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REAUTHORIZATION OF THE USA PATRIOT ACT

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

JUNE 8, 2005

Serial No. 109–10

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://www.house.gov/judiciary

U.S. GOVERNMENT PRINTING OFFICE

21–654 PDF WASHINGTON : 2005

For sale by the Superintendent of Documents, U.S. Government Printing Office
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REAUTHORIZATION OF THE USA PATRIOT ACT

WEDNESDAY, JUNE 8, 2005

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10 a.m., in Room 2141, Rayburn House Office Building, the Honorable F. James Sensenbrenner, Jr. (Chairman of the Committee) presiding.

Chairman SENSENBRENNER. The Committee will be in order.

A quorum is present for the taking of testimony. Today marks the Committee's eleventh hearing in a series of oversight hearings on the reauthorization of the USA PATRIOT Act. We are pleased to have with us as our witness today the Deputy Attorney General, James Comey.

Mr. Comey, it is my understanding that you are leaving the Department of Justice, and I would like to thank you for your dedication and service to our country.

I would also like to thank Chairman Coble, Ranking Member Scott, and other Members of the Subcommittee on Crime, Terrorism, and Homeland Security, for holding nine of the 11 hearings on the PATRIOT Act. These hearings have been beneficial in informing Congress and the public about many aspects of the PATRIOT Act, and also demonstrate this Committee's continued commitment to taking our oversight responsibility seriously.

As this series of hearings has shown, the PATRIOT Act has been effective in bringing down the wall that prevented information sharing between the intelligence community and law enforcement. It has also updated the tools of law enforcement to match the technology used by the terrorists and criminals today.

In reviewing the authorities of this act, it is crucial to focus on the facts, and not on hypothetical scenarios. In a post-9/11 world, it would be irresponsible to refuse to provide our law enforcement authorities with vital anti-terrorism tools based solely on the possibility that somewhere at some time someone might abuse the law.

Unfortunately, all Government powers have the potential to be abused; which is why Congress provides penalties for such abuse. Additionally, Congress, the courts, and the executive branch have created several protections against abuse before, during, and after the enactment of the PATRIOT Act.

Rather than base the decision on whether to reauthorize the PATRIOT Act on scenarios on how it might be abused, I think it is more constructive to focus our review on how the PATRIOT Act has actually been used.

A real-life example on how the tools of the PATRIOT Act have been effectively used involves a recent case of two U.S. citizens, Tarik ibn Osman Shah and Rafiq Sabir, who were arrested and indicted on charges of providing material support to al-Qaeda. This investigation began in 2002, and over the course of 3 years the FBI used several provisions enhanced by the USA PATRIOT Act. So that everybody may see how the FBI used these tools, I am submitting for the record a copy of the indictment which was unsealed on May 31st.

[The material referred to is located in the Appendix.]

Chairman SENSENBRENNER. I am pleased that these hearings have also been effective in dispelling public misconceptions about the PATRIOT Act. For instance, the Attorney General informed us that section 215, dubbed "the library provision," has never been used to obtain business records from a library or bookstore.

However, the hearings have also demonstrated the danger of carving out safe harbors or exemptions that terrorists could exploit. As U.S. Attorney Wainstein testified, the 9/11 terrorists used computers in public libraries to check on their travel arrangements for the day of the attack.

These hearings also corrected the erroneous claim that probable cause was no longer necessary when law enforcement sought court approval for surveillance orders. Probable cause is needed in both a criminal case or an intelligence case. For a criminal case, there must be probable cause that a crime has been or is about to be committed; and for an intelligence case, there must be probable cause that the target of the surveillance is an agent of a foreign power. These probable cause standards existed before the PATRIOT Act, and remain unchanged.

The hearings also provided the Members and the Department of Justice the opportunity to discuss the adequacy of notice to suspected terrorists and criminals, the need for reporting to Congress, and the ability to challenge the intelligence authorities in court.

The hearing today will provide Members the opportunity to address any issues that remain open and allow the Deputy Attorney General to address any concerns that were raised during the previous hearings. With that, I recognize the Ranking Member, the gentleman from Michigan, Mr. Conyers, for his remarks.

Mr. CONYERS. Thank you, Chairman Sensenbrenner. I'm delighted to be here and welcome the Honorable James Comey, Deputy Attorney General for the Department of Justice. We have your prepared statement, and we look forward to a rigorous discussion during this hearing.

I'd also ask unanimous consent to put my statement in the record at this time, and I'll return any time that I have.

Chairman SENSENBRENNER. Without objection, the gentleman's statement will be placed in the record. Without objection, all Members' opening statements will be placed in the record at this point.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND RANKING MEMBER, COMMITTEE ON THE JUDICIARY

There are few issues that are more important to this Committee or this Congress than the Patriot Act and the war against terror. This not only affects the rights and

privacy of every American, but impacts the extent our nation is able to hold itself out as a beacon of liberty as we advocate for democracy around the world.

For many of us, this process of hearings is not merely about whether we should extend 16 expiring provisions of the USA Patriot Act; its about the manner in which our government uses its legal authorities to prosecute the war against terror, both domestically and abroad.

That is why I think its so critical that our Committee hold hearings on the practice of closed immigration proceedings; the sanctioning of torture and abuse; and the widespread use of racial profiling of Arab and Muslim Americans. To avoid issues of this nature is to avoid dealing with the concerns that go to the very heart of our constitutional values and principles in my judgment.

If the Majority is not willing to hold hearings on such issues, I believe fundamental fairness and comity dictate that those Members who have an interest in doing so be able to conduct their own forums, as has always been the case on this committee.

The importance of this issue is also why I believe that at the very least the Members are entitled to answers to their written questions before we markup any legislation. There is no reason in the world that the Department of Justice—the largest law firm in the world—can't take time to respond to our questions in a timely and useful manner.

In order to protect the rights of the Minority to a fair process, I am today submitting a letter seeking additional hearings. I of course remain open and hopeful that we can resolve these matter though the ordinary give and take of discussions with the Majority, as we have in the past.

As we move from the hearing process to legislation, there is no member of this Committee who is more interested in developing a bipartisan solution to the problem of terrorism in the 21st century than I am. Events in the Senate make it all the more imperative that we come to the table with a united front to this problem. We came very close to such an approach four years ago, and there is no reason we cannot craft a bill which protects our nation against terrorists, while preserving our fundamental values.

[The prepared statement of Ms. Waters follows:]

PREPARED STATEMENT OF THE HONORABLE MAXINE WATERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman, the USA Patriot Act has too many provisions that leave the government with too much discretion and power in their application. Furthermore, the Patriot Act provides absolutely no checks on government power and leaves too much room for misuse and abuse of its provisions, which could lead to an unconstitutional application of the law. Therefore, many sections of the USA Patriot Act should be allowed to sunset at the end of the year.

Mr. Chairman, to illustrate, section 215 of the Patriot Act allows the government to seize and search business records and any other tangible things that are "relevant" to an international terrorism investigation or an investigation of clandestine intelligence activities. The recipient of the orders to turn over the records, are placed under a gag order, prohibiting them from telling anyone about the search or seizure. This section clearly overreaches.

In the government's ability to secretly seize and search any records that are "relevant" to the investigation, the information the government can seize is overwhelming. For it gives the government too much secret surveillance power. American citizens have the right to be eventually notified that they are under surveillance and section 215 impedes on that right by allowing the government to conduct surveillance, without the requirement of notice, for time periods that are unspecified and unchecked.

Mr. Chairman, another example of the Patriot Act's vast powers is section 206. This provision should also be allowed to sunset. Section 206, allows the government to obtain "John Doe" roving wiretaps in foreign intelligence cases. There is no requirement to specify a target or a telephone, and the government can use the wiretaps without checking that the intercepted conversations actually involve a target of the investigation. In addition, these wiretaps are ordered with no requirement to give the target notice that they are being wiretapped. This section is blatantly unconstitutional. It violates the Fourth Amendment by failing to specify, with "particularity," what the subject of the investigation is, again giving the government unchecked power to secretly wiretap a target, without sufficient judicial oversight.

Mr. Chairman, these are just a few of the extreme powers bestowed upon the government through the USA Patriot Act. Without a carefully monitored system of

checks and balances, we specifically endanger our individual rights to privacy and due process of the laws. Even though national security has become a top priority since 9/11, we still must not allow our constitutional rights to be so blatantly violated.

Mr. Chairman, as I have stated before, absent an undeniably clear demonstration from law enforcement that these provisions are essential, the relevant sections of the USA Patriot Act must be allowed to sunset at the end of this year. I yield back the balance of my time.

Chairman SENSENBRENNER. Now it is my privilege today to introduce Deputy Attorney General James B. Comey. President Bush nominated Mr. Comey on October 3, 2003, and he was unanimously confirmed by the Senate on December 9, 2003.

Prior to becoming Deputy Attorney General, Mr. Comey served as the United States Attorney for the Southern District of New York, from January 2002 until the time of his confirmation and his present post. As U.S. Attorney, he oversaw numerous terrorism cases, and created a specialized unit devoted to prosecuting international drug cartels.

Mr. Comey graduated from the College of William and Mary, and received his Juris Doctor from the University of Chicago Law School.

Mr. Comey, would you please raise your right hand and stand up, and I will swear you in.

[Witness sworn.]

Chairman SENSENBRENNER. Thank you, Mr. Comey. Let the record show that Mr. Comey answered in the affirmative. Without objection, his written statement will be included in the record as a part of his testimony.

And Mr. Comey, you are now recognized.

TESTIMONY OF THE HONORABLE JAMES B. COMEY, DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. COMEY. Thank you, Mr. Chairman, Mr. Conyers, Members of the Committee. Thank you for this opportunity to come and to talk, but most importantly to listen and to respond to concerns and questions.

I believe that people should question authority; that people should be skeptical of Government power; people should demand answers about how the Government is using its power. Our country, I was taught, was founded by people who had a big problem with Government power and worried about Government power, and so divided our powers and then added a Bill of Rights to make sure that some of their concerns were set out in writing.

I think it's incumbent upon the Government to explain how it's using power, how its tools have been important, how they matter; and to respond especially to the oversight of the legislative branch. I think citizens should question authority, and should demand the details about how the Government is using its power.

I worried very much a year ago that we were never going to find the space in American life to have a debate, a real informed discussion about the PATRIOT Act. Instead, where we had found ourselves was people on both sides of the issue exchanging bumper stickers; people standing around at a barbecue or a cocktail party and talking about all manner of things, and someone saying, "Isn't the PATRIOT Act evil?" and people would nod and then go on talk-

ing about whether the Nationals were going to be a real baseball team or current events of some sort; and that we were missing a discussion from both sides, a demand for the details and a supplying of the details.

I worried very much about that. I needn't have worried. Thanks largely to the work of this Committee and to your colleagues in the Senate, we have had, as you said, Mr. Chairman, a robust discussion and debate about these tools over the last months. And I think the American people understand them better. I think all of us have had an opportunity to demand details and respond to the questions.

I look forward to answering any and all questions, especially those about the details. I believe that the angel of the PATRIOT Act is in those details. The angel is in demonstrating that these are tools that make a difference in the life of this country and in our ability to protect people in this country.

I think the angel is also in the details that demonstrate to folks that the PATRIOT Act is chock full of oversight, in a lot of ways that regular criminal procedure is not; full of the involvement of Federal judges, full of the involvement of the Inspector General, full of the involvement of this Committee and other Committees in Congress to conduct rigorous oversight in response to our reporting about what we're doing.

The bottom line, I believe, is that the PATRIOT Act is smart; it's ordinary in a lot of respects; it's certainly constitutional. We ought to make permanent the provisions that have meant so much to the people that I represent: the men and women in law enforcement and in the intelligence community fighting the fight against terrorism and crimes of all sorts.

So I thank you for this opportunity. I look forward to a robust discussion and debate. And I will try my best to answer any and all questions; and not talk past a question, but respond directly. So thank you, Mr. Chairman. **

[The prepared statement of Mr. Comey follows:]

PREPARED STATEMENT OF JAMES B. COMEY

Statement of
James B. Comey
Deputy Attorney General
United States Department of Justice
Before the
Committee on the Judiciary
United States House of Representatives

June 8, 2005

Introduction

Good Morning. Chairman Sensenbrenner, Ranking Member Conyers and Members of the Committee, it is my pleasure to appear before you today to discuss the USA PATRIOT Act. Thank you for allowing me the opportunity to discuss the important tools contained in that Act. As I have said many times before Members and Committees of both houses of Congress, and all over the country, when it comes to the USA PATRIOT Act, I believe that the angel is in the details and that if we engage in conversation and shed daylight on how the Department of Justice has used the important tools in the Act, more people will come to see that the tools are simple, constitutional, and just plain sensible.

The Administration is fighting the War against Terror both at home and abroad using all the lawful tools at our disposal. Survival and success in this struggle demand that the Department continuously improve its capabilities to protect Americans from a relentless enemy. The Department will continue to seek the assistance of Congress as it builds a culture of prevention and ensures that our government's resources are dedicated to defending the safety and security of the American people.

I will never forget, as I know the Members of this Committee will not forget, the thousands of our fellow citizens that were murdered at the World Trade Center, the Pentagon and a field in rural Pennsylvania. Nearly four years have passed since that tragic day and, in large part due to the tremendous efforts of our federal, state and local law enforcement as well as the Intelligence Community, our country has been spared another attack of that magnitude. But our success presents a new challenge. How do we bring voice to victims that were never murdered, to family members who have not lost a loved one? How do we explain to Congress and the American people these "ghost pains?" This is the continuing challenge of law enforcement in our country. When we are faced with rising crime and victimization rates, it is easy to point to those in need of our protection to justify our requests for tools to protect our citizens. But when we are successful in our efforts, when our hard work and relentlessness pays off, it becomes more difficult to convince the people to let us keep those tools.

Mr. Chairman, as a career prosecutor, and now in my role as Deputy Attorney General, I have heard many times the question of when will we next break up a terror cell moments before implementation of a devastating plot. But let me tell you, as a prosecutor, you don't want to be there. You want to catch a terrorist with his hands on the check instead of his hands on the bomb. You want to be many steps ahead of the devastating event. The way we do that is

through preventive and disruptive measures, by using investigative tools to learn as much as we can as quickly as we can and then incapacitating a target at the right moment. Tools such as enhanced information sharing mechanisms, roving surveillance, pen registers, requests for the production of business records, and delayed notification search warrants allow us to do just that.

Proactive prosecution of terrorism-related targets on less serious charges is often an effective method of deterring and disrupting potential terrorist planning and support activities. Moreover, guilty pleas to these less serious charges often lead defendants to cooperate and provide information to the Government information that can lead to the detection of other terrorism-related activity.

I'd next like to discuss the material support statutes, which are the cornerstone of our prosecution efforts. The first material support case to be tried before a jury involved a group of Hizballah operatives in Charlotte, North Carolina found to have been involved in a massive inter-state cigarette smuggling and tax evasion scheme. The investigation uncovered a related plot in which some of these defendants were procuring dual-use items at the instructions of Hizballah leaders in Lebanon. This indictment, which involved RICO and material support charges, resulted in the conviction of 20 people. The Charlotte prosecution was upheld by the Fourth Circuit Court of Appeals (*United States v. Hammoud*, 4th Cir., September 8, 2004; remanded for resentencing in light of *Booker*). Since then, "material support" charges have been used against other cigarette smuggling plots in Detroit. We have successfully prosecuted *al Qaeda* supporters in Portland and Alexandria, and Hizballah supporters in Detroit and Charlotte. We have convicted persons involved in *jihad* training activities in Buffalo, Seattle, and Alexandria.

Indeed, prior to the attacks of 9/11, 17 persons in four different judicial districts were charged with offenses relating to material support to terrorists and terrorist organizations. Since then, however, 135 people in at least 25 different judicial districts have been charged with material support-related offenses. Of the 152 people charged both before and since 9/11, 70 have been convicted or pleaded guilty, and many more are still awaiting trial.

Our prosecution of those who seek to provide material support continues including most recently a on April 27, 2005, a New Jersey federal jury convicted Hemant Lakhani, a United Kingdom national, of attempting to provide material support to terrorists for his role in trying to sell an antiaircraft missile to a man whom he believed represented a terrorist group intent on shooting down a United States commercial airliner. On April 22, 2005, in the Eastern District of Virginia, Zacarias Moussaoui pled guilty to six counts of conspiracy, acknowledging his role in assisting *al Qaeda*. Also on April 22, 2005, a jury convicted Ali Al-Timimi, a speaker and spiritual leader in Northern Virginia, in the second phase of the Northern Virginia jihad case involving a group of individuals who were encouraged and counseled by Al-Timimi to go to Pakistan to receive military training from Lashkar-e-Taiba, which has ties to the *al Qaeda* terrorist network, in order to be able to fight against American troops. The first phase of the

prosecution involved convictions under the material support statutes; Al-Timimi's firearms convictions were predicated, in part, on the material support statutes. And there are many more examples due to our continuing efforts to ensure the safety of the American people.

