused of espionage, Army Capt. **James Yee** saw his notoriety bloom overnight. He was vilified on the airwaves and on the Internet as an operative in a supposed spy ring that aimed to pass secrets to al-Qaeda from suspected terrorists held at Guantanamo Bay, Cuba, where Yee ministered to them. After his arrest, Yee was blindfolded, placed in manacles and taken to a Navy brig, where he spent 76 days in solitary confinement.

Eight months later, all the criminal charges against the 36-year-old West Point graduate have melted away. A subsequent reprimand has been removed from his record. And while many legal analysts are questioning whether a security-conscious military over-reached in its investigation, Yee is back home at Fort Lewis, Wash., pondering what remains of his military career.

Military officials involved in the case won't say what they thought they had on Yee, or why they pursued him with such zeal. Prosecutions are proceeding against three other men - two Arabic translators and an Army Reserve colonel - who worked at Guantanamo, where the military is holding nearly 600 suspected al-Qaeda and Taliban operatives captured in Afghanistan and elsewhere.

The decision to jail Yee was made by Maj. Gen. Geoffrey Miller, then commander of Guantanamo's detention camp. He oversaw the espionage investigations of all four men. He has since been transferred to Iraq, where he is now engulfed in the controversy involving prisoner abuse at Abu Ghraib.

When the Army dropped six criminal counts against Yee in March, military officials said

they did so to avoid making sensitive information public - not because he was innocent. An Army general stressed that again in April, when he took the unusual step of removing the case from Yee's permanent military record.

But a growing number of critics say the Yee case demands further examination. The critics, who include former military judges and prosecutors well-versed in military law, say the case offers a chilling glimpse into military anxiety at a time of heightened concern about terrorism.

"This is a case that's so obviously wrong that (even) people who don't know military law are, if not outraged, then very concerned about what happened," says Kevin Barry, a retired Coast Guard judge. "There apparently was no evidence. If they had the goods, they would have prosecuted."

Like Barry, many of the critics suggest that the case collapsed not because of national security concerns, but because the evidence against Yee, whatever it was, didn't hold up. They wonder whether the military's threshold for suspicion at Guantanamo was such that benign behavior too easily could have been mistaken as sinister.

No espionage charges

They say that the military compounded its errors by leaking to the media, before the Yee probe was complete, that the chaplain could face multiple death-penalty charges tied to espionage. Those charges never materialized. The six counts against Yee that were dropped later were significantly less serious and included mishandling classified materials, adultery, storing pornography on his Army laptop and lying to investigators.

"They let him languish in solitary confinement for 76 days. That's outrageous," says John Fugh, a retired Army judge advocate general. "When he saw his legal counsel, he was in leg irons. We don't treat commissioned officers that way. I don't care what he did."

Bob Barr, a Republican and former Georgia congressman, sees the Yee case as part of a disturbing trend in the handling of terrorism-related cases. He cites some cases brought by U.S. prosecutors against groups accused of laundering funds for terrorists. The cases got headlines but collapsed, Barr says.

"What we're seeing in Guantanamo, and perhaps in this case, is what happens when you've removed any judicial oversight over what the government is doing," says Barr, who has criticized the administration's policy of detaining some terrorism suspects indefinitely without charging them.

Two Democrats on the Senate Armed Services Committee, Edward Kennedy of Massachusetts and Carl Levin of Michigan, have asked the Pentagon to investigate the Army's treatment of Yee.

Gen. James Hill, chief of the U.S. Southern Command, which oversees military operations at Guantanamo, declined to be interviewed. In cleansing Yee's military record last month, Hill

called Yee's incarceration necessary, "given the circumstances at the time."

Col. William Costello, a Southern Command spokesman, added: "There's really nothing more that we're going to share on the case. We've dropped the charges. ... I'm not at liberty to talk about what the investigation entailed."

Yee, meanwhile, is under a new Army order not to talk about his ordeal in any way that might be seen as critical of the military. If he does, he could face further prosecution or discipline. He declined to be interviewed by USA TODAY.

Without an explanation from the military, the attorneys for Yee and the three others arrested in the Guantanamo espionage probe can only theorize about what might have triggered it. Was Yee too outspoken in his requests to superiors that the prisoners receive better treatment? Did authorities suspect a "Syrian connection" between Yee and a Syrian-born translator who worked for him? Did cultural misunderstandings raise suspicions about Muslims at the base?

"We know basically nothing about what got this all started," says Eugene Fidell, a lawyer in Washington, D.C., who worked with Yee's Army defense lawyers.

Yee arrived at Guantanamo on Nov. 5, 2002, and was assigned to minister to Muslim prisoners. He and Muslim workers used a vacant office for their own prayer sessions; sometimes they had a meal. The lawyers think the get-togethers might have raised suspicions.

Yee was arrested Sept. 10 at the start of a one-week leave. Customs agents at the Jacksonville (Fla.) Naval Air Station, tipped by an investigator at Guantanamo that Yee could be carrying classified materials, confiscated drawings and documents containing information about the prisoners and their interrogators. A Customs agent later testified at a preliminary hearing that the items were "of interest to national security."

Yee also had ties to Syria that apparently drew investigators' attention: His wife, Huda, is Syrian. He met her while studying Islam in Damascus in the late 1990s, as he prepared to become one of the Army's first Muslim chaplains. (Born in New Jersey and raised a Lutheran, he converted to Islam in 1991.)

Yee was baffled by his arrest, his attorneys say. But what came next was even more surprising. At a confinement hearing two days later, a Navy prosecutor argued that Yee was a flight risk and that he should be held in the maximum-security Navy brig in Charleston, S.C. Court papers said he would be charged with espionage, spying, aiding the enemy, mutiny or sedition, and disobeying an order. His attorneys were told that he could face execution.

On Sept. 16, Yee was driven to Charleston and was given the sensory-deprivation treatment the military had used on Guantanamo prisoners when they were flown to Cuba. He was blindfolded and placed in shackles, and his ears were covered to block his hearing. He spent the next 76 days in solitary confinement.

On Sept. 20, details of Yee's arrest appeared in a story in The Washington Times, which quoted unidentified government sources. A gush of publicity followed and took root on the Internet, where it flourishes today.

Yee was held in maximum security until Oct. 24. He wore hand and leg irons when he left his cell. Brig guards refused to recognize him as an officer and required him to identify himself as an E-1, the lowest enlisted rank. He wasn't allowed to send or receive mail, watch TV or read anything except the Koran. Only his attorneys could visit. After Oct. 25, he could make two 15-minute calls a day.

The case goes nowhere

Yee's defense team believes the case against him ran off the rails less than 48 hours after his arrest. At Yee's confinement hearing, they noted a disparity between the severity of the charges listed against Yee and the vague arguments the government made to justify his arrest. The prosecutor didn't have to tip his hand then, but the defense team found it unusual that so little evidence was presented.

"When you see a gulf between the shrill charges and this anthill of evidence ... you have to wonder," Fidell says.

Many military law specialists say they became increasingly skeptical about the quality of the government's case - especially after Oct. 10, when the criminal charges filed against Yee turned out not to be espionage and spying, but two lesser counts of mishandling classified materials. Yet Yee remained in solitary confinement.

On Nov. 24, Fidell wrote to President Bush, pleading for Yee's release. The next day, Yee was released - and was hit with four new charges. The new counts - adultery, lying to investigators and two counts of downloading porn - were another sign to many observers that the evidence didn't support the original allegations.

Fugh calls the added charges "Mickey Mouse stuff."

The crux of the case was the charges that Yee had mishandled classified information. But prosecutors did not show the defense any evidence that Yee had such materials. A hearing to determine whether he should be court-martialed was delayed over the issue.

"The government has never produced the evidence that it believes was classified, so I am somewhat at a loss," Fidell says. "We were playing Hamlet without Hamlet here."

When the hearing began Dec. 8 at Fort Benning, Ga., prosecutors led off not with their most serious charges, but with adultery. As Yee's parents, wife and 4-year-old daughter watched, Navy Lt. Karyn Wallace testified under immunity about her affair with Yee.

Under military rules, adultery rarely is prosecuted. It is a crime only if it is "prejudicial to good order and discipline," meaning that it has to be disruptive or be so widely known that it

damages the service. Yee's affair apparently had been secret. "It is arguable that there was no crime," Barry says.

On the second day of the hearing, prosecutors asked for a 41-day delay to examine the classified issues. The hearing never resumed. The criminal charges were dropped on March 19.

"This would have been a logical place to back off," says Gary Solis, a former Marine prosecutor and staff judge advocate who teaches military law at Georgetown University in Washington. But the military "kept going. They already had enough egg on their face to make an omelet or two. But no, they wanted to serve a table of 10."