Foreign Intelligence Surveillance Act

The authorities contained in the Foreign Intelligence Surveillance Act (FISA) have been critical to the Department's efforts to combat terrorism. Since September 11, 2001, the volume of applications to the Foreign Intelligence Surveillance Court (FISA Court) has dramatically increased. In 2000, 1,012 applications for surveillance or searches were filed under FISA. By comparison, in 2004 we filed 1,758 applications; this represents a 74% increase in four years. Of the 1,758 applications made in 2004, none were denied, although 94 were modified by the FISA Court in some substantive way.

In enacting the USA PATRIOT Act and the Intelligence Reform and Terrorism Prevention Act of 2004, Congress provided the government with tools that it has used regularly and effectively in its war on terrorism. The reforms in those measures affect every single application made by the Department for electronic surveillance or physical searches authorized under FISA regarding suspected terrorists and have enabled the government to become quicker and more flexible in gathering critical intelligence information on suspected terrorists. It is because of the key importance of these tools to winning the war on terror that the Department asks you to reauthorize those USA PATRIOT Act provisions scheduled to expire at the end of this year.

For example, section 207 of the USA PATRIOT Act governs the authorized periods for FISA collection and has been essential to protecting both the national security of the United States and the civil liberties of Americans. It changed the time periods for which some electronic surveillance and physical searches are authorized under FISA, and, in doing so, conserved limited resources of both the FBI and the Department's Office of Intelligence Policy and Review (OIPR). Instead of devoting time to the mechanics of repeatedly renewing FISA applications in certain cases -- which are considerable -- those resources are now devoted to other investigative activities as well as conducting appropriate oversight of the use of intelligence collection authorities at the FBI and other intelligence agencies. A few examples of how section 207 has helped the Department are set forth below.

Since its inception, FISA has permitted electronic surveillance of an individual who is an agent of foreign power based upon his status as a non-United States person who acts in the United States as "an officer or employee of a foreign power, or as a member" of an international terrorist group. As originally enacted, FISA permitted electronic surveillance of such targets for initial periods of 90 days, with extensions for additional periods of up to 90 days based upon subsequent applications by the government. In addition, FISA originally allowed the

government to conduct physical searches of any agent of a foreign power (including United States persons) for initial periods of 45 days, with extensions for additional 45-day periods.

Section 207 of the USA PATRIOT Act changed the law to permit the government to conduct electronic surveillance and physical search of certain agents of foreign powers and non-resident-alien members of international groups for initial periods of 120 days, with extensions for periods of up to one year. It also allows the government to obtain authorization to conduct physical searches targeting any agent of a foreign power for periods of up to 90 days. Section 207 did not change the time periods applicable for electronic surveillance of United States persons, which remain at 90 days. By making these time periods for electronic surveillance and physical search equivalent, it has enabled the Department to file streamlined combined electronic surveillance and physical search applications that, in the past, were tried but abandoned as too cumbersome to do effectively.

As the Attorney General testified before the House Judiciary Committee, we estimate that the amendments in section 207 have saved OIPR approximately 60,000 hours of attorney time in the processing of FISA applications. This figure does not include the time saved by agents and attorneys at the FBI. Because of section 207's success, the Department has proposed additional amendments to increase the efficiency of the FISA process. Among these would be to allow initial coverage of any non-U.S. person agent of a foreign power for 120 days with each renewal of such authority allowing continued coverage for one year. Had this and other proposals been included in the USA PATRIOT Act, the Department estimates that an additional 25,000 attorney hours would have been saved in the interim. Most of these ideas were specifically endorsed in the recent report of the bipartisan WMD Commission. The WMD Commission agreed that these changes would allow the Department to focus its attention where it is most needed and to ensure adequate attention is given to cases implicating the civil liberties of Americans. Section 207 is scheduled to sunset at the end of this year.

Access to Tangible Things

Section 215 of the USA PATRIOT Act allows the FBI to obtain an order from the FISA Court requesting production of any tangible thing, such as business records, if the items are relevant to an ongoing authorized national security investigation, which, in the case of a United States person, cannot be based solely upon activities protected by the First Amendment to the Constitution. The Attorney General recently declassified the fact that the FISA Court has issued 35 orders requiring the production of tangible things under section 215 from the effective date of the Act through March 30th of this year. None of those orders were issued to libraries and/or booksellers, and none were for medical or gun records. The provision to date has been used only to order the production of driver's license records, public accommodation records, apartment leasing records, credit card records, and subscriber information, such as names and addresses for telephone numbers captured through court-authorized pen register devices.

Similar to a prosecutor in a criminal case issuing a grand jury subpoena for an item relevant to his investigation, so too can an investigator obtain an order from the FISA Court requiring production of records or items that are relevant to an investigation to protect against international terrorism or clandestine intelligence activities. Section 215 orders, however, are subject to judicial oversight before they are issued – unlike grand jury subpoenas. The FISA Court must explicitly authorize the use of section 215 to obtain business records before the government may serve the order on a recipient. In contrast, grand jury subpoenas are subject to judicial review only if they are challenged by the recipient. Section 215 orders are also subject to a similar standard as are grand jury subpoenas – a relevance standard.

Section 215 has been criticized by some because it does not exempt libraries and booksellers. The absence of such an exemption is consistent with criminal investigative practice. Prosecutors have always been able to obtain records from libraries and bookstores through grand jury subpoenas. Libraries and booksellers should not become safe havens for terrorists and spies. Last year, a member of a terrorist group closely affiliated with *al Qaeda* used Internet service provided by a public library to communicate with his confederates. Furthermore, we know that spies have used public library computers to do research to further their espionage and to communicate with their co-conspirators. For example, Brian Regan, a former TRW employee working at the National Reconnaissance Office, who was convicted of espionage, extensively used computers at five public libraries in Northern Virginia and Maryland to access addresses for the embassies of certain foreign governments.

Concerns that section 215 allows the government to target Americans because of the books they read or websites they visit are misplaced. The provision explicitly prohibits the government from conducting an investigation of a U.S. person based solely upon protected First Amendment activity. 50 U.S.C. § 1861(a)(2)(B). And, as the Attorney General has made clear, we have no interest in the reading habits of ordinary Americans. However, some criticisms of section 215 have apparently been based on possible ambiguity in the law. The Department has already stated in litigation that the recipient of a section 215 order may consult with his attorney and may challenge that order in court. The Department has also stated that the government may seek, and a court may require, only the production of records that are relevant to a national security investigation, a standard similar to the relevance standard that applies to grand jury subpoenas in criminal cases. The text of section 215, however, is not as clear as it could be in these respects. The Department, therefore, would support amendments to section 215 to clarify these points. Section 215 also is scheduled to sunset at the end of this year.

The right of a recipient to challenge a production order must, however, be distinguished from a potential right of a third party to suppress information obtained from the recipient--a right not normally afforded in criminal proceedings. This, for example, is true in the case of grand jury subpoenas. *See, e.g., United States v. Miller*, 425 U.S. 435 (1976) (holding that bank customer had no standing to challenge the validity of grand jury subpoenas issued to a bank for

his records). Similarly, a defendant in a criminal proceeding has no constitutional right to suppress evidence obtained in a search of someone else's property, even if that search was conducted unlawfully. *See, e.g., Rakas v. Illinois*, 439 U.S. 128 (1978) (passengers in car have no standing to suppress evidence obtained in allegedly illegal search and seizure of car); *see also Wong Sun v. United States*, 371 U.S. 471 (1963) (defendant may not suppress evidence obtained as a product of statement made by co-defendant incident to an unlawful arrest, even though the evidence was inadmissible against co-defendant); *United States v. Mendoza-Burciaga*, 981 F.2d 192 (5th Cir. 1992) (driver of a truck has standing to challenge a search of the truck, but a passenger does not).

While the Department supports the aforementioned clarifying amendments to section 215, the Department is very concerned by proposals currently pending before Congress which would require the government to show "specific and articulable facts" that the records sought through a section 215 order pertain to a foreign power or agent of a foreign power. Such a requirement would disable the government from using a section 215 order at the early stages of an investigation, which is precisely when such an order is most useful.

Consider, for example, a case where a known terrorist is observed having dinner with an unknown individual at a hotel. Currently, investigators may use section 215 to obtain the unknown individual's hotel records so that he may be identified and then investigated further so that the government may find out if he is also involved in terrorism. It is important to remember that terrorists and spies are generally trained to camouflage their dangerous activities and thus even an innocent conversation or encounter may look benign to an untrained observer. But our agents must be enabled to, when conducting surveillance, follow up on individuals associating with known *al Qaeda* operatives. Such a use of section 215, however, would not be permissible if the standard were changed from relevance to one of specific and articulable facts that the records pertain to a foreign power or agent of a foreign power. This is because investigators in this hypothetical do not yet know whether the unknown individual is a terrorist or spy. Indeed, that is exactly the question that investigators are trying to answer by using section 215.

Pen Register and Trap-and-Trace Devices

Some of the most useful, and least intrusive, investigative tools available to both intelligence and law enforcement investigators are pen registers and trap and trace devices. These devices record data regarding incoming and outgoing communications, such as all of the telephone numbers that call, or are called by, certain phone numbers associated with a suspected terrorist or spy. These devices, however, are not used to record the substantive content of the communications. For that reason, the Supreme Court has held that there is no Fourth Amendment protected privacy interest in information acquired from telephone calls by a pen register. Nevertheless, information obtained by pen registers or trap and trace devices can be extremely useful in an investigation by revealing the nature and extent of the contacts between a

subject and his confederates. The data provides important leads for investigators, and may assist them in building the facts necessary to obtain probable cause to support a full content wiretap.

Under chapter 206 of title 18, which has been in place since 1986, if an FBI agent and prosecutor in a criminal investigation of a bank robber or an organized crime figure want to install and use pen registers or trap and trace devices, the prosecutor must file an application to do so with a federal court. The application they must file, however, is exceedingly simple: it need only specify the identity of the applicant and the law enforcement agency conducting the investigation, as well as "a certification by the applicant that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by that agency." Such applications, of course, include other information about the facility that will be targeted and details about the implementation of the collection, as well as "a statement of the offense to which the information likely to be obtained . . . relates," but chapter 206 does not require an extended recitation of the facts of the case.

In contrast, prior to the USA PATRIOT Act, in order for an FBI agent conducting an intelligence investigation to obtain FISA authority to use the same pen register and trap and trace device to investigate a spy or a terrorist, the government was required to file a complicated application under title IV of FISA. Not only was the government's application required to include "a certification by the applicant that the information likely to be obtained is relevant to an ongoing foreign intelligence or international terrorism investigation being conducted by the Federal Bureau of Investigation under guidelines approved by the Attorney General," it also had to include the following:

> information which demonstrates that there is reason to believe that the telephone line to which the pen register or trap and trace device is to be attached, or the communication instrument or device to be covered by the pen register or trap and trace device, has been or is about to be used in communication with—
>
> > (A) an individual who is engaging or has engaged in international terrorism or clandestine intelligence activities that involve or may involve a violation of the criminal laws of the United States; or
> >
> > (B) a foreign power or agent of foreign power under circumstances giving reason to believe that the communication concerns or concerned international terrorism or clandestine intelligence activities that involve or may involve a violation of the criminal laws of the United States.

Thus, the government had to make a much different showing in order obtain a pen register or trap and trace authorization to find out information about a spy or a terrorist than is required to obtain the very same information about a drug dealer or other ordinary criminal. Sensibly, section 214 of the USA PATRIOT Act simplified the standard that the government

must meet in order to obtain pen/trap data in national security cases. Now, in order to obtain a national security pen/trap order, the applicant must certify "that the information likely to be obtained is foreign intelligence information not concerning a United States person, or is relevant to an investigation to protect against international terrorism or clandestine intelligence activities." Importantly, the law requires that such an investigation of a United States person may not be conducted solely upon the basis of activities protected by the First Amendment to the Constitution.

Section 214 should not be permitted to expire and return us to the days when it was more difficult to obtain pen/trap authority in important national security cases than in normal criminal cases. This is especially true when the law already includes provisions that adequately protect the civil liberties of Americans. I therefore urge you to re-authorize section 214.

Proposals currently before the Congress would raise the standard for obtaining a pen register or trap and trace device – both in the criminal investigative and FISA contexts – from relevance to "specific and articulable facts." Like subpoenas, pen registers and trap and trace devices are not as intrusive as other investigative techniques and often are used as the building blocks of an investigation. Federal courts have held that the Constitution does not even require a court order for such a device to be installed (though federal statute does so require) because of the lower expectation of privacy that attaches to the numbers dialed to and from a telephone. Imposing a specific and articulable facts standard on pen registers/trap and trace devices would hamper investigations just as imposing such a standard on section 215 orders would.

Information Sharing

During the 1980s, the Department operated under a set of largely unwritten rules that limited to some degree information sharing between intelligence and law enforcement officials. In 1995, however, the Department established formal procedures that more clearly separated law enforcement and intelligence investigations and limited the sharing of information between intelligence and law enforcement personnel more than the law required. The promulgation of these procedures was motivated in part by the concern that the use of FISA authorities would not be allowed to continue in particular investigations if criminal prosecution began to overcome intelligence gathering as an investigation's primary purpose. To be sure, the procedures were intended to permit a degree of interaction and information sharing between prosecutors and intelligence officers, while at the same time ensuring that the FBI would be able to obtain or continue FISA coverage and later use the fruits of that coverage in a criminal prosecution. Over time, however, coordination and information sharing between intelligence and law enforcement investigators became even more limited in practice than was allowed in theory under the Department's procedures. Due both to confusions about when sharing was permitted and to a perception that improper information sharing could end a career, a culture developed within the Department sharply limiting the exchange of information between intelligence and law enforcement officials.

Through enactment of sections 203 and 218, the USA PATRIOT Act helped bring down this "wall" separating intelligence officers from law enforcement agents. It not only erased the perceived statutory impediment to more robust information sharing between intelligence and law enforcement personnel, but it also provided the necessary impetus for the removal of the formal administrative restrictions as well as the informal cultural restrictions on information sharing.

The Department's efforts to increase coordination and information sharing between intelligence and law enforcement officers, which were made possible by the USA PATRIOT Act, have yielded extraordinary dividends by enabling the Department to open numerous criminal investigations, disrupt terrorist plots, bring numerous criminal charges, and convict numerous individuals in terrorism cases. For example, the removal of the barriers separating intelligence and law enforcement personnel played an important role in investigations and prosecutions of the Portland Seven, Sami Al-Arian, the Virginia Jihad case and numerous others.

Some have voiced the concern that under section 218 of the USA PATRIOT Act the government may utilize FISA surveillance when its primary purpose is to investigate and prosecute crimes unrelated to foreign intelligence. For example, the government, in obtaining a surveillance order targeting an agent of a foreign power, may have a significant purpose of obtaining foreign intelligence information but its primary purpose would be to investigate and prosecute that agent of a foreign power for a crime unrelated to foreign intelligence, such as tax fraud. This interpretation of FISA, however, has been clearly rejected by the FISA Court of Review, which observed that it would be "an anamolous reading" of section 218. The manifestation of such a primary purpose, the FISA Court of Review has stated, "would disqualify an application" under FISA. According to the court, this is because "the FISA process cannot be used as a device to investigate wholly unrelated ordinary crimes." *In re Sealed Case*, 310 F.3d 717, 736 (FISCR 2002).

Roving Wiretaps

Another important tool provided in the USA PATRIOT Act was provided by section 206, which allows the FISA Court to authorize "roving" surveillance of a terrorist or spy. This "roving" wiretap order attaches to a particular target rather than a particular phone or other communication facility. Since 1986, law enforcement has been able to use roving wiretaps to investigate ordinary crimes, including drug offenses and racketeering. Section 206 simply authorized the same techniques used to investigate ordinary crimes to be used in national security investigations. Before the USA PATRIOT Act, the use of roving wiretaps was not available under FISA. Therefore, each time a suspect changed communication providers, investigators had to return to the FISA Court for a new order just to change the name of the facility to be monitored and the "specified person" needed to assist in monitoring the wiretap. International terrorists and foreign intelligence officers are trained to thwart surveillance by

changing communication facilities just prior to important meetings or communications. This provision therefore has put investigators in a better position to counter the actions of spies and terrorists who are trained to thwart surveillance. This is a tool that we do not use often, but when we use it, it is critical. As of March 30, 2005, it had been used 49 times.