On March 22, Yee was called to a non-criminal hearing where he received a reprimand on the adultery and pornography charges.

Yee appealed the reprimand. Appeals of disciplinary actions rarely are granted, but on April 14, Hill did just that. Hill said later, "While I believe that Chaplain Yee's misconduct was wrong, I do not believe, given the extreme notoriety of his case ... that further stigmatizing Chaplain Yee would serve a just and fair purpose."

Yee returned to his chaplain duties at Fort Lewis two weeks ago. His tour of duty expires next year. Fidell says Yee has made no decisions about his future.

This article comes from Asian American Empowerment: ModelMinority.com
http://modelminority.com

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SUBCOMMITTEE LETTER TO THOMAS J. HARRINGTON REQUESTING RESPONSES TO POST-HEARING QUESTIONS

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LINDA T. SANCHEZ, California

June 3, 2004

The Honorable Daniel J. Bryant
Assistant Attorney General
United States Department of Justice
Washington, DC 20528

Dear Mr. Bryant:

On behalf of the Committee on the Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security, I want to express our sincere appreciation for your participation in the May 18, 2004 hearing concerning H.R. 3179, the "Anti-Terrorism Intelligence Tools Improvement Act of 2003." Your testimony was informative and will assist us in future deliberations on the important issues addressed during the hearing. I am enclosing follow-up questions to which I would appreciate your responses.

Also, please find a **verbatim** transcript of the hearing enclosed for your review. The Committee's Rule III (e) pertaining to the printing of transcripts is as follows:

> *The transcripts...shall be published in **verbatim form**, with the material requested for the record...as appropriate. .... Any requests... to correct any errors, other than errors in the transcription, or disputed errors in the transcription, shall be appended to the record, and the appropriate place where the change is requested will be footnoted.*

Please send your response to the Subcommittee on Crime, Terrorism, and Homeland Security, Attn: Emily Newton, 207 Cannon House Office Building, Washington, DC 20515 and because of the uncertainty of mail delivery to the Capital, by telefax at (202) 225-3737 no later than *June 18, 2004.* If you have any further questions or concerns, please contact Emily Newton at (202) 225-2421.

Thank you again for your testimony and assistance in this regard.

Sincerely,

Howard Coble
Chairman
Subcommittee on Crime, Terrorism, and Homeland Security

Enclosure

HC/esn

SUBCOMMITTEE LETTER TO THOMAS J. HARRINGTON REQUESTING RESPONSES TO POST-HEARING QUESTIONS

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ANTHONY D. WEINER, New York
ADAM B. SCHIFF, California
LINDA T. SANCHEZ, California

June 3, 2004

Mr. Thomas J. Harrington
Deputy Assistant Director
Counterterrorism Division
Federal Bureau of Investigation
935 Pennsylvania Avenue, NW
Washington, DC 20535

Dear Mr. Harrington:

Thank you again for your participation in the May 18, 2004 legislative hearing, concerning H.R. 3179, the "Anti-Terrorism Intelligence Tools Improvement Act of 2003." The Honorable John Conyers, Jr. has requested your response to the following enclosed questions.

Please send your responses to the Subcommittee on Crime, Terrorism, and Homeland Security, Attn: Emily Newton, 207 Cannon House Office Building, Washington, DC 20515 and because of the uncertainty of mail delivery to the Capital, by telefax at (202) 225-3737 no later than *June 18, 2004.* If you have any further questions or concerns, please contact Emily Newton at (202) 225-2421.

Thank you again for your testimony and assistance in this regard.

Sincerely,

Howard Coble
Chairman
Subcommittee on Crime, Terrorism, and Homeland Security

Enclosure
HC/esn

POST-HEARING QUESTIONS[1] FOR THE HONORABLE DANIEL J. BRYANT FROM THE SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Post-hearing Questions for Dan Bryant, Department of Justice witness for the Subcommittee's hearing on H.R. 3179, "The Anti-Terrorism Intelligence Tools Improvement Act of 2003" (5/18/04).

1. How many times has the Department of Justice been asked by the Committee on the Judiciary or its subcommittees to testify in reference to the PATRIOT Act? Do you have a record of other interactions the Department has had with the Committee on the Judiciary and its subcommittees concerning the PATRIOT Act, for example, through briefings, letters, etc? If so, can you please make them available to our Subcommittee?