Section 206 also contains important privacy safeguards. Under Section 206, the target of roving surveillance must be identified or described in the order. Therefore, section 206 is always connected to a particular target of surveillance. Even if the government is not sure of the actual identify of the target of the wiretap, FISA nonetheless requires the government to provide "a description of the target of the electronic surveillance" to the FISA Court prior to obtaining a roving surveillance order. Under Section 206, furthermore, before approving a roving surveillance order, the FISA Court must find that there is probable cause to believe the target of the surveillance is either a foreign power or an agent of a foreign power, such as a terrorist or a spy. The description of the target must, therefore, be sufficiently detailed for the FISA Court to find probable cause that the target is either a foreign power or an agent of a foreign power. Roving surveillance under section 206 also can be ordered only after a FISA Court makes a finding that the actions of the target of the application may have the effect of thwarting the surveillance. Moreover, Section 206 in no way altered the FISA minimization procedures that limit the acquisition, retention, and dissemination by the government of information or communications involving United States persons. A number of federal courts, including the Second, Fifth, and Ninth Circuits, have squarely ruled that "roving" wiretaps are perfectly consistent with the Fourth Amendment. No court of appeals has reached a contrary conclusion.

Proposals currently pending before Congress would require the government to know the "identity" of the target in order to obtain a roving wiretap. This limitation would be problematic in the FISA context, in which we may be dealing with spies and terrorists trained to cloak their identities. If the government is able to find a description of the target sufficiently specific to allow the FISA Court to find probable cause that the target is an agent of a foreign power and may take action to thwart surveillance, the FISA Court should be able to authorize roving surveillance of that target.

Proposals in Congress also would require that the presence of the target at a particular telephone be "ascertained" by the person conducting the surveillance before the phone could be surveilled. This is a stricter standard than is required in the criminal context and would be impracticable in the FISA context, in which surveillance is usually done continually on a targeted phone and later translated and culled pursuant to minimization procedures. Moreover, such a requirement would be exceptionally risky in a world where terrorists and spies are trained extensively in counter-surveillance measures.

National Security Letters

Currently, NSLs, which are similar to administrative subpoenas, are issued for certain types of documents "relevant" to international terrorism or espionage investigations. Provisions currently before Congress would amend each existing NSL authority to impose one or more "specific and articulable facts" requirements. For each type of record, the government would be required to show specific and articulable facts that the records sought "pertain to a foreign power or agent of a foreign power." Additional specific and articulable facts requirements would be imposed with respect to other types of information. For example, with respect to telephone subscriber information, the government would have to show specific and articulable facts that the subscriber's communications devices "have been used" in communication with certain categories of individuals. These standards would significantly reduce the usefulness of NSLs for the same reason that a heightened standard of proof would diminish the usefulness of section 215.

Delayed Notification Search Warrants

Section 213 of the USA PATRIOT Act brought national uniformity to a court-approved law enforcement tool that had been in existence for decades and has been relied on by investigators and prosecutors in limited but essential circumstances. While there has been much discussion about this provision, there remain many misconceptions about this tool. The concept of rolling back delayed notification search warrants in any manner concerns me and demonstrates, I believe, a misunderstanding of how our criminal justice system works. Approval to delay notification of a search warrant is granted only after a federal judge finds reasonable cause to believe that immediate notification of execution of a search warrant would bring one of five enumerated adverse results including destruction of evidence, witness tampering, or serious jeopardy to an investigation. It is important to remember that judicial approval for the underlying search warrant is also required and remains governed by the probable cause standard. Nothing in the USA PATRIOT Act changed that. Also, notice is always provided to the target of the search, it is only delayed temporarily.

Section 213, like other provisions of the USA PATRIOT Act, is one tool we use in our efforts to combat terrorism. Although the Department has used this provision at least 18 times in terrorism-related investigations, it is true that this provision is used more frequently in non-terrorism contexts, particularly large, sensitive drug investigations, as it was for decades before the USA PATRIOT Act. This should not undermine the fact that it is an important tool to law enforcement and should not be limited to only the national security context. Indeed, the use of delayed notice search warrants in non-terrorism cases is consistent with Congressional intent – section 213 was never limited to terrorism cases. Some opponents of this tool also attempt to hold our agents' and prosecutors professionalism against us, by pointing to statistics showing that federal judges have never denied a request for a delayed notification search warrant. At the Department of Justice, we have the highest expectations for our professionals. Every prosecutor pushes for more than the bare minimum and takes great care to lay out facts and circumstances

in application for a search warrant that meet or exceed the probable cause requirement. In addition, the record reflects the fact that the Department has judiciously sought delayed notification search warrants as they comprise fewer than 2 in 1000 search warrants issued nationwide.

Some opponents of our use of section 213 would strike one essential justification for delayed notices search warrants, that immediate notice would "seriously jeopardize an investigation" from the statute. This would hamper criminal investigations in circumstances where immediate notice would cause an adverse effect not otherwise listed in the statute. For example, if the "seriously jeopardize" prong were eliminated, notice could not be delayed even if immediate notice of a search would jeopardize an ongoing and productive Title III wiretap. I'd like to highlight one example of where the "seriously jeopardizing an investigation" prong was the sole "adverse result" used to request delayed notice.

In 2004 the Justice Department executed three delayed notice searches as part of an OCDETF investigation of a major drug trafficking ring that operated in the Western and Northern Districts of Texas. The investigation lasted a little over a year and employed a wide variety of electronic surveillance techniques such as tracking devices and wiretaps of cell phones used by the leadership. The original delay approved by the court in this case was for 60 days. The Department sought two extensions, one for 60 days and one for 90 days, both of which were approved.

During the wiretaps, three delayed-notice search warrants were executed at the organization's stash houses. The search warrants were based primarily on evidence developed as a result of the wiretaps. Pursuant to section 213 of the USA PATRIOT Act, the court allowed the investigating agency to delay the notifications of these search warrants. Without the ability to delay notification, the Department would have faced two choices: (1) seize the drugs which would have alerted the criminals to the existence of wiretaps and thereby end our ability to build a significant case on the leadership or (2) not seize the drugs and allow the organization to continue to sell them in the community as we continued with the investigation. Because of the availability of delayed-notice search warrants, the Department was not forced to make this choice. Agents seized the drugs, continued this investigation, and listened to incriminating conversations as the dealers tried to figure out what had happened to their drugs.

On March 16, 2005, a grand jury returned an indictment charging twenty-one individuals with conspiracy to manufacture, distribute, and possess with intent to distribute more than 50 grams of cocaine base. Nineteen of the defendants, including all of the leadership, are in custody. All of the search warrants have been unsealed, and notice has been given in all cases.

In addition, certain proposals currently before Congress would limit the discretion of a federal judge in granting the initial periods of delay other than seven days. It would allow extensions in 21-day increments, but only if the Attorney General, DAG, or Associate Attorney

General personally approved the application for an extension. Requiring the government to go back to court after seven days – even where the court would have found a longer period of delay reasonable under the circumstances – would unduly burden law enforcement and judicial resources. And although the provision for a 21-day extension period is better than the 7-day period previously suggested by critics, requiring personal approval by the AG, DAG, or Associate would be impractical and unnecessarily burdensome. Currently, the length of delay is decided on a case-by-case basis by a federal judge familiar with the facts of a particular investigation. The Department believes that this system has worked well and should not be replaced by a one-size-fits-all statutory time limit.

Allegations of Abuse

In addition, the Department of Justice remains very concerned about any allegations of abuse of the tools provided in the USA PATRIOT Act. I am pleased that the Congress takes its oversight role seriously and has been attempting to address any relevant allegations. As Congress decides the fate of the tools contained in the Act, I hope that it does so in a thoughtful manner and in response to real concerns, not as a reaction to baseless allegations.

Recently, Senator Dianne Feinstein shared with the Department of Justice correspondence from the American Civil Liberties Union (ACLU). That correspondence was in response to her request for information regarding alleged "abuses" of the USA PATRIOT Act. Senator Feinstein requested that the Department review these allegations. Our review demonstrated that each matter cited by the ACLU either did not, in fact, involve the USA PATRIOT Act, or was an entirely appropriate use of the Act.

For example, the ACLU's letter alleged that the "Patriot Act [was used] to secretly search the home of Brandon Mayfield, a Muslim attorney whom the government wrongly suspected, accused and detained as a perpetrator of the Madrid train bombings." Mr. Mayfield's home was searched with the approval of a federal judge because the available information, including an erroneous finger-print match, gave investigators probable cause to believe that he was involved in the terrorist bombings in Madrid - - the search was not on account of any new authority created by the USA PATRIOT Act or any abuse of the Act.

The ACLU's allegation regarding Mr. Mayfield seems to be based in part on the mistaken idea that the search of Mr. Mayfield's home was conducted pursuant to section 213 of the USA PATRIOT Act. That is not correct. The search was conducted pursuant to the Foreign Intelligence Surveillance Act under an authority that has existed in the FISA statute since 1995. Because the search was conducted under a FISA Court order, some of the USA PATRIOT Act provisions that amended FISA or relate to intelligence investigations may have been implicated or "used" in some sense of that word. That does not in any way mean that these USA PATRIOT Act provisions were misused. The Department would be happy to share other information from

our letter to Senator Feinstein with the Committee.

Moreover, last month, the Department of Justice's Inspector General, Glenn A. Fine, testified before the Subcommittee on Crime, Terrorism and Homeland Security about section 1001 of the USA PATRIOT Act, which directs his office to undertake a series of actions related to complaints of civil rights or civil liberties violations allegedly committed by DOJ employees. In his testimony, Mr. Fine noted that, with the exception of the Brandon Mayfield case, none of the allegations received by his office alleging misconduct by a Department employee related to use of a provision of Patriot Act. That is a significant finding.

Conclusion

Mr. Chairman, I'd like to say a final word about congressional oversight and my concern that Congress, while reauthorizing the USA PATRIOT Act, may seek to include new sunsets. In just the last few weeks, the Attorney General and I have met with dozens of Members of Congress to discuss these important tools. In addition, the Attorney General has appeared three times to testify. Moreover, 32 Department of Justice witnesses have appeared at 17 Congressional hearings which have explored in depth the various tools contained in the USA PATRIOT Act. All of this activity is because Congress is rightly engaging in its critical role to conduct appropriate oversight. But sunsets are not required to conduct oversight. Congress maintains its authority and responsibility to conduct oversight, to ask questions, to demand answers, even without sunsets. My concern is that sunsets on these important tools might inhibit the culture of information sharing that we are trying to foster. Rather than encouraging and empowering our agents and prosecutors to rely upon these new tools, we send a message that a particular provision may only be temporary and chill development of the culture of information sharing. As long as congressional oversight remains robust, which I am convinced it will, there is no need for sunsets.

Mr. Chairman, again, thank you for the opportunity to appear before you today and thanks to you and all your colleagues for providing us with the important tools of the USA PATRIOT Act. I would now be happy to answer any questions.

Chairman SENSENBRENNER. Well, thank you very much. The Chair will enforce the 5-minute rule, as he has done in the past. And Members will be called alternatively from one side to the other, in the order in which they have appeared. The Chair will recognize himself and Mr. Conyers first, and I will recognize myself for 5 minutes.

Mr. Comey, section 218, which is the provision of the PATRIOT Act that tore down the so called "wall" that inhibited or prohibited the sharing of intelligence information between the CIA and the FBI, was enacted to change the culture that inhibited law enforcement and the intelligence community from sharing vital intelligence and criminal information.

Congress recognized immediately after 9/11 that one of the problems that may have contributed to the successful attacks by the terrorists was the lack of information sharing. This was a problem that previous Administrations and Congresses had tried to address, but failed. The PATRIOT Act succeeded. The lack of information sharing was also criticized by various commissions, including the 9/11 Commission, which was created to examine how the terrorists were able to attack our country.

We're now considering whether or not to reauthorize and make permanent section 218. Do you believe that section 218 helped tear down the wall that prevented communications between agencies? Should we make this section permanent? And can you give us some specific details on why we had a problem before 9/11, and how this was solved?

Mr. COMEY. Yes, Mr. Chairman, I'd be glad to, and thank you for the question. Section 218 changed our world. It is the one part of the PATRIOT Act that is groundbreaking, earthshaking, breathtaking to those of us who have devoted our lives to this work, because it broke down that wall.

The situation we had before September 11th, as you said, was a situation that didn't make any sense when you're talking about fighting international terrorism. My good friend, Pat Fitzgerald, now the U.S. Attorney in Chicago, was then the chief of the terrorism unit at the U.S. Attorney's Office in Manhattan. And he and a dedicated group of agents in the 1990's were chasing somebody named "Osama bin Laden," whose name was not a household name by any means anywhere in this country certainly. But they knew who he was; they knew what he had done; and they were tracking him.

And in the course of doing that, they were working with informants; they were conducting surveillance; they were obtaining documents. They could talk to foreign police officers; they could talk to foreign spies. Most importantly, they could talk to al-Qaeda cooperators. They brought a couple of guys in from the dark side, and they could talk to them.

There was only one group they couldn't talk to, and that was the group of equally talented investigators and agents, literally across the street from the FBI, who were FBI agents conducting the so-called intelligence investigation of Osama bin Laden and al-Qaeda; conducting surveillance; conducting electronic surveillance; talking to witnesses—all parallel to what these bright people on the criminal side were doing.

And as Pat Fitzgerald has said, a world in which he could talk to al-Qaeda, but not to other members of the FBI, was a world in which we were not as safe as we needed to be.

And I think there's broad support for that, the notion that that's changed our world. Today, when we approach al-Qaeda, if we have an al-Qaeda operative or suspected al-Qaeda sleeper cell in the United States, we conduct—use our tools under FISA conduct our intelligence investigations; but we're able to make sure that the criminal prosecutors and criminal investigators are in the loop and able to use their tools to incapacitate these terrorists. And that makes us immeasurably safer.

That is the absolutely most important part of the PATRIOT Act. And if it were to go away, we would go back to a place that people don't want us to be. That changed our world for the better, Mr. Chairman.

Chairman SENSENBRENNER. Mr. Comey, much of the criticism of the PATRIOT Act has been directed at section 215, which is the business records part of the PATRIOT Act. When the Attorney General was here a couple of months ago, he said he was going to propose some amendments to section 215 to address the concerns of the libraries and book stores. Could you detail what those changes are the AG proposes? And also, tell us how many times this section has been used relative to get library and book store records, if you can.

Mr. COMEY. Yes, sir. section 215, as you said, has become known as the so-called "library provision"—something that remains a mystery to me. I tease some of my friends in journalism, to ask them to do an investigative piece to figure out how it came to be called that; because it never occurred to those of us in law enforcement, when we saw that we had a provision that we could obtain tangible things—which was defined as books, records, etcetera—that people would understand "books" to mean library books.

Regardless, it's become the "library provision." We've never used it in connection with a library or book store, as the Attorney General has said. But the Attorney General has also said that people have made some reasonable comments about section 215, and some constructive criticisms.

Among other things, they've said, "Look, you guys in Government understand it to be a relevance standard, but it doesn't say that in the statute." So the Attorney General has said that we will support adding a relevance standard. That's the way we've operated, and that's what we expect it to be.

Second, folks have said, "Look, it doesn't make it clear that we're able to talk to a lawyer, and to challenge if we believe the order is over-broad or abusive or something like that." And that's a very good point. And as the Attorney General has said, we support putting that in the statute. So, if someone receives a 215 order—most likely in the real world, a credit card issuer, a hotel company, or a travel record company—and they believe for some reason it's inappropriate, they can talk to a lawyer. And there are procedures in place, and the real power for them to challenge the court—before the court that issued that order. The substance of that order. That's reasonable. That's appropriate.

But this is a very, very important tool, and it is a tool that offers far more oversight and involvement of the courts and Congress than our normal tool to obtain records, including records we could obtain from a book store or library; that is, grand jury process.

Section 215 requires that an FBI agent go to a Federal judge, nominated by the President, confirmed by the Senate, who sits on the Foreign Intelligence Surveillance Court, and make a written application for an order to obtain documents. So a Federal judge is involved. Then, requires us to report to Congress every 6 months on how we're using it precisely; what we're using it for; and how many times we've used it.

There is nothing like that oversight in the thousands and thousands of instances every day where we obtain records using the grand jury process. I think 215 strikes an important balance. It offers oversight and offers a very important tool to the FBI to obtain records in our most important investigations.

Chairman SENSENBRENNER. Thank you. My time has expired. The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

Several weeks ago, Mr. Deputy Attorney General, Members of the Committee have submitted questions to the Department of Justice, and we've not had any response. And if you could help expedite a response to those questions—they are all in the record of the some-11 hearings that have been held—we would be grateful.

Now, let's be frank about this subject that we're on. We've had lots of hearings, but here is the problem. We haven't been discussing much more than the expiring provisions in the PATRIOT Act. Which is fair enough: we've got to make sure we want to keep them, or we want to let them go.

There have been a few added, but let me review with you the matters that have not come before the Committee at this point:

The torture and abuse of detainees, Abu Ghraib, Guantanamo, and other places;

The outsourcing of torture; that is, rendition, sending people to countries where we know torture is a standard activity;

The practice of closed immigration hearings;

The indefinite detention of thousands of people who responded to the Department of Justice and then end up being kept and held without notification to their families or without them being able to contact a lawyer;

The racial profiling of many of the more than 30 countries with Middle Eastern origins;

And, the use of FISA authorities on non-terrorism cases.