2. In an ACLU press release entitled, "House Judiciary Committee Considers Patriot Expansion Legislation: ACLU Strongly Objects to Unwarranted Increase in Spying Power," Laura W. Murphy, Director of the ACLU Washington Legislative Office, says that Congress needs to evaluate the balance between public safety and civil liberties "before further reducing judicial review of government wiretapping and taking other steps that reduce government accountability." In your view, does H.R. 3179 reduce the judicial review of government wiretapping and government accountability?

3. The ACLU states in reference to H.R. 3179, "The new proposal would increase the government's powers to secretly obtain personal records without judicial review, limit judicial discretion over the use of secret evidence in criminal cases, eliminate important foreign intelligence wiretapping safeguards and allow use of secret intelligence wiretaps in immigration cases without notice or an opportunity to suppress illegally acquired evidence." Do you agree with these assertions? Please respond to each of these allegations?

4. Mr. Barr claimed that H.R. 3179 is unneeded. Do you agree? If not, what specific needs does H.R. 3179 meet?

5. Mr. Barr stated that looking at the "'lone wolf' provision, we find that this would reach very, very broadly and affect the fundamental underpinnings of the entire FISA structure that has been built up?" How would you respond to this statement?

6. Is this the right time for H.R. 3179, or is it "premature" as Mr. Barr suggested?

7. Mr. Barr expressed concern that the "Department of Justice may well abuse its authority" and pointed, when asked for a specific example, to a D.C. or Northern Virginia case that extends down to Georgia. Do you know of any such cases that show the abuse of expanded authority? How would you respond to the fears that these abuses occur because the FISA warrant prevents disclosure?

8. **Mr. Barr stated, "Insofar as provisions of the PATRIOT Act and provisions of H.R. 3179 would prevent them [defendants] from knowing that there is evidence going to be used against them that has been gathered under FISA, as opposed to the standard applicable under the Fourth Amendment, yes, it would result in, could result in, a violation of their Fourth Amendment rights." Would you agree with this statement? How would the distinction between criminal investigations and foreign intelligence investigations affect Mr. Barr's assertions?**

9. Do you agree with Mr. Barr that the government should give up those powers under the PATRIOT Act that it has not exercised?

[1] Responses to these questions had not been received at the time of the printing of this hearing.

10. Do you believe that the "sneak and peak" provision should have a sunset?

11. **Mr. Barr stated that the true "lone wolf" does not exist because all terrorists have links to terrorist organizations. Would you agree with this statement?** Mr. Barr continues, "Under existing FISA standards, without removing the nexus to foreign power, the department of Justice can go after that person if they show as little as there is one other person with whom they are dealing as part of their conspiracy or their activities. This provision is simply unnecessary to break the important link between he President's national security power and the extraordinary power of gathering evidence outside the Fourth amendment." How would you respond to this statement?

12. Mr. Barr claimed that "there's no incentive whatsoever and no way to hold the Government to narrow its requests under the FISA provisions." How would you respond to this statement?

13. Is the government "relying more and more on National Security Letters as opposed to judicial subpoenas because they're so easy to get," as Mr. Barr asserts? Please provide the Subcommittee with the context of when a "judicial subpoena" may and may not be used in both a criminal investigation and in a foreign intelligence investigation, as well as when a National Security Letter may and may not be used.

POST-HEARING QUESTIONS[2] FOR THE HONORABLE DANIEL J. BRYANT FROM THE HONORABLE ROBERT C. SCOTT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Post-hearing Questions for the U.S. Department of Justice from The Honorable Bobby Scott.

1. I am concerned about the constitutionality of Section 4, the so-called 'lone wolf' provision. Would DOJ object to an alternative that creates a presumption that an individual planning a terrorist attack alone is an agent of a foreign power, particularly if that helped to ensure that FISA remains constitutional by retaining the requirement of a connection to a foreign power?

2. When the Senate passed the so-called 'lone wolf' bill, it included a provision imposing FISA reporting requirements. Would DOJ object to including similar reporting requirements in HR 3179?

3. The USA PATRIOT Act expanded the authorization for National Security Letters by removing the requirement of individualized suspicion. Broadly read, the provisions could authorize the FBI to issue NSL's for entire databases, rather than just the records of a particular individual. Is the FBI using NSLs to request and obtain entire databases?