Now, what we are trying to do here—and we're in the process of deciding this within the Committee—is whether we're going to just review mostly the provisions that are expiring, or whether we're going to have an opportunity to look at the whole PATRIOT Act.

And I don't want to take you into ancient history, but I think you know the rather murky circumstances of which the original bill this Committee passed was substituted for a bill that came from the Department of Justice to the Rules Committee the night before it came to the floor. Are you aware of that?

Mr. COMEY. No, sir.

Mr. CONYERS. You weren't? Okay.

Mr. COMEY. I mean, I've heard——

Mr. CONYERS. I know.

Mr. COMEY.—press accounts, but I was not——

Mr. CONYERS. Right.

Mr. COMEY. I was happily ensconced as an Assistant U.S. Attorney in Richmond at the time.

Mr. CONYERS. All right. The other matter that I want to bring to your attention—and you may be one of the people that'll have to send the letter back with us giving us additional comments to these questions. I've got two more.

The Department of Justice has failed to bring any criminal prosecutions for the abuse of detainees that took place at Abu Ghraib. In your view, or within your knowledge, does the Department believe that the abuses, the electrocution shocks, the beatings, the humiliations that occurred, were legal?

And my final question is, can you guarantee the Members of this Committee that the Department of Justice is not holding any individual in the war of terrorism, that you're aware of, who is the victim of misidentification similar to that in the Brandon Mayfield instance? The Department held Seattle attorney Brandon Mayfield as a material witness to Madrid train bombing, and the FBI incorrectly identified Mayfield through a fingerprint found on a bag in Spain.

So those are the questions. My time has expired. And I suggest you spend as much time writing a response, or getting it in any way that you can. I do not—Would you allow him to answer, Mr. Chairman?

Chairman SENSENBRENNER. Mr. Comey, you can answer the questions verbally, if you know the answers. And if you don't know the answers, please indicate, and we'll include your written response in the record.

Mr. CONYERS. Thank you, Mr. Chairman.

Mr. COMEY. Thank you, Mr. Chairman. Mr. Conyers, starting with the last one, I am not aware of anyone who's being held anywhere in the Federal criminal justice system based on a case of mistaken identity. If I were to learn of that, I wouldn't be here today. I'd be working to try and fix that.

You're correct; Mr. Mayfield was held, by order of a court, on application of the Government, for 2 weeks, as I recall, as a material witness, based on a mistake.

You asked me if I—with respect to the abuse of detainees at Abu Ghraib. Based on the pictures I've seen, which I'm sure you've seen, a whole lot of it looks criminal to me. I'm also aware, though, that people are being prosecuted for that in the forum in which the jurisdiction lies, which is, for the military personnel, in the Court of Military Justice.

The Department of Justice does have under review at least one matter related to that that relates to a non-military employee. That's the area where we would have jurisdiction. But it's something we take very, very seriously, and pursue very, very aggressively.

And I think that's—I think those are the ones I'm able to answer at this point.

Mr. CONYERS. Thank you.

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. Thank you, Mr. Chairman.

Mr. Comey, you are indeed correct when you said earlier that governmental authority should be challenged and questioned. We have provided many forums for that. Our Subcommittees had nine hearings, as you probably know.

I want to share with you and with my colleagues what happened to me back in my district about nine or 10 months ago. A constituent came to me and he said, "We've got to do something about this PATRIOT Act." He said, "It's trampling all over rights of everybody here, there, and yonder." And I said to him, I said, "Well, sir, can you give me an example how you have been adversely affected by it?" "Well, no, I can't do that," he said. I said, "Well, can you give me an example how anyone you know has been adversely affected by the PATRIOT Act?" "Well, I can't do that, either." I said, "Well, you're not helping me any."

Now, I'm not suggesting, Mr. Comey, that the PATRIOT Act is a perfect piece of legislation. I am suggesting that much misunderstanding has surrounded it, as was evidenced by my conversation with my constituent.

At one of our hearings—strike that. At several of our hearings, there were some recommendations, Mr. Comey, that section 220—that is, to allow for the recipient, usually an ISP, to challenge a nationwide search warrant in the district where it is issued, or where it is served. As we all know, currently section 220 allows challenges only in the district where it's issued.

Now, at first blush, I don't see a problem here. But do you see a problem where you might have different districts reviewing or examining or authorizing a warrant that may have been issued in one district, served in another; rather than an appeals court making that determination? Do you see a problem if we did in fact amend 220?

Mr. COMEY. Potentially, Mr. Coble, on its face, I agree with you. My first reaction to it was, "Well, that's not a big deal." But it might be a big deal because, first of all, you'd have a district judge, in a district that had not issued it, passing upon it; so not have spent time reviewing it. You wouldn't be going to the judge that had the expertise and had issued the order in the first place. So I'm not sure how efficient it would be from a judicial perspective.

But potentially complicating is the fact that the districts, if they're in different circuits, may operate under slightly different rules that govern suppression hearings, that govern standards to apply when there's a fourth amendment challenge. And so you'd have a tricky question of having one circuit and a district in that circuit trying to evaluate under its standards, or maybe those of a foreign circuit, what the judge had done originally.

I don't think this is enormously burdensome. It's not a problem that I've heard from ISPs. In my experience, ISPs are fairly sophisticated businesses and don't find it daunting to have, if they want to move to suppress or to challenge—excuse me, if they want to move to challenge a warrant, to be able to do it in a district other than the one in which they're physically located.

I'm not sure anything is broken there, I guess is what I'm trying to say. And I worry that, because it seems on its face like not a big deal, if we made that change, we might bollox up what is a process that's working pretty well.

Mr. COBLE. I thank you, sir. Another suggestion at one of our hearings involved publicly announcing how many reporting requirements or inquiries were made. For example, "X"-number of inquiries were presented to a book store, as opposed to five to a library. Now, I don't want to seem paranoid, Mr. Comey, but I don't want to give anybody who wants to do harm to us any information that might in fact be beneficial to them.

We in the Congress receive this classified information already. Do you see any advantage to making this information as public knowledge?

Mr. COMEY. That's a hard question. And we get beat up all the time and accused of being paranoid for over-classifying and not wanting to release numbers. And as was discussed earlier, the Attorney General took the step, as Attorney General Ashcroft did, to declassify some numbers.

The reason we don't want to have those numbers out there is not because we're looking to hide them; especially from Congress, because Congress is going to get them anyway. We just don't want to give any additional clues to the bad guys; especially when the bad guys are terrorist groups that really, really want to do horrific damage in the United States.

And so people say to me all the time, you know, "What's the harm if you declassified the number on a regular basis?" And I turn it around a little bit and say, "Well, there may not be any harm, but given the nature of what I do, shouldn't there be a really good reason to tell the bad guys how often I'm using a tool in this place or in that place?" Sometimes I can't figure out how it would help them exactly, but they're pretty clever people who are not only clever, but willing to die to kill people.

Mr. COBLE. They're clever people, Mr. Comey, who want to kill you, and they're willing to kill themselves to make a point.

Mr. COMEY. Yes, sir. And that makes me proceed very, very cautiously.

Mr. COBLE. Thank you, Mr. Comey. Thank you, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from California, Mr. Berman.

Mr. BERMAN. Well, thank you very much, Mr. Chairman.

General Comey, as I mentioned to you in my office, I have a number of concerns about actions that aren't part of the PATRIOT Act, but relate to unilateral actions taken by the Administration on issues that fall squarely within the jurisdiction of this Committee; even though in these areas we haven't at this point offered input.

I'd like to talk to you about four of these areas. One of them is detention of non-citizens without notice of charges. The second is the blanket closure of immigration proceedings by the so-called "Creppy memo." The third, automatic stays of bonds. And the fourth, denial of individualized bond hearings.

What each of these policies has in common is that they are all a one-size-fits-all policy applied in immigration cases across the

board, whether or not they involve matters of national security, and with little or no balance in terms of due process.

I've raise these issues in previous hearings, and Attorney Generals have acknowledged we need to improve and mistakes were made. I think at the time, as we consider the sunset provisions in the PATRIOT Act, I'd like to get past the acknowledgement of errors and into a discussion of solutions.

Mr. Delahunt and I introduced the Civil Liberties Restoration Act, where we tried to strike a balance, without taking away any of the powers the Department has that they believe are vital to the war on terror. I think we've found a solution on each of these issues. I'd like to hear your thoughts on them.

First, on the issue of notice of charges to detained non-citizens, we provided in section 412 of the PATRIOT Act a way for you to hold aliens suspected of involvement in terrorism for up to 6 months without approval of a judge, subject only to issuance of a writ of habeas corpus, as long as they were given notice of the charges against them within 7 days.

As far as we've been told, that power has never been used. And instead, it was circumvented in favor of a policy put in place before the PATRIOT Act that allows people to be held for indeterminate periods of time with no notice of charges.

Our bill would leave section 412 undisturbed, but replace the policy the Department put in place with a requirement that a notice to appear be served on every non-citizen within 48 hours of his arrest or detention, and that those held for more than 48 hours be brought before an immigration judge within 72 hours of arrest. You'd still have the 412 authority to hold for up to 7 days, and then to keep in detention in cases of suspected terrorism, espionage, and other provisions set forth in 412.

Second, the Creppy memo, the blanket closures of immigration hearings following September 11. On this policy, the Civil Liberties Restoration Act would end the across-the-board closure, but would still authorize closure of all or part of an immigration hearing when the Government can demonstrate a compelling privacy or national security interest.

Third and fourth are two issues that I'd like your thoughts on, also. They deny bond to whole classes of non-citizens, with no individualized hearings before a judge, is one of them. And another that enables a Government lawyer to unilaterally nullify a judge's order to release an individual on bond after finding that he is neither a flight risk nor a danger to the community.

On the blanket denial of bond issue, the CRLA [sic] would make a shift from a one-size-fits-all policy to a case-by-case approach, to provide detainees, except those in categories specifically designated by Congress as posing a special threat, with an individualized assessment as to whether the non-citizen poses a flight risk or a threat to public safety.

And finally, on the automatic stays of bonds, our bill would permit the Board of Immigration Appeals to stay the immigration judge's decision to release an alien for a limited time period, when the Government is likely to prevail in appealing that decision and the board finds there is risk of irreparable harm in the absence of a stay.

So I'd be, one, interested in your comments on this and, secondly, I would in the context of dealing with the PATRIOT Act at the point where we get to marking up, would like the opportunity—even though these aren't specifically PATRIOT Act provisions, but they all are directly related to the events and actions taken after 9/11—have a chance to see if we can rectify the balance somewhat. Thank you.

Mr. COMEY. Thank you, Mr. Berman. And as you said, these are not PATRIOT Act issues, per se; which is one of the challenges we have in dealing with the PATRIOT Act. Folks sort of—you know they're not, and I know they're not, but people tend to lump them together. But they're important issues, nonetheless.

Mr. BERMAN. And I take your point about the confusion out there as to what is or isn't. It's quite widespread.

Mr. COMEY. Yes, big challenge. And I pretend to know a lot about a lot of things. The one I will not pretend to know a lot about is immigration laws. I think I confess to you. But I can comment on a couple of these.

Maybe revealing that I am a short-timer, I never liked the blanket closure of immigration proceedings, because it's a one-size-fit-all approach. And if our lawyers can demonstrate that it ought to be sealed, we'll get that from the judge and so I think—and that's where we are now. We proceed on a case-by-case basis. To say all of a certain class must be closed, frankly, is not smart, and makes us take a hit that we don't need to take. I mean, if we can demonstrate it, let's demonstrate it. If we can't, let's have it be an open hearing.

With respect to your concerns about due process, my understanding, which is non-expert, is that there are no immigrants who are arrested on immigration charges who are held without notice of their charges; that there is a requirement that they brought before an immigration judge to have an application—opportunity to apply for bond and to have notice of the charges. It may be what——

Mr. BERMAN. What about the Inspector General's report?

Mr. COMEY. Well, the Inspector General found in the practice in the months after September 11th that there were a whole bunch of people who were sort of held until cleared, and that was a screw-up; that that was not consistent with what the policies and procedures that the regulatory regime lays out are.

My understanding of what the regulatory regime is is that you have to have—it's sort of—there's a lot of due process—I was frankly surprised when I tried to educate myself on it—that people have an opportunity to appear promptly before a judge, to apply for bond, to obtain counsel if they wish, to contact family members; and that the problems that the IG found were that procedures were not followed; and that people were held in kind of a limbo state that was inappropriate; that they were not given notice of why they were held, they didn't have a reasonable opportunity to contact counsel or family members. And those are things that were the subject of the IG's report. But I'm not sure the procedures are broken.

Mr. BERMAN. Well, I'd like to take a chance at some point—not now—to show you——

Chairman SENSENBRENNER. The gentleman's time has expired. Mr. Comey, you can answer the questions that Mr. Berman asked before the red light went on, but there are a lot of other Members that would like to have a shot at you, too.

Mr. COMEY. Okay. I think I tried to, and I'm sure the Department—experts in the Department will have an opportunity to offer views on those particular provisions. Mine would be too uninformed to add more, I think.

Chairman SENSENBRENNER. And with that, the gentleman from Texas, Mr. Smith, is recognized.

Mr. SMITH OF TEXAS. Thank you, Mr. Chairman.

Mr. Comey, thank you for your testimony, and also for your answers to the earlier questions. I'd like to ask you about a subject that was dealt with in your written testimony, but that hasn't been mentioned so far today. And that is the question of sunsets.

Several people have suggested that, rather than eliminate the sunsets, we simply extend the sunsets; particularly in regard to section 218. Why would that be a good or bad idea?

Mr. COMEY. It would, in my opinion, be a very bad idea to continue the sunsets, generally; but particularly with 218. Because what 218 does is foster cultural change, which—all of us work in big institutions—is enormously difficult in big institutions.

And I worry very much that if we hung out there the prospect that the destruction of the "wall" might be reversed, we will never get people to embrace the idea that we need to have everybody communicating, sharing information in the counterterrorism realm.

We've made great progress. Somebody who went to Mars in the summer of '01 would not recognize our counterterrorism operation today. But we need to do better. And 218 is what has given us the space to knit together everybody who matters in counterterrorism. And if people thought—sort of like living in a house you think someone might come and kick you out of: You're going to maybe not unpack your stuff, because you might get kicked out. And I don't want people to think they're going to get kicked out of 218.

Mr. SMITH OF TEXAS. So you oppose any sort of continuation of any sunsets, whatsoever?

Mr. COMEY. I do. I think the answer, though, is rigorous oversight. I think we ought to be dragged up here and drilled and asked, "How are you using this power? Why does it matter?" on a regular basis. I don't think we need sunsets to do that, for you to scrub how we're conducting ourselves. And I support that.

But the sunsets send a message that there's no permanence to these important tools, and that undercuts the ability to get the bureaucracy to embrace them and to understand they're part of our arsenal.

Mr. SMITH OF TEXAS. Okay, thank you, Mr. Comey. My next question deals with a television advertisement that has been run by the ACLU, that claims that section 213 of the USA PATRIOT Act allows law enforcement to search out homes "without notifying us;" implying that this provision gave Federal law enforcement the authority to conduct searches without ever providing notice to the individual whose property is searched. Is this an accurate description of section 213?

Mr. COMEY. No, sir, it is not. And it's one that I've spent a lot of time talking to folks about, and it's driven me a bit crazy.

We have had for years—decades—delayed-notice search warrants in this country. That's what we in law enforcement call them, because it's accurate. You don't—there's never a circumstance when you're doing a criminal search that you never have to tell that the search was conducted. What was the circumstance before the PATRIOT Act is that in a limited set of circumstances—I would estimate probably 50 times a year in the whole country—a judge would give you permission, based on a written showing of probable cause and a written warrant, to conduct a search and simply delay—not get rid of, but delay telling the bad guys that you were there; to save lives, to preserve evidence, to protect witnesses.

The PATRIOT Act simply enshrined that in black-letter law so we have the same standard across the country, and gave judges the ability to set periods of time that they believe reasonable, based on their knowledge of the facts, to delay notice. It will be given.

I have personally used—and I won't take the time here—but I've personally used delayed-notice search warrants many times, and I think that in the process we've saved lives, in my career as a prosecutor. And if we lost that tool, anybody who understands it—and I think people at all points understand it—would realize we were less safe.

Mr. SMITH OF TEXAS. Okay. Thank you, Mr. Comey. One last question, and this deals with section 201. If 201 were allowed to expire, is it true that criminal investigators could obtain a court-ordered wiretap to investigate mail fraud in obscenity offenses, but not offenses involving weapons of mass destruction?

Mr. COMEY. Yes. It would return us to the criminal predicate list that supported wiretaps that existed before, and I don't think anybody wants that. We need to be able to use that tool, certainly in the fraud and child pornography cases, but also where the stakes are impossibly high.

Mr. SMITH OF TEXAS. Okay. Mr. Comey, thank you very much. Those are very good answers to my questions.

Chairman SENSENBRENNER. Thank you. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you. Mr. Comey, it's good to see you again.

Mr. COMEY. You, too.

Mr. SCOTT. You mentioned in your opening remarks that there is certain language that is not helpful in promoting an honest dialogue about this legislation. Would that include language such as, "To those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists; for they erode our national unity and diminish our resolve"?

Mr. COMEY. I may be a short-timer, Mr. Scott, but I would prefer not to focus on anybody's words in particular. Any words that chill aggressive questioning of Government authority I think are not helpful. As I said in my opening, I think people should demand to know—all points of the political spectrum. I think Republicans should have as big a problem with Government power as Democrats.

Mr. SCOTT. You recognize the words?

Mr. COMEY. I've heard them before, yes, sir.

Mr. SCOTT. You mentioned—you explained how in section 215, what we're calling the "library provision," you went to great lengths to explain how the judge was involved. Is that an important part of 215?

Mr. COMEY. I believe it is, yes.

Mr. SCOTT. On roving wiretaps, when you have gotten probable cause, not that a crime has been committed, but the probable cause that the target is an agent of a foreign government—which means you can get the wiretap without probable cause of any crime, just that you're trying to get intelligence information which may not be criminal, just, you know, information on a trade deal, something, no crime as a predicate—and then you expand this as a roving wiretap, is it important that you ascertain before you start listening in that the target is actually in the location where you've placed the bug?

Mr. COMEY. It may be important as a practical matter, because we don't want to waste time. But in intelligence investigations, given the nature of the people we're following and surveilling, both with spies and terrorists who are trained to look for us and to be very careful, I'm troubled by an ascertainment requirement; which would require us, as you said, Mr. Scott, as we do in the criminal context, to know that the target is the one on the phone or the target is the one near the bug.

Mr. SCOTT. Well, I say this because we've heard from witnesses before, like the Attorney General, that some of these—you know, we reduced the standard from the purpose of the wiretap being foreign intelligence to a significant purpose, which invites the question: If it wasn't the purpose, what was the purpose? And the answer, of course, is you're running a criminal investigation without probable cause.

Now, since you're running a criminal investigation, isn't it important that the people you're listening in are actually targets of the wiretap? I mean, you could put these all over town where the target may be using the phone. If he leaves, shouldn't you stop listening?

Mr. COMEY. Well, you'd like to, because you don't want to waste the time, but the way——

Mr. SCOTT. Well, no, no. No, you're not wasting time. You're listening in to people you wanted to listen in to. I mean, because you're running the criminal investigation under the auspices of this less strict standard of foreign intelligence. Should you be able to take advantage of the criminal investigation with the lower standard by listening in, when the target isn't even there?

Mr. COMEY. Well, first of all, you'd better not, if you work for me, be conducting an investigation to obtain criminal information using FISA unless the following is true: Significant purpose, as you said, Mr. Scott, is to obtain foreign intelligence. And if there is an additional purpose to obtain criminal information, it's only criminal information related to foreign intelligence crimes, terrorism crimes or espionage crimes. That's what the FISA court of review has told us is the law, and so we'd better—we are following the law.

Mr. SCOTT. Well, we changed the law under the PATRIOT Act.

Mr. COMEY. Well, I've heard that said, but the court of appeals that governs this has said you may only collect information of for-

eign intelligence crimes if that's an additional purpose to the collection of foreign intelligence.

But the ascertainment—the way we collect intelligence information, we strike a balance. Because of the nature of the target, we stand off a little bit more. We collect, and don't necessarily review real-time what's being collected. And we account for that with the rules that govern the storage and dissemination of that information. And that's a balance that's been struck to recognize that criminal investigations are different, and I think it's a reasonable one.

When you drill down and look at the way we follow spies and follow terrorists, it would make it much more difficult to operate intelligence investigations if the agents were required to ascertain in every circumstance that the target is there at the bug or there on this particular phone.

Mr. SCOTT. Could you——

Mr. COMEY. Rather than collecting and minimizing it later, and strictly controlling what you do with U.S. person information. I'm sorry, sir.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. Mr. Comey, welcome. We are pleased to have your testimony today. Looking at section 217, some have suggested that in order to better protect privacy, it should be more difficult under section 217 for a computer owner to seek the assistance of law enforcement in monitoring hackers who are trespassing on his or her computer.

I believe, however, that we must be also concerned about the privacy rights of those who are being victimized by the hacking. And I wonder if you could please explain how hackers threaten the privacy rights of law-abiding Americans, and how section 217 has assisted the Justice Department in protecting privacy.

Mr. COMEY. I think of the computer today, sort of the cyber world, as like our house. I mean, so much of your—so much of my business, I think of all of our business, including our children's business, is in that computer and online that I think of it like a house. And what 217 allows us to do is—if a bad guy breaks into the house, the person who owns the house can invite the police to come in and help catch the bad guy.

All of us know—I know, because I've tried to get some of this software on my computer to stop people from hacking and taking over passwords and taking over my account—that this is a scourge that we deal with all the time. That's on an individual level.

If a hacker gets into an Internet service provider, it's not just my house. It's as if we all live in one enormous condominium, and the bad guy is in there, able to open all the doors and take all of our stuff. We think that it's very, very smart law enforcement to allow the owner of that condominium to call "911" and say, "Cops, get in here, help me find this guy who's somewhere in here rummaging through people's belongings."

If you make that more cumbersome, I just think you make it harder to catch the bad guys in that sort of electronic house, if that makes any sense.

Mr. GOODLATTE. It does. The Department of Justice has informed the Congress that the September 11th terrorists utilized our public libraries before they killed 3,000 of our citizens. Yet some are proposing to exempt libraries and book stores from providing business records that are relevant to a terrorist investigation. And I wonder if you could tell us, if section 215 were amended to exempt libraries, what would be the effect?

Mr. COMEY. Oh, gosh. I think an effect that nobody really wants. We don't want to create sanctuaries any place—no less libraries—for bad guys, especially terrorists. But we have a big problem with pedophiles going to libraries, fraudsters going to libraries. We've had spies in libraries. And we know terrorists go there, because it's Internet access and they think it makes it harder for us to follow them and to know what they're doing.

If we ever sent a message—and I worry, to be frank, that we've sent that informally, with some people posting signs at libraries saying basically that, "We scrub the hard drives," or "Be careful"—that we move toward creating a sanctuary for this kind of activity. And nobody wants that. Librarians don't want that. Nobody wants that.

What people want to discuss—which is reasonable—is what's appropriate for the Government to be able to collect information in that forum and others? And I'm happy to discuss that.

Mr. GOODLATTE. To your knowledge, have there been any abuses of the section 215 powers?

Mr. COMEY. No, absolutely not.

Mr. GOODLATTE. Have there been any substantiated reports of abuse of the 18 orders that have been granted under section 213 for delayed notification search warrants?

Mr. COMEY. No. And as I said earlier, that's a tool that's supervised by Federal judges. And I've spent my life with Federal judges of all stripes, and they are pretty good overseers.

Mr. GOODLATTE. Some have used section 213 and other provisions of the PATRIOT Act to scare the public, claiming that this is a new authority that allows law enforcement to enter your house and secretly search it. The implication appears to be that section 213 eliminated the existing probable cause requirement that a crime is or is about to be committed. Is section 213, that authorizes delayed notice, a new authority, or a codification of existing court decisions?

Mr. COMEY. Codification of existing court decisions, and a practice that's been approved—in fact, was developed by Federal judges, and concluded to be reasonable under the fourth amendment. I used it as an Assistant U.S. Attorney before it was in the PATRIOT Act, to do a search, to save lives, when a drug gang was coming into Richmond, Virginia.

Mr. GOODLATTE. And it does not change the standard for obtaining a search warrant?

Mr. COMEY. Oh, no. It still requires a written demonstration based on a sworn affidavit that makes out probable cause, and a written search warrant affidavit from the judge. All the judge does is makes a determination that, "Because of the danger here, I will let you delay notice for a brief period of time."

Mr. GOODLATTE. Let me get one more question in. In evaluating the need for roving wiretap authority in FISA investigations, I think that we need to take into account the ability of potential targets to evade surveillance. Based on your experience, do terrorists and spies attempt to thwart surveillance? And if so, how skilled are terrorists and spies at thwarting surveillance?

Mr. COMEY. Thwarting surveillance is their stock in trade. They are, unfortunately, very good at it. When you're talking about spies, you're talking about people that other governments spent lots of time and money training to stay away from us. Terrorists do the same thing. Al-Qaeda trains its people to deceive; to avoid; to hide.

It is an authority that is important when you're talking about drug cases. And that's why Congress gave it to us in the 1980's, because drug dealers were slippery characters. You can't compare in slipperiness drug dealers to terrorists and spies—orders of magnitude different. If we need these tools for drug dealers—which we do—boy, we sure need it for terrorists and spies.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you, Mr. Chairman.

General, first of all, before I ask my questions, let me say I want to associate myself with the comments of the gentleman from California, Mr. Berman. It seems to me that what he was driving at, the need for specificity in some of these with some of these tools, really defines the difference between due process and arbitrary power. And much of what we're doing, or what we're dealing with, is very high risk of the use of arbitrary power; which is un-American, our tradition. And that's what we're getting at.

Last week, at a Subcommittee hearing, Mr. Matthew Berry, the counselor to the Assistant Attorney General for the Office of Legal Policy of the Department of Justice, introduced the following hypothetical dealing with national security letters.

He said, suppose investigators were tracking a known al-Qaeda operative, and saw him having lunch and conversing with an individual. Mr. Berry explained that such a situation would meet the relevance standard required for the FBI to issue a national security letter under section 505 of the PATRIOT Act.

Now, let's take this hypothetical further. That person has been tainted and could be used—could be the target of a national security letter, of an NSL, for sitting next to a known al-Qaeda operative and politely making small talk. Sit down in Starbucks next to who knows—okay.

Now, let's say that they were having lunch at the food court. From the food court, she walks—the person who happened to sit next to the al-Qaeda operative—to Barnes & Noble right there at the mall. Can the FBI then be justified in using a self-authorized NSL to demand records on her from the book store?

She then walks to a jewelry store and purchases something. Could those records be sought using an NSL? She then decides to leave the mall, and walks to her car. Can the FBI get her records using an NSL from the car dealership or the rental agency?

She drives to the public library, and there uses a computer to make travel plans through the online agency. Using a national security letter, can her private records be sought from the public library, the Internet server, the travel agency? You get the point. How far do we extend this?

Furthermore, would the people she came into contact with during this time also be tainted with suspicion and be subject to NSLs, given their supposed relevance to a national security investigation?

The records we're talking about are very private and sensitive. They show a person's private life and, as such, should enjoy a rather high standard of protection. Would you support legislation reestablishing the standard that the information sought be based on specific and articulable facts that suggest that that information pertains to a foreign power, or to one or more of its agents? Or are we on an open-ended fishing expedition that extends to the known universe, as apparently my hypothetical would seem to suggest?

Mr. COMEY. It's a very good question. And the same point is made not just with respect to NSLs, but with respect to 215.

Mr. NADLER. Absolutely. But the NSLs seem to me even more Government arbitrary power than 215.

Mr. COMEY. Because there's no judge involved, especially.

Mr. NADLER. No judge at all, that's right. It's just a field agent—a field office of the FBI.

Mr. COMEY. My concern with raising—with putting a "specific and articulable facts" standard; or some have suggested "reasonable articulable suspicion;" others have gone so far as to say "probable cause," which I know you're not suggesting——

Mr. NADLER. Although I've thought of it.

Mr. COMEY. Okay. I hope you don't suggest it. I'm trying to think of real-life examples, and the one I come up with is—and it's fair to draw those kind of hypotheticals out—is Mohamed Atta's roommate. So I keep focusing on, what if I had these tools before September 11th, and just after September 11th I found out that a guy had lived in Mohamed Atta's apartment, but I knew nothing else about him. What reasonable investigation would I, as a career prosecutor, want to conduct?

I would tell the FBI I want his credit reference record, I want his bank records, I want his travel records, I want his phone records. And what do I know, besides that this guy lived with a really bad guy? Do I have specific and articulable facts that justify, that show that these records are going to be——

Mr. NADLER. But where do you draw a line? What if he sat down in Starbucks and talked to somebody. That was the hypothetical given us by the counsel to the Assistant Attorney General.

Mr. COMEY. Right.

Mr. NADLER. I mean, we hope we don't live in the world of the wonderful show that I like to watch every Monday night, "24," where anything goes. I mean, yes, any suspicion based on anything, if there are no standards, if the king can give a writ of assistance to anybody in 1760, yes, it might help an investigation. But you have to have some protection.

Mr. COMEY. Yes.

Mr. NADLER. Where do you draw that?

Mr. COMEY. And it's a show that always shows the prosecutors as the real namby-pambies.

But it's a hard question to answer. I cling to the relevance standard. I don't believe—first of all, I'm not sure you could obtain some of those records under NSLs, given the limitations on the material that they can obtain. But they wouldn't be relevant. But I worry, if you import this. And I'm not saying it's unreasonable to suggest—when you put that standard in——

Mr. NADLER. Let me ask you one further question before my time runs out. In *Doe v. Ashcroft,* the New York District Court held NSLs unconstitutional because the issuance of these letters is accomplished without any judicial review and are subject to an indefinite gag rule. Given this decision, do you agree that additional legislation may be warranted?

Would you work with this Committee to legislatively clarify that an NSL recipient has the right to challenge both the requests and the gag orders in court? Would you support a congressional effort to permit the recipient of an NSL to disclose receiving such a letter in order to comply with the request, and/or to consult with legal counsel?

And finally, would you have a problem with Congress setting a 90-day time limit for the gag orders based on exigent circumstances, with the possibility of 180-day extensions available from the court of appeals?

Chairman SENSENBRENNER. The gentleman's time has expired, and the witness will answer the question.

Mr. COMEY. We will work with you on all of that. I know there is legislation that's pending to address some of those. I don't think we've taken a position on it. But a lot of it is smart and reasonable.

I don't have that same feeling about the 90-day/120-day. Given the nature of the people that we're dealing with in intelligence investigations, I think the balance has to be struck in favor of indefinite. And at some point——

Mr. NADLER. How about that for conditional renewals?

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from California, Mr. Lungren.

Mr. LUNGREN. I thank the Chairman. And I thank Mr. Comey for the open and forthright way with which you are facing this. And obviously, we wouldn't be here discussing the PATRIOT Act or the sunset provision, had it not been for 9/11. And sometimes we have to remind ourselves of that.

I was reminded of that today when, in my home district, we received news of a father and a son charged with lying to Federal agents about the son's alleged training at an al-Qaeda camp for a mission that the judge said was to "kill Americans whenever and wherever they can be found."

I'm not sure we've ever faced that before with a transnational organization that has indicated it is the duty of all those who have allegiance to the same beliefs they have to kill Americans—men, women, and children—wherever and whenever they can be found.

Having said that, there is this concern about the PATRIOT Act; whether it's real or imagined, whether it's perception or reality. And for that reason, I lean toward putting sunsets in this legislation; not because, Mr. Comey, I want to upset the cultural change

that's trying to take place in the Justice Department. But I point to a cultural change that's needed in the Congress.

I think we're doing a tremendous job of oversight here, I think this Committee is. And I think that we have had good cooperation with the Department of Justice. But oversight has not been the strong suit of Congresses in the past. And I wonder whether we would be as vigorous if we didn't have the obligation of this. And some of us have a feeling that not only is it something necessary to effect the cultural change on the executive branch, but also the legislative branch.

Do you truly think that if we had sunset provisions for section 215, for instance, and some of the others, that that would be a real interference with what you're accomplishing and what you hope to accomplish in the future with the changes brought about by the PATRIOT Act?

Mr. COMEY. The honest answer is I don't think it would be a disaster. But here's another reason why I don't think it makes sense. And I'm not in any position to talk about oversight, except that, as I said to the Chairman, we have seen, I think, remarkable oversight, as you noted, here.

Chairman SENSENBRENNER. The Chair thanks you for that comment. I think some of your predecessors in your office would not have done so.

Mr. COMEY. Well, the one thing I can tell you, though—and it's hard for me to put this into words without seeming small in my remarks—but we have devoted huge resources and time to this, as we should. But we have hundreds—"hundreds" is fair—of people working on what we've done over the last 6 months, and spending countless hours collecting information, responding, meeting.

That's an enormous drain. And it should be. But I hope it's a rare drain, and that we use it to establish that the base line is sound; that what Congress did in September—after September 11th was sound; and that what we can do going forward is rolling, and not in a way that makes everybody and his brother in the Department of Justice work on the effort.