4. Prior proposals have extended the so-called 'lone wolf' provision to cover both U.S. persons and non-U.S. persons. Although the provision in HR 3179 applies only to non-U.S. persons, I am concerned that if we pass this provision, the FBI and Justice Department will return to this Committee and ask that we extend it to U.S. persons. Is DOJ prepared to assure that it will not come back here and ask for that?

[2] Responses to these questions had not been received at the time of the printing of this hearing.

POST-HEARING QUESTIONS[3] FOR THE HONORABLE DANIEL J. BRYANT FROM THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

QUESTIONS SUBMITTED BY REP. JOHN CONYERS, JR.

Please answer the following questions for the record for the Crime, Terrorism, and Homeland Security Subcommittee hearing on H.R. 3179, the "Anti-Terrorism Intelligence Tools Improvement Act." If the response to a question is classified, please submit the response under separate, classified cover. Also, if extra time is required to collect the information needed to respond, please so inform the Committee and respond as soon as is practicable.

For Daniel J. Bryant (Assistant Attorney General, Office of Legal Policy)

1. Section 2 of H.R. 3179 would impose criminal penalties upon persons who receive National Security Letters, including librarians and bookstore owners, and violate the gag orders contained therein. You support this proposal on the grounds that making such information public could jeopardize on-going investigations.

   (a) Is it not true that your justification could be used as a rationale for closing all court proceedings, providing no evidence to defendants, and allowing no public disclosure of court proceedings?

   (b) Would the Department similarly support the imposition of criminal penalties against Department officials who violate judicial non-disclosure orders in terrorism cases? If not, why not? On December 16, 2003, Judge Gerald Rosen of the U.S. District Court for the Eastern District of Michigan ruled that the Attorney General had twice violated a judicial order prohibiting government and defense lawyers in the case of *United States v. Koubriti* from making public statements regarding the case.

   (c) In determining whether a person has violated the law by "knowingly" disclosing the receipt of an NSL, must the person know he is prohibited from disclosing or must he simply know he made the disclosure?

   (d) Would the Department support limiting penalties for disclosure of NSL's to only those situations in which it can establish that harm to the national security resulted from the disclosure? If not, why not?

2. With respect to section 4, the "lone wolf" provision, would the Department object to an alternative that creates a presumption that an individual planning a terrorist attack is an agent of a foreign power, particularly if that helped to ensure that FISA remains constitutional by retaining the requirement of a connection to a foreign power?

3. Please provide an example of a particular instance in which the Department was unable to obtain a surveillance order for a suspected terrorist because it could not establish that the target was a foreign power or an agent of a foreign power. If such cases exist, please explain for each such case why the Department was unable to obtain a title III surveillance order.

[3] Responses to these questions had not been received at the time of the printing of this hearing.

4. Prior proposals have extended the "lone wolf" provision to cover both U.S. persons and non-U.S. persons. Although section 4 of H.R. 3179 applies only to non-U.S. persons, I am concerned that if we pass this provision, the FBI and Justice Department will return to this Committee and ask that we extend it to U.S. persons. Can I get your commitment that the Department will not come back here and ask for that?

5. Section 5 of H.R. 3179 permits the Department to make *ex parte* requests of courts for authorization to withhold classified information from defendants.

   (a) Since September 11, 2001, where the Department has sought the ability to withhold classified information from defendants, in how many instances have the courts denied the government the ability to make such requests *ex parte*? For each such instance, what reason did the judge give for denying the request?

   (b) In how many such instances have the courts allowed the government to make such requests *ex parte*?

6. Section 5 of H.R. 3179 permits the Department to request orally that classified information be protected. Why is it necessary for the Department to request protection of classified information under Classified Information Procedures Act orally? Is it not true that a classified or redacted written request could be maintained in the case file so that there is a clear and complete record of what transpired?

7. Your testimony indicates that section 6 of H.R. 3179 would expand the exception that allows the government to withhold notice of FISA evidence in alien terrorist removal proceedings to all other immigration proceedings. The existing exception (8 U.S.C. § 1534(e)) specifically restricts notice and disclosure of FISA information "if disclosure would present a risk to the national security of the United States."

   (a) Since September 11, 2001, how many immigration proceedings have occurred where the government had information on an alien obtained via FISA (regardless of whether the evidence was used)?

   (b) In how many of such cases was there a national security nexus? Please provide detailed information regarding the national security nexus for each case.

   (c) In how many of such cases was there a terrorist activity nexus? Please provide detailed information regarding the terrorist activity nexus for each case.

   (d) Please answer the following question with a number or percentage. In how many of such cases was there no national security or terrorist activity nexus?

(e) Would the Department support an amendment that limits the exemption proposed in section 6 to those situations in which a judge determines that disclosure "would present a risk to the national security of the United States?" If not, why not?

(f) If section 6 were to be enacted, please explain how a person facing detention or removal could challenge the lawfulness of FISA surveillance used in support of that detention or removal.

8. With respect to the changes proposed by section 6 of H.R. 3179, please provide any specific examples where a defendant has jeopardized a case because he or she was allowed to petition the court to have access to FISA evidence. If such cases exist, please explain how they were resolved.

9. Your testimony indicates that if section 6 of this bill became law, the government would still be required to disclose information it plans to use at immigration proceedings to aliens if such disclosure is "otherwise required by law." Please list and explain all legal obligations that could require the disclosure of FISA evidence in immigration proceedings and what, if any, limitations exist on the Department's obligation to make such disclosures.

10. Your testimony says there are cases where the Department, in the interest of protecting on-going investigations, has decided not to use FISA evidence in immigration proceedings.

    (a) How many such proceedings have there been since September 11, 2001? How many persons were involved? Describe all such cases.

    (b) How many of such persons were found deportable on immigration charges?

    (c) On what grounds were they deported?

    (d) If any of such persons were deported, doesn't that mean that current law was sufficient and the FISA evidence was not necessary to deport the individual?

    (e) If there are cases where the person was not deported, were they released or are they in detention on immigration or other grounds?

    (f) Please provide detailed information on those cases where a deportation of a dangerous person was thwarted because FISA evidence was not used.

11. Please provide the names and the charges filed against the 310 individuals you referred to as "being charged with criminal offenses as a result of terrorism investigations." Please also provide the districts in which those charges are pending. Also please submit a copy of all indictments, plea agreements, and guilty verdicts for such persons.

12. Please provide detailed information regarding the 179 convictions you have obtained "as a result of terrorism investigations." Include the charge against each person, the disposition of each charge, the charge(s) for which each person was convicted, and the sentence imposed for each person for each charge.

13. At the May 18, 2004 hearing, in discussing whether National Security Letters violate the Fourth Amendment rights of a person whose information is sought, you stated: "Terrorists have no such Fourth Amendment right."

    (a) Is it not correct that, at the stage of an investigation when information about a person is sought through an NSL, that person has not yet been convicted of a terrorist offense?

    (b) Is it the Department's position that a person who is suspected or accused of a terrorist offense, but not convicted of one, has no Fourth Amendment rights?

14. At any time during the period between and including September 25, 2001, and October 12, 2001, did anyone in the Department ever indicate to any Member of Congress or their staff that revising the PATRIOT Act (as reported by the Judiciary Committee) before it was considered by the Rules Committee or the full House would "benefit the Republican Party politically" (or words to that effect)?

15. (a) Does the Department believe that an essential component of the war on terrorism is keeping weapons out of the hands of terrorists?

    (b) Is it not true that extending the assault weapons ban would help keep weapons out of the hands of terrorists?

    (c) Is it not true that the Department could better track terrorists if terrorists could be searched in NICS? Has the Department sought legislation from Congress to extend the assault weapons ban and clarify NICS? If not, why not?

For Thomas J. Harrington (Deputy Assistant Director, Counterterrorism Division, FBI)

16. Please answer the following questions with numbers. How many National Security Letters have been issued since September 11, 2001? How many were for terrorism investigations? How many were for intelligence activities?

17. What language is used to notify National Security Letter recipients that they may not disclose the fact that they received the NSL and that disclosure is a violation of federal law?

18. Since September 11, 2001, in how many instances have recipients of National Security Letters failed to comply with the gag order? In how many of those cases did you have evidence that the disclosure was committed with the intent to obstruct an investigation or judicial proceeding?

19. Please answer the following question with a number. Since September 11, 2001, in how many instances have recipients of National Security Letters failed to turn over the requested information?

20. Section 505 of the USA PATRIOT Act expanded the authorization for National Security Letters by removing the requirement of individualized suspicion.

    (a) Is the FBI using this or any other authority to issue NSL's that request entire databases? If so, please list the statutory authority used.

    (b) If so, what types of databases are being sought? Also, if any NSL's were used to obtain computer databases, please so indicate and give the size of each database in terms of computer memory used and number of records contained therein.