We live in a bit of a myth, and that is that we have limitless resources. We don't. And it is a major challenge for us to do this. And we're happy to do it, because it ought to be done. I just—to be very frank, and I won't be here, it would be really hard to do this 3 years from now, or another 2 years from now, when we can substitute for it something that I think is as effective, which is rigorous oversight.

Mr. LUNGREN. Well, it sort of begs the question of whether we would have rigorous oversight——

Mr. COMEY. Yes.

Mr. LUNGREN.—if we didn't have this requirement. And you have talked about the tremendous number of hours that have been put into it, precisely because the Department thinks it's important to have this reauthorized. And precisely because many of us think it's important to have it reauthorized, we are spending the time to do that.

I guess, let me ask a question about a specific section, section 212, which allows computer service providers to disclose communications and records in life-threatening emergencies. Number one,

has that proven to be successful and useful? If so, could you provide some real examples of that? Also, have there been any substantiated reports of abuses of section 212?

And then, it's my understanding that that section does not require judicial intervention. Is there a problem with an after-the-fact judicial review to see if in fact there was an emergency circumstance that required this?

Chairman SENSENBRENNER. The gentleman's time has expired. Would you answer the question?

Mr. COMEY. Yes, Mr. Chairman. Section 212 is the life-saver. That's how I refer to it, because it's not used much in those circumstances, but I met a young girl, 16 years old, from—her parents brought her to meet me and the Attorney General from just outside of Pittsburgh, who had met some whacko on the Internet and he had lured her to meet him—she not knowing exactly who he was—and then kidnapped her and brought her and locked her in a dungeon in, I believe, the western part of the State of Virginia. And she was saved with 212.

And I won't take the time to explain all the details, but an Internet service provider was able to provide information, because this whacko sent an e-mail to one of his fellows bragging about that he had this girl in a dungeon. And they were able to provide the FBI with instant information on where he was, and they rushed in there and they saved this girl's life. And I was able to shake her hand—had my picture taken with her—because of 212.

The proposal for judicial review, I'm not exactly sure how that would work. And I worry that it would tie up 212, because it's an emergency situation where the ISP is able to call the police—almost like the house is on fire—and provide the information. And I'd have to think through more carefully exactly how post-hoc judicial review would work. I have a hard time sort of figuring it out on the fly.

Chairman SENSENBRENNER. The gentlewoman from California, Ms. Lungren [sic].

Ms. LOFGREN. Actually, it's "Lofgren," not "Lungren."

Chairman SENSENBRENNER. It's "Lofgren." [Laughter.]

I'm sorry. I should know better.

Ms. LOFGREN. Thank you, Mr. Chairman. And thank you, Mr. Comey. I, to some extent, agree with the comments that we need to cool down the rhetoric on the PATRIOT Act. I think we're here, and it's important that we're here, to review the details not just of the sunsetting provisions of the act, but all of the act.

And yet, having said that, there are people in the country that everything they don't like they believe is because of the PATRIOT Act. And I constantly challenge, "Where in the act is this misbehavior?" There's things I don't like, too, but it's not all in the PATRIOT Act.

At the same time, I think it's a terrible mistake to criticize those, or to question the patriotism of those who are legitimately engaging in oversight to make sure if we have preserved the balance between our civil liberties and our need to have vigorous law enforcement; which is what we're doing here today.

Along those lines, I want to go back to section 215. In your testimony, you state that the FISA court has issued 35 orders, but that

none were issued to a library. At the same time, you say if we exempt or change 215 relative to libraries, you know, it's the end of the world. The roof will fall in; terrorists will make libraries safe havens.

And I guess I'm skeptical of that. And I'm wondering if there isn't some intermediate provision that would assist with the anxiety that is afoot in the land. People are afraid that their reading habits are going to be interfered with. Their first amendment rights are in fact being chilled today, because of what people think is happening, even if it's not happening.

And so the question I have is, why not require that personally identifiable information be exempt from section 215? It is true that anybody can go in and use a computer terminal in a library, and they can do good things or bad things. But the libraries I've been to don't keep track of who's on the terminals, and it's not personally identifiable. Could you answer that question?

Mr. COMEY. Yes, I'd be happy to. Something is broken, but I think—and I may be impossibly naive—but I think it's people's understanding of 215, and not 215. And if what's broken is their understanding, I'm going to work till I have no more breath to try and fix that; rather than change 215 just because folks don't understand it.

Ms. LOFGREN. What about the personally identifiable information exemption?

Mr. COMEY. I don't know why we would do that, though, because that would—I don't think the sky would fall, but you would create a sanctuary in those particular places. Because a bad guy would know, "That's a place I can go."

Ms. LOFGREN. Well, I mean, you can still get the information, if it's personally identifiable; just not through section 215.

Mr. COMEY. If we couldn't use 215 to obtain information that we could tie to a particular person, say, we were following—again, this is the kind of thing that doesn't happen, but if we were following a terrorist, and he was sitting at a computer terminal, and we wanted to get the records, his records, and we had done something that made it impossible for us to obtain records that told us they were his, I don't know why we would do that. And I don't think librarians would want that.

Ms. LOFGREN. Let me ask another question. And it goes back to our need to review the whole situation, not just what is being sunsetted. I guess in a way it goes back to the earlier comment about oversight and how much time and effort is being put into answering the questions that Congress has posed. And I assure you, I don't question that you are putting in a considerable amount of time.

But after the Attorney General, Mr. Gonzales, appeared before the Committee, I had two questions that he was not able to answer on the spot. One had to do with section 218, how many prosecutions for non-terrorism-related crimes had been a result of this section; and then further, about the material witness section, under 3144 of 18 U.S. Code, how many individuals actually ended up testifying before a grand jury.

I never—he wasn't able to answer it on the spot, which I can understand. I never got the answer afterwards. Do you know the answer today? And if not, will you promise to get me the answer?

Mr. COMEY. I don't know the answer, and I will promise to get you the answer. And I can do that with some confidence, because I know it's being worked on very hard. They're collecting—we're going out to the field to collect the information so that we can supply it.

Ms. LOFGREN. Finally, I just want to mention that we did not suspend habeas corpus in the PATRIOT Act. And yet, the detention of American citizens without charge, without access to counsel, has been referenced to the general action we took to authorize the invasion to enact the PATRIOT Act. Shouldn't we make it explicitly clear in any reauthorization that we are not suspending habeas corpus?

Mr. COMEY. I don't know—certainly, no one that I know has argued that Congress has suspended habeas corpus, and in fact——

Ms. LOFGREN. Then you wouldn't mind if we made that clear in the act?

Mr. COMEY. Well, I suppose I wouldn't mind. I mean, I don't know how the legislative process works. But habeas corpus is alive and well in this country. And in fact, the litigation you're referring to is pursuant to the habeas corpus, the great writ, and being decided by the courts now, whether the Government has that authority.

Mr. LUNGREN. [Presiding.] The gentlelady's time has expired.

The gentleman from Texas, Mr. Gohmert, is recognized for 5 minutes.

Mr. GOHMERT. Thank you, Mr. Chairman. And I appreciate your being here, Deputy.

First of all, I want to address something that was brought up earlier very quickly. And that is the so-called abuse or torture some people referred to, whether at Abu Ghraib or Guantanamo. And I'm deeply offended when I hear that individuals indicate that Abu Ghraib was some type of gulag. They need to go back and read the accounts of what happened to our fly-boys in the Pacific in World War II, when they had internal organs removed to be cannibalized by their captors; or had holes drilled in the head while their brain was probed while they were alive, to see what parts responded to what probing; to have bones repeatedly broken; to be handcuffed from behind and be hung by the wrists.

These people that think that we are running gulags either have their head up an earthen or biological hole somewhere. I'm concerned.

But anyway, also to read in a local tabloid today that a former President believes we should close Guantanamo, when perhaps he didn't protect the country when we had American soil attacked and our own people taken hostage and nothing meaningful was done for over a year to ever try to get them out, I have to take that with a grain of salt.

So with that background and defense of the Nation and things we're doing, there have been abuses. Having been in the military, I know the UCMJ takes care of those. It is taking care of the abuses. They are abuses. They're not torture. And I've talked to

POWs of ours who indicate just that. They would have welcomed having the abuse rather than the torture and hell they went through, for example, at the "Hanoi Hilton."

So anyway, with regard to 215, though, would you have a problem—you know, I understand this AG's office and this DOJ believes that individuals that get the order to produce records, or even NSL, that's been interpreted as meaning they have a right to counsel and can talk to their own attorneys; isn't that correct?

Mr. COMEY. Yes, sir.

Mr. GOHMERT. But that's not written in the law, as I see it or find it. Would you have a problem with that being written in, so future AG offices or DOJs would understand you can consult your own attorney when you get this letter; you're not just, you know, blindfolded and having to produce records. Do you have a problem with that?

Mr. COMEY. No, sir. We agree with you on that.

Mr. GOHMERT. Well, I know that I understood that was your position, as far as interpretation. But it seems for future reference it would be good to have that in there.

I do still have concerns about 215. And I trust implicitly this AG's office, this DOJ. But like in 215, where it says, you know, to get the order from the judge it just has to specify that records are sought for an authorized investigation, that could be to protect against clandestine intelligence activities.

Hypothetically, if you had a President, an Attorney General, or DOJ top officials, that believed, perhaps hypothetically, there was some right-wing conspiracy out there to undermine or hurt the Presidency, and that they may be involved in clandestine intelligence activities, it just seems like the potential is there for using this in ways that it was not intended by an abusive President or an AG.

You might hypothetically even have a DOJ that's so callous that they may just find a friendly judge—and we know some judges are more friendly to one Administration than another—find a friendly judge that wasn't supposed to hear a case, just to go get an order to kidnap a child at gunpoint from people that are holding them. I mean, those kind of things might actually happen.

So I'm concerned about removing the sunset review. You won't be there next time. But just so that there is that kind of attention. You foresee that possibility, if you're not there, there is somebody that could abuse their position?

Mr. COMEY. It's a very good point, Congressman. And I think all of us should worry about how authority could be abused. I think with 215, though, there are safeguards that are important to emphasize. One is that you've got to involve the FISA court; not just any Federal judge. You've got to go to the FISA court——

Mr. GOHMERT. To the FISA court.

Mr. COMEY.—selected by the Chief Justice of the United States. But beyond that, you've got to put it in writing. And then you've got to tell Congress every 6 months in a written report how you're using it, what you're using it for. And I think those are checks and balances that are very important and that are there to check against just the kind of thing you're talking about.

We're a nation of laws, not men. We shouldn't rely on that we like the folks that are in the office. I agree with you. But I think those checks are in place to check that power, and they're appropriate.

Chairman SENSENBRENNER. [Presiding.] The gentleman's time has expired.

The Chair recognizes the gentleman from Michigan, Mr. Conyers, for a unanimous consent request.

Mr. CONYERS. Thank you, Mr. Chairman. I ask unanimous consent that the gentlelady from Florida representative, Debbie Wasserman Schultz, soon to be a Member of the Committee, be permitted to participate in today's oversight hearing, and that it will not constitute a precedent.

Chairman SENSENBRENNER. Without objection, so ordered. And the gentlewoman from Florida is recognized.

Ms. WASSERMAN SCHULTZ. Thank you, Mr. Chairman. And thank you, Ranking Member Conyers.

General Comey, you made a reference earlier—and I also want to ask a question about section 215—to pedophilic activity, and that you would hate to see pedophilic activity be able to continue, or to continue unchecked, if a change was made in 215. But I mean, my familiarity with library activity is such that pedophilic activity has been going on before 9/11 and since 9/11, and there aren't many foreign terrorists who are engaging—using libraries to engage in pedophilic activity.

In fact, you have been able to utilize grand jury subpoenas and your authority that existed before 9/11 to go after that kind of activity. So in fact, Ted Koczynski was apprehended as a result of your ability to examine library records and subpoena them before 9/11.

So why did you need the provisions in 215 to go as far as they did, and what are you not able—what will you not be able to do if they are changed? Thank you.

Mr. COMEY. Thank you for the question. You're absolutely right. I made reference to pedophilia simply, I think, to try to buttress the broader point: that we don't want any particular place to be a sanctuary for criminal behavior. But you're absolutely right; 215 is about foreign intelligence crimes.

We could always use, as you said, the grand jury process to go after regular crooks, big-time crooks, pedophiles, if they were using libraries; and we have. Section 215, what it does is it gives that grand jury criminal power to intelligence investigators. But makes it harder for them, because unlike a criminal investigator who wants to use a grand jury subpoena, who could come to an Assistant U.S. Attorney and get the grand jury subpoena, by the PATRIOT Act Congress made the intelligence investigators who want the same records have to go do it in writing, and do it to a Federal judge, and get a written order. And that makes it harder for them. And that's a judgment of Congress, and that's fine. But I think a lot of times when people focus on 215, they don't realize how we do it in the criminal context, as you said.

Ms. WASSERMAN SCHULTZ. And I agree with the gentlewoman from California when she talks about the balance that we need to strike. I strongly support much of the provisions in the PATRIOT

Act. This is the most disturbing provision. It's the provision that I hear the most about, unsolicited, when I'm not even talking about the PATRIOT Act at home. At town hall meetings people bring up their concern about the library provision.

The two other questions I have is, why did we need to give special powers to the FBI in those investigations, without at least first making the FBI show some proof that the person might be an agent of a foreign power? I mean, I realize they have to go to the FISA court, but they don't really have to show much of anything that their suspicion is that they're an agent of a foreign power.

Mr. COMEY. Right. They have to show—and we've always understood the statute to say this, but it's not explicit, so it's one of the things that we would support adding—that the records sought are relevant to a foreign intelligence or foreign counterterrorism investigation.

The reason that they don't have to show more than that is this is a baseline investigative tool; and that, as Mr. Nadler and I were discussing, if you raised the threshold to make it more challenging, you have to make a higher showing to get basic records, you're going to thwart a lot of investigation you don't want to thwart.

And the food court example is not mine, but it's if you saw someone in a restaurant and had an animated conversation with a Mohamed Atta, what do you know about that person? Not much, but you want to know an awful lot. And if the threshold is raised, that you have to have some baseline facts before you can start gathering baseline facts, you thwart an investigation in a way that I don't think any of us want.

And when you drill down and think about how folks actually conduct these investigations, grand jury subpoenas and 215 orders have to have the same standard; which is relevance. That's how we get started to see whether someone is bad. Or in many, many cases, what we're doing is investigating and clearing somebody, because we've received one of the many poison pen e-mails we get saying, "My neighbor is a terrorist." We have to check that out. And what do we know, besides somebody wrote it anonymously? We don't. But we check it out, and when it turns out to be bogus, that's the end of the matter.

Ms. WASSERMAN SCHULTZ. Well, and the last part of my question relates to the gag orders. I mean, why do we have to have gag orders on those who receive the orders related to the library records and other provisions of 215? I mean, that seems to cloak the whole thing in secrecy.

Mr. COMEY. Yes. No, and that upsets folks. The reason is the same reason we have automatic gag orders, for example, in the thousands of bank subpoenas we issue in criminal investigations every year. Banks can't tell the account holder, by statute, that we've subpoenaed the records.

The reason we have that there and we have it on the 215 side is so the bad guys don't know we're looking at them, and so good people—and this is not something to be ignored—so good people don't get ruined.

If we walk into an institution—a credit card company or hotel record—and serve a subpoena or a 215 order, check out one of these tips that someone's a terrorist, if that clerk who gets it can

tell people, we may ruin a good person by doing that. So secrecy has two purposes: protect the bad guys from knowing we're coming, and protect the good guys from being ruined. And both of them are very important to the way we do our work.

Chairman SENSENBRENNER. The time of the gentlewoman has expired.

The gentleman from Florida, Mr Feeney.

Mr. FEENEY. Well, thank you, Mr. Chairman. And first, I'd like to welcome, I guess a day or two ahead of time, our possible new colleague on the Committee, Congresswoman Wasserman Schultz. We have a long history in Florida together. And I want to warn my colleagues on this side of the aisle that we can expect some lively and engaging discussions and debate with the gentlelady. And we're glad to have her here.

We thank you for your testimony. I had a question I'd like to start with that maybe you cannot answer. And that concerns a trial ongoing now in Florida with respect to Professor Al-Arian, who is accused of a number of crimes related to international terrorism. And I'd like you to tell us, if you can, what portions of the PATRIOT Act were helpful in this specific investigation. And also, describe, if you will, the charges against Mr. Al-Arian.

Mr. COMEY. Congressman, as you mentioned, I have to be very careful——

Mr. FEENEY. Yes, I understand.

Mr. COMEY.—with a jury sitting in Florida right now, hearing that case, about what I say. I think I can safely say he's been indicted for providing material support to terrorism, and that there's been public litigation that much of the evidence that the Government is intending to offer in that prosecution stems from information—evidence obtained through foreign intelligence surveillance. I really ought to stop there.

Mr. FEENEY. Okay. Well, I appreciate that, and I understand the caution.

A lot of us who are civil libertarians by instinct and concerned about Government power are supportive of the PATRIOT Act. We want to revise it where it needs to be revised. Some of us like the sunset provisions. I understand that you'd like to see some of those, if not all of them, repealed. But you know, the point is that over America's history, at times of national duress and threat to the very national existence—I mean, the Civil War, for example—civil liberties have been strained. And there is a balance that moves back and forth.

Matter of fact, the Bill of Rights anticipates some of that when it talks about outlawing unreasonable searches and seizures. And presumably, what's reasonable during a period of time where there are little or no threats is different than what is a reasonable search during times of threats. Matter of fact, Chief Justice Rehnquist has a great book out on the history of civil liberties during times of duress, called "All the Laws But One," which he wrote a good 12, 14 years before the terrorist attacks.

But having said that, the PATRIOT Act is subject to a lot of myths out there. And if you had—you know, when I get accosted on the street, just like, you know, my Subcommittee Chairman mentioned, people blame all sorts of ills that they experience,

whether it's at airports, or discomfort, on the PATRIOT Act, which of course have nothing to do with the PATRIOT Act.

If you had 30 seconds or a minute to explain the difference between the PATRIOT Act reality versus myth to the American people, how would you convince us that much of what it has been blamed for is simply not related to or the fault of the PATRIOT Act itself?

Mr. COMEY. Thank you, Congressman. The first thing I would do is urge folks, all walks of life, who have concerns about the PATRIOT Act to demand the details. Always, always, always ask. When someone says, "The PATRIOT Act is evil," say, "What do you mean, specifically? What part of it? And how is that different from what they can do in a criminal investigation? And so you're saying the PATRIOT Act does what?"

The reason that's so important is it has become a vessel into which people pour concerns about all manner of stuff that has nothing to do with the PATRIOT Act. And I think if everybody demands the answer—doesn't just shake their head like one of those bobble dolls when someone says, "Isn't the PATRIOT Act evil?"—they will find out that the stuff people are talking about either is not in it, or what's in it is reasonable, ordinary, and smart. Because it's mostly taking what we can do to track drug dealers and thugs, and give those tools to people tracking spies and terrorist. And then, something breathtaking; which is the destruction of the wall, the separation between counterterrorism intelligence and counterterrorism criminal.

And if folks will simply demand the details, as hard as it can be, I think at the end of the day they're going to see there's an angel in those details.

Mr. FEENEY. Finally, has the standard for the demonstration that you have to establish under FISA's 207 as to who is an officer or employee of a foreign power, has that changed under the PATRIOT Act? And what is that standard? Presumably, the bad guys' versions of "James Bond" don't come register as a foreign agent or employee. What do you have to establish, and has that changed under the PATRIOT Act?

Mr. COMEY. We have to establish probable cause to believe that someone is an agent of a foreign power. And that can be a foreign power as commonly understood—a foreign state—or a foreign terrorist organization that the court has found to be a foreign power. So probable cause to believe that. Or, that someone is engaged in clandestine activities, intelligence activities, on behalf of a foreign power.

My understanding is that was the standard under FISA before. It's the standard that the FISA court's been applying since 1978. And it requires a written showing of probable cause. And the reason I keep repeating that is folks don't realize that. People are always telling me, "Oh, you have a different, lower burden in FISA." Huh-uh. It's the same probable cause we use to get arrest warrants and get search warrants.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentlewoman from California, Ms. Waters.

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

And I'd like to apologize if this question has already been asked or discussed. I thank you for being here. I'm concerned about the national security letters. And I'm not clear about whether or not the Justice Department continues to use national security letters, or whether or not the court decision that—I think it was in the Southern District Court of New York.

Mr. COMEY. Yes, ma'am.

Ms. WATERS. Decided that perhaps these NSLs were in violation of the fourth amendment, and maybe the first amendment. I'm concerned whether or not you continue to use NSLs, whether or not you're appealing the court decision. And if you are, why do you think it's important to have them?

The ability to use NSLs gives you awesome power to demand, command, all kind of personal information, without judicial review. It's another form, I guess, of administrative subpoena, without having to get the same kind of review that you would get under the normal administrative subpoena. So where does the Department stand on these NSLs at this time?

Mr. COMEY. Thank you. I think the answer is—or I can tell you what I know perhaps for certain. The Government is appealing to the Second Circuit Court of Appeals Judge Marrero's decision in the Southern District of New York. That I'm certain of. I'm quite certain that the judge's order was stayed, pending the appeal. And so there is no order presently in effect forbidding their use.

So I expect—although as I sit here, I haven't been involved in issuing any—but I'm quite certain that they continue to be used, because they're very, very important. It's a limited class of information that can be obtained with an NSL. As I understand it, limited to credit information, financial institution information, or telecommunications records, phone, Internet records. And that's very, very important stuff for the FBI's counterintelligence and foreign intelligence investigators.

Mr. NADLER. Would the gentlelady yield for a second?

Ms. WATERS. Yes, I'll yield.

Mr. NADLER. You're aware that under legislation that we passed last year, financial institutions, for NSL purposes, means almost anything now? I yield back.

Ms. WATERS. Thank you. Oh, did you finish?

Mr. NADLER. Yes, I think so. The knowledge.

Ms. WATERS. It is my understanding that we changed the standards so severely that we could have innocent people who come in contact with people who may be suspected of being an agent, who then would be subject to NSLs.

The last time we had someone here from your department, I used the food court example, where you innocently sit in a public place and get involved in a conversation with someone that you don't know, just out of courtesy, and then become an object and suspected of having some relationship to someone. And then, all of a sudden you are subject to an NSL.

And I wanted you to continue the discussion, to tell us why you think it's so important, even if you end up violating the privacy of innocent people.

Mr. COMEY. Yes, ma'am. Mr. Nadler had me in the food court. It's sometimes hard for people to hear, coming from a prosecutor,

or it sounds odd to them. We don't just investigate the guilty. We end up investigating a lot of people who turn out to be innocent. And that's true in the criminal arena; which is understandable, if you sort of focus on what we do. Even if we're investigating a fraud, we know the fraudster ran a company. And we need to know, well, did those around him at the meetings with him, were they in on it.

And a lot of them may turn out, no, they didn't know about it. Those are the truly innocent people. Or they may be people we just decide we can't—there isn't enough evidence to charge them, and so that goes away.

It's true, as well, in the intelligence and counterterrorism context. As I mentioned earlier, we get a lot of what I call "poison pens"—letters, e-mails, phone calls—telling us that neighbors and friends and, in many, many cases, former spouses and former significant others, are spies and terrorists. We have to check that out. We have to investigate that. We would be drilled if we didn't and one of them turned out to be a bad guy.

And so we have to investigate people all the time based on our belief that information about them will be relevant to an investigation. The food court example is a good one, although Mr. Nadler had excellent hypotheticals to tease it out. If we saw someone having dinner with, sitting in a food court, talking in an animated way with Mohamed Atta, you're darn sure—and everybody in this room would want us to—we're going to figure out who that person is. And we may use an NSL, we may use 215, we may use a grand jury subpoena. We need to know more about them. And we'd probably start with a credit check.

Ms. WATERS. Well, if Mohamed Atta was in the——

Chairman SENSENBRENNER. The gentlewoman's time has expired.

Ms. WATERS.—in that food court, I would suspect that you should have caught him before that.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Forbes.

Mr. FORBES. Thank you, Mr. Chairman. And Mr. Chairman, thank you for holding this hearing.

Mr. Comey, I want to thank you not just for your substantive knowledge of the PATRIOT Act, but for the articulate way that you've been able to explain to us some of the myths that we have been hearing about it.

Piggybacking on what Congressman Feeney said, I've seen few measures that have had more misinformation than the PATRIOT Act; some of that unintentional, much of it intentional. So I thank you for clearing some of that up.

One of the areas is section 213. And I know that you've talked a lot about that today, but specifically I was wondering, just two aspects of that, if you would clarify for us today. On the delayed notification of search warrants, it's my understanding you still need judicial review and approval. And I was wondering if you could just tell us for the record what the Government needs to show to get delayed notification.

And as part of that, I know that one of the justifications is that it would—giving contemporaneous notice would seriously jeop-

ardize the investigation. And there are some arguments that that perhaps is too broad of a scope. And I wonder if you would just respond to that as you explain the Government's burden.

Mr. COMEY. Yes, sir. Thank you. Under the PATRIOT Act, which codified existing practice over 40 years before that, the Government has to go to a Federal judge, make a written showing of probable cause based on a sworn affidavit. The judge has to conclude there's probable cause to search, and issue the warrant. The judge will only give the Government permission to delay notice—not suspend notice, but delay notice—if the judge concludes that one of five things is true. And those are the five categories in the PATRIOT Act: one of them being "seriously jeopardize an ongoing investigation;" another one being "that lives will be at risk;" "that there will be witness intimidation, flight, destruction of evidence," as I recall them, serious events in the course of an investigation.

And it's a tool that, as before the PATRIOT Act, we don't use much. As I said, I think we use it about 50 times a year—once for each State, once a year. We use it when it really, really matters; when people are going to get killed, bad guys are going to flee, people are going to get hurt. If we have to tell them that we were the ones who went into the drug house and took their drugs—instead of having them think it was stolen by rival drug dealers—if we tell them we went in, they're going to know who the informant was, and they're all going to flee.

Folks have said that "seriously jeopardize" is too broad, and inappropriate. I don't think so, and in fact I don't think Federal judges have found that. We've provided to Congress examples where that provision was the one where judges found a basis to delay notice of a search warrant. And it's one that judges have used sparingly, that we've used sparingly; but when it matters, it's a tool we really need.

Mr. FORBES. Thank you, Mr. Chairman. I yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from Iowa, Mr. King.

Mr. KING. I thank the Chairman. And I want to thank the gentleman for his testimony before this Committee. It has been enlightening. And it's important to have this Committee informed. It's also important to have much of the presentation in the record.

I would just make a statement and ask your reaction to this, and that's with regard to the PATRIOT Act. The allegations that it either violates constitutional rights or allows for the violation of constitutional rights, rights to privacy or civil liberties, would you say that that allegation has become an urban legend in this country?

Mr. COMEY. Yes, sir, I would. I say when I speak publicly it's become part of the drinking water. So much so that we have two groups in this country when you go out and meet real folks: those who think it's okay that there's been a tradeoff of liberty for security, and those who think that's not okay. And I always propose to the group: Could you open your mind to the possibility that there ought to be a third group—of which maybe I'm the only member——

Mr. KING. I'm with you.

Mr. COMEY.—that there hasn't been a tradeoff. But it's so much part of the drinking water that people think you must have smoked

something before you came into the meeting. That's absolutely true.

Mr. KING. Well, it's clear you have not. And I appreciate that, particularly being able to articulate that in a fashion more clearly than we have heard before, I believe, before this Committee.

In your mind, is there a particular definition of a terrorist that you're looking for, that helps you narrow the focus from this mass of information that you have, for one thing? You spoke to the information that—how do you sort through all that? How do you identify where to target your investigations?

Mr. COMEY. We work from known facts. I think sometimes people imagine—maybe folks who watch "24"—that we somehow zoom over with a satellite and look for bad guys everywhere. What we do is capture an al-Qaeda guy; find out what's in his pockets; find those phone numbers; find out whose phones those are; find out where those people are, who they might know, to try—just the way we do criminal investigations. We start from a known fact, a known bad guy, and we try and figure out who's connected to him.

And that's why, to respond to the concern earlier, we have to end up looking at people—maybe he called a particular number 15 times. We have to check that out. We may find out it's the Domino's pizza place, but it's incumbent upon us to check that out.

That's how we work. We start with a known fact, with a known bad guy, and try and figure out where the web is, where the connections are. Because our goal is prevention. We need to find those, especially those who are here looking to harm us, but then those around the world who are looking to come here to harm us.

Mr. KING. Are there distinctions between the approach to terrorists, and al-Qaeda in particular, from the investigation and prosecution of the Mob? Are there some things there that transpose across into terrorist investigations that are very similar?

Mr. COMEY. Very, very similar. And it's why some of the best counterterrorism investigators started out as La Cosa Nostra, Mafia investigators, because they are used to secretive organization, bound by an oath—"bayat" in al-Qaeda, "omerta" in La Cosa Nostra; and I've done Cosa Nostra work. And it's a web of connections where people are looking to conceal themselves in ordinary businesses: "I'm just a butcher," or "I'm just a—you know, I just sell clothes for a living," when you're really a Mob guy.

And those skills, the ability to put together networks and connect, and flip people, develop sources to move up the chain—same tools we use in the criminal—on the counterterrorism side.

Mr. KING. And there are common denominators there that would be maybe family relationships, business relationships, ethnicity, religion, those kind of things, as well?

Mr. COMEY. Yes. All those things that connect good people also connect bad people, and help us understand who are the potential bad guys close to the known bad guy. That's the work we do. And we try to use all tools at our disposal to incapacitate. With Al Capone, we used spitting on the sidewalk, tax charges. We do the same with counterterrorism.

The one advantage we have is the response of—the real heroes in this story are not people like me, but are the people in the military and the intelligence community who have taken the fight to

the enemy far from here. That's made an enormous difference. That's a tool we didn't have in the Mob, appropriately; but that's made an enormous difference.

Mr. KING. And one of the things that I would think would be part of the initiative would be to keep the terrorists out of the United States. And I would point out that, to our records, 1,129,000 were apprehended coming across the southern border in the last year. The most consistent number I hear is that for every one that's apprehended, two make it through—that would be roughly three million-plus—to here. They may or may not have gone back. In that huge haystack of illegal immigration that's pouring across this border, how can we ask you to find the needles that are the terrorists?

Mr. COMEY. That's a very, very big challenge, and a thing that's of great concern to us, great concern to the Department of Homeland Security. It is an obsession of ours, and it should be.

Mr. KING. I thank you very much for your testimony, and I yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Arizona, Mr. Franks.

Mr. FRANKS. Well, thank you, Mr. Chairman. And thank you, General Comey. I am one of those who is constantly having to explain to constituents, you know, some of the urban legend that you spoke of earlier. And so let me just ask you first—you know, sometimes a policy is measured in the context of the experience that you have with it. Having said that, do you have any examples or any indication or research that shows where people that were truly innocent victims have been caught up in a misapplication or perhaps as a result of some flaw in the PATRIOT Act?

Mr. COMEY. No, absolutely not. And I mean that. I mean none. We have a very aggressive, very talented Inspector General at the Department of Justice. And it's his job, under section 1001 of the PATRIOT Act, to receive complaints and investigate them, of abuses of the PATRIOT Act. And our record is perfect in that regard.

The Mayfield case from Oregon was mentioned earlier, where the fellow was arrested as a material witness and held for 2 weeks based on a mistaken identification of his fingerprint from a bag in a van near the Madrid bombings. But that's not the PATRIOT Act. I mean, he was detained under the material witness provision, which has been a part of the criminal code for many, many years.

But under the PATRIOT Act, I'm very confident in saying there have been no abuses found; none documented. Plenty alleged, but most of it turns out to be stuff that, again, has nothing to do with the PATRIOT Act.

We had a lady call in and say there was a line across the top of her television screen, and she thought that had something to do with the PATRIOT Act. And you know, we get a lot of stuff like that. And it all goes to the Inspector General, and he has to decide what to do with it.

Mr. FRANKS. Well, General, you know, sometimes the example that's given, that with the people in power now, there's a great deal more comfort level with a given policy; but should those people

change—you know, you articulated it very well yourself—you never know who will gain the reins of power at some point.

I think that today, as we consider terrorists, we're not concerned at all, in a sense, that England may have the nuclear capability to essentially devastate us, because they're friends, they're people that we trust. But of course, if an al-Qaeda or someone like that gained even one nuclear capability, then we would be very, very concerned. So who is in power is of preeminent consideration.

Having said that, if the wrong people got in power—and I realize the wrong people can ultimately subordinate and twist any policy—but if the wrong people did somehow get into power, that had no real concern or respect for the kind of civil liberties that we have grown to enjoy, what do you see, personally—and this is a bad question to ask, but what do you see, personally, as the greatest weakness contained within the PATRIOT Act, or the greatest opportunity for it to be misused at some point?

Mr. COMEY. That's a great question, Congressman. To start with the premise, I agree with you completely. I said this to Senator Craig in the Senate. I don't think it came out the way I meant it. I said to him, "You shouldn't trust me." I mean, I didn't mean that. I mean, you should, and I trust me, and I like the people who lead the Justice Department and the Executive Branch now.

But I meant that, when I say we are a country of laws, not men, we can't devise the systems based on who's in the office; because you could have other people there. But second, good people make mistakes when under great pressure. I mean, if, God forbid, there's another attack in this country, there will be tremendous pressure from the American people to respond to it. And we need these laws and this oversight in place.

I think the greatest risk is that—to pick on something Congressman Lungren said—that oversight won't mean anything; that gradually the culture will drift to a point where people doing this work understand that nobody in Congress reads the reports, and so just, you know, send them up there; that there's no real check.

We need a check on our power. I do. And I need to know that someone is going to look at what I do. It helps me. It helps me when I'm tired not to make a mistake. It helps me when I'm overeager sometimes not to make a mistake.

So if there's a risk, I think the PATRIOT Act is chock-full of what we need: judges, inspector general, and oversight. But if the culture of that drifts and 5 years from now it's sort of a myth, or 10 years from now nobody even looks, you could have problems. Because it happens. We have a history of it happening.

Mr. FRANKS. Well, that's kind of a segue into my last brief question here. Given the fact that you consider oversight so important, I know that, as I understand, the Department itself has—I won't use the word "vacillated," but something along those lines—on this review, this sunset that would occur at some point. And it occurs to me that that's a good idea; even though my own perspective has developed in this situation. You know, I've come to——

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. I thank the Chair. And I apologize for not being here sooner, but there's a markup going on. And I welcome Mr. Comey.

I'm just going to make an observation that I think segues into what I anticipate as the observation that was going to be made by the gentleman from Arizona, and your comments earlier. I happened to catch your reference to congressional oversight as being a check, if you will, on behavior of the executive branch. And I agree with that. And I know you're sincere in that comment.

And I also want to acknowledge that there has been very good input from the Department of Justice during the hearings by the Crime Subcommittee on the reauthorization. And I should commend the Chair for directing Chairman Coble in conducting those hearings. I think it's been very fruitful.

And I think that there's the potential for some consensus on some of the substantive issues. But I've said this publicly at these hearings, and let me just repeat it once more. I think there's a natural disinclination on the part of the executive—and I'm not referring specifically to the Department of Justice, but to all executive agencies—to cooperate on an ad hoc basis, when it suits their particular agenda, with Congress.

I look back 4 years now, when we were in the process of passing the PATRIOT Act. And as you well know, it came out of this Committee with a 36-to-nothing, unanimous vote; which was extraordinary. It subsequently was changed, to the chagrin of some of us. But I keep hearing the comment from witnesses and from others saying that, "We have to make this permanent."

After, I think, eight or nine hearings by the Crime Subcommittee, I am now convinced that that would be a mistake, to make it permanent. In fact, I would go so far as to insist, or at least make an effort to have a sunset attached to the PATRIOT Act, and maybe to other pieces of legislation that come before this Committee for its considerations. Because it does really secure the cooperation of the Executive—in this case, the Department of Justice—to be much more forthcoming and to be much more cooperative. Your response?

Mr. COMEY. It's not an unreasonable thing to say. The reason I would urge that we not do that is a number of things. I think, as I said earlier, that especially with some of these tools, if you sunset them again we will never be able to get people to completely buy that the world has changed, particularly on information sharing. We're trying to change a culture, which is like turning a battleship. And if people think, "Well, Congress might just take away the tug boats, then why are we all going to work to turn that battleship?" That's one worry.

The second is, I think the tools are in there. And maybe, you know, I overestimate the ability of oversight to get it done; but I don't think so. I mean, I think that, with the power of the purse and the power of legislation, this Committee and the others have the ability to haul us up here and demand to know what we're doing. And if we're not giving you the information, to have some consequences for that. I think that's a far better way to proceed.

Mr. DELAHUNT. Let me reclaim my time. Because I really want to let you know that I disagree with you. Okay? And it's been the

experience, I believe, of this Committee in a variety of different areas, not just the PATRIOT Act itself, but where the lack of cooperation has been frustrating, aggravating, and on different occasions has required rather strong action, not just by the Chair of this particular Committee but by other Committees, to secure cooperation. And if we don't have some leverage, we're not going to get it. That's been the conclusion that I've reached as a result of my experience here.

Chairman SENSENBRENNER. The time of the gentleman has expired.

Mr. DELAHUNT. Would the Chair indulge me for an additional 30 seconds?

Chairman SENSENBRENNER. I will. Proceed.

Mr. DELAHUNT. In addition to the incentive—and I understand the culture change that you're talking about—you know, if the tug boats aren't there—I think that was your metaphor—I just want to encourage and incentivize the Department of Justice to keep the tug boats running well. That's what I see as the incentive. We're watching, and we do have leverage.

And as long as those tug boats are steaming, and steaming well, and not going off course, are charting a course that we can all embrace and be proud of as Americans with our cherished core values of civil liberties and privacy, then fine. But we're going to incentivize.

Chairman SENSENBRENNER. The time of the gentleman has once again expired.

Mr. Comey, thank you very much for coming here and for your testimony. I would like to echo the words of Mr. Delahunt. I believe that in the last year and a half the Justice Department has been much more forthcoming on the PATRIOT Act and on other issues than in the two and a half years prior to that.

And this Chair has both publicly and privately expressed to former Attorney General John Ashcroft that an "I've got a secret" attitude on legitimate oversight that does not involve classified information is self-defeating.

I would like to salute both you and Attorney General Gonzales. I think that there has been a change in attitude that has been particularly marked in the hearings that we've had on this. You help your cause by coming up here and answering questions in the way that you did, and the way that your boss did a couple of months ago. And I hope that continues.

Thank you very much for coming. The hearing is adjourned.

Mr. COMEY. Thank you, Mr. Chairman.

[Whereupon, at 11:55 a.m., the Committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

INDICTMENT OF TARIK IBN OSMAN SHAH SUBMITTED BY F. JAMES SENSENBRENNER, JR., CHAIRMAN, COMMITTEE ON THE JUDICIARY

05 MAG 956

Approved: _____
VICTOR L. HOU
Assistant United States Attorney

Before: HONORABLE HENRY PITMAN
United States Magistrate Judge
Southern District of New York

DOC #: 1
ORIGINAL

UNITED STATES OF AMERICA -v.- TARIK IBN OSMAN SHAH, a/k/a "Tarik Shah," a/k/a "Tarik Jenkins," a/k/a "Abu Musab," and RAFIQ SABIR, a/k/a "the Doctor," Defendants.	SEALED COMPLAINT Violation of 18 U.S.C. § 2339B COUNTY OF OFFENSE: NEW YORK, BRONX

U.S. DISTRICT COURT FILED MAY 27 2005 S.D. OF N.Y.

SOUTHERN DISTRICT OF NEW YORK, ss.:

BRIAN J. MURPHY, being duly sworn, deposes and says that he is a Special Agent with the Federal Bureau of Investigation, and charges as follows:

COUNT ONE

1. From at least in or about 2003, up to and including in or about May 2005, in the Southern District of New York and elsewhere, TARIK IBN OSMAN SHAH, a/k/a "Tarik Shah,"a/k/a "Tarik Jenkins," a/k/a "Abu Musab," and RAFIQ SABIR, a/k/a "the Doctor," the defendants, and others known and unknown, unlawfully and knowingly combined, conspired, confederated and agreed together and with each other, within the United States, to provide material support and resources, as that term is defined in Title 18, United States Code, Section 2339A, to a foreign terrorist organization, namely, al Qaeda.

(Title 18, United States Code, Section 2339B.)

The bases for my knowledge and the foregoing charge are, in part, as follows:

2. I have been a Special Agent with the Federal Bureau of Investigation ("FBI") for the past seven years and am a member of the FBI/New York City Police Department Joint Terrorism Task Force ("JTTF"). I have been personally involved in the investigation of this case. I am currently assigned to a squad whose principal responsibility is to investigate the activities of al Qaeda and its founder Usama Bin Laden. I have been investigating the criminal activities of members and associates of al Qaeda for the last approximately four years. This affidavit is based upon my personal participation in this investigation, conversations with witnesses and other agents, law enforcement officers, and review of relevant documents, reports, audio recordings, and transcripts.

3. Because this affidavit is being submitted for the limited purpose of establishing probable cause, it does not include all the facts that I have learned during the course of my investigation. Where the contents of documents and the actions, statements and conversations of others are reported herein, they are reported in substance and in part.

Background on Al Qaeda

4. Al Qaeda, an international terrorist group dedicated to opposing non-Islamic governments with force and violence, was founded in or about 1989 by Usama Bin Laden and other coconspirators not named as defendants herein. Members of al Qaeda pledged an oath of allegiance (called a "bayat") to Usama Bin Laden and al Qaeda. On or about October 8, 1999, al Qaeda was designated by the Secretary of State as a foreign terrorist organization pursuant to Section 219 of the Immigration and Nationality Act, and has remained designated since that date.

5. Al Qaeda functions both on its own and through some of the terrorist organizations that operate under its umbrella, including the Egyptian Islamic Jihad, of which Ayman al Zawahiri, not named as a defendant herein, is a founder. Zawahiri, an Egyptian-born, Islamic radical with medical training, joined forces with Usama Bin Laden, and together in 1998, the two endorsed a fatwah (ruling on Islamic law) under the banner "International Islamic Front for Jihad on the Jews and Crusaders." This fatwah, printed in the publication Al Quds al-'Arabi on February 23, 1998, stated that Muslims should kill Americans -- including civilians -- anywhere in the world where they can be found. Later that year, on or about August 7, 1998, the United States embassies in Nairobi, Kenya, and in Dar es Salaam, Tanzania, were bombed, resulting in the deaths of well over 200 people, including United States citizens, and the injury

of over 4,000 more persons. In connection with those bombings, a federal grand jury has returned indictments, including (S9) 98 Cr. 1023 (KTD), which charges, among other things, that Usama Bin Laden, Ayman al Zawahiri, and al Qaeda, in coordination with other terrorist groups, have declared war against Americans worldwide, specifically including the American civilian population. Four of the defendants charged in that indictment have already been convicted in the United States District Court for the Southern District of New York of participating in a conspiracy to kill American nationals. Zawahiri is recognized as Usama Bin Laden's principal deputy within al Qaeda.

6. From at least in or about 1989 until in or about 2001 and 2002, Usama Bin Laden and al Qaeda sponsored, managed and/or financially supported training camps in Afghanistan, Pakistan and elsewhere, which camps were used to instruct members and associates of al Qaeda and its affiliated terrorist groups in the use of firearms, explosives, chemical and biological weapons, and other weapons of mass destruction. In addition to providing training in the use of various weapons and explosives, these camps were used to conduct operational planning against United States targets around the world. The camps also taught surveillance techniques for potential targets of attack. Al Qaeda and its affiliated organizations are still involved in training members and associates in the Middle East.

7. Subsequent to the Embassy bombings referred to above, al Qaeda has conducted several other terrorist attacks against the United States and U.S. interests, including the October 2000 attack in Yemen on the U.S.S. Cole and the September 11, 2001 terrorist attacks on the World Trade Center in New York and the Pentagon in Virginia, which resulted in the deaths of thousands of people.

Evidence of Material Support

8. During the course of this investigation, and as set forth below, TARIK IBN OSMAN SHAH, a/k/a "Tarik Shah,"a/k/a "Tarik Jenkins," a/k/a "Abu Musab," and RAFIQ SABIR, a/k/a "the Doctor," the defendants, engaged in multiple meetings and conversations (the vast majority of which were consensually-recorded) in which they discussed providing material support to al Qaeda. Specifically, SHAH agreed to provide training in martial arts and hand-to-hand combat to al Qaeda members and associates, while SABIR agreed to provide medical assistance to wounded jihadists. Ultimately, in order to express their loyalty to al Qaeda, SHAH and SABIR pledged an oath (referred to as

bayat) to al Qaeda and Usama Bin Laden, thereby essentially becoming members of the organization.

9. During the course of this investigation, I have interviewed on a number of occasions a confidential source ("CS-1").[1] CS-1 advised me and other law enforcement officers, in part and in substance, of the following: In or about Summer 2003, CS-1 was in contact with an individual later identified as the defendant TARIK IBN OSMAN SHAH, a/k/a "Tarik Shah," a/k/a "Tarik Jenkins," a/k/a "Abu Musab." During various conversations with CS-1 between in or about Summer 2003 and in or about October 2003, many of which were consensually recorded, SHAH discussed with CS-1 the duty of "jihad" (i.e., holy war). In one conversation, in or about October 2003, SHAH informed CS-1 that he was a "professor" of the "martial arts" but that he was currently not "training" any "brothers" and noted that after September 11, 2001, various mosques had, in fact, prevented SHAH from continuing such training.

10. On or about December 11, 2003, TARIK IBN OSMAN SHAH, a/k/a "Tarik Shah," a/k/a "Tarik Jenkins," a/k/a "Abu Musab," the defendant, was arrested by the City of Yonkers Police Department for petit larceny in connection with property damage which had been done to an apartment he had vacated. During an inventory search of SHAH's vehicle, the Yonkers police officers found several telephone numbers, including home and cellular telephone numbers for two individuals, "Individual-1," and Seifullah Chapman.[2] As set forth more fully below, Individual-

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[1] In or about 1990, CS-1 was convicted of certain state crimes relating to robberies. While serving his state sentence, CS-1 agreed to cooperate with the Government regarding certain terrorism investigations and, in return, the Government wrote the state sentencing judge for sentencing consideration. After serving his sentence, CS-1 continued to cooperate with the Government and currently provides information as a paid informant. CS-1's information has proven to be reliable and has been corroborated by other sources of information, including surveillance and recordings.

[2] On or about March 4, 2004, Chapman and two of his co-conspirators were convicted in the Eastern District of Virginia of, among other charges, providing material support to a terrorist group in Pakistan. Chapman was a member of the Virginia Jihad Network in which members interested in jihad were trained in combat techniques, which involved, among other things, paintball exercises. At trial, Chapman testified on his own behalf and

1's identity is known to the FBI and it is believed that Individual-1 has trained at foreign terrorist camps.

11. On or about December 16, 2003, TARIK IBN OSMAN SHAH, a/k/a "Tarik Shah," a/k/a "Tarik Jenkins," a/k/a "Abu Musab," the defendant, had a meeting with CS-1, which was consensually recorded. SHAH and CS-1 discussed the following subjects, among other things:

a. SHAH indicated that he was interested in obtaining a location where he could "train" in hand-to-hand combat and prepare Muslim "brothers [for jihad]."

b. SHAH stated that his expertise was in teaching martial arts and that the martial arts that he taught are "deadly and dangerous."

c. At the FBI's direction, CS-1 informed SHAH that CS-1 had access to a warehouse in Long Island (the "Warehouse") and suggested that SHAH might want to use the space for his "training." In response, SHAH discussed the potential for using the Warehouse and told CS-1, in substance, that he would have to "hang some tires [in the Warehouse] 'cause I teach, I teach the brothers how to use swords and machetes."

d. SHAH discussed how one has to "fight the jihad" and to "find those people" who are willing to press the fight. SHAH also indicated that he had previously discussed with other "brothers" how "we could pass" knowledge on to "brothers who are ready" [to fight jihad].

e. SHAH indicated that his "greatest cover has been" his career as a "professional" jazz musician.

f. SHAH complained that he is unable to get out of the country [the United States] because he has "no papers."[3]

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admitted that he had attended a Lashkar-e-Taiba (a Pakistan-based terrorist group) training camp in or about 2001. Chapman was sentenced to 85 years' imprisonment.

[3] According to New York State criminal records and information provided by New York State authorities, SHAH is subject to a court order regarding his failure to provide child support, and as a result, the New York State Family Court has prevented SHAH from traveling out of the country until he has complied with his financial obligations.

g. SHAH discussed his December 11, 2003 arrest for petit larceny and told CS-1 that if he had been arrested for terrorism, he would have attempted to fight the police.

12. On or about December 23, 2003, TARIK IBN OSMAN SHAH, a/k/a "Tarik Shah," a/k/a "Tarik Jenkins," a/k/a "Abu Musab," the defendant, had a conversation with CS-1, which was consensually recorded. During this conversation, SHAH and CS-1 discussed, among other things, the suitability of the Warehouse for SHAH's training. SHAH also stated, in substance, that he needed a "headquarters" so that he could "really train brothers" and bring "people in there". SHAH indicated that he was looking for "other places" [for jihad training] too. SHAH also discussed the possibility of opening a machine shop in order to fabricate "many things," including weaponry, so that "you wouldn't have to depend on people" to make "your barrels [gun barrels], anything like that."

13. On or about December 31, 2003, CS-1 and TARIK IBN OSMAN SHAH, a/k/a "Tarik Shah," a/k/a "Tarik Jenkins," a/k/a "Abu Musab," the defendant, visited the Warehouse in order to determine its feasibility for "training." This visit was surveilled by FBI agents and was videotaped. In addition, conversation between SHAH and CS-1 was recorded. During their discussion at the Warehouse, SHAH indicated, among other things, that the facility was good for what he had in mind and that he liked the fact that the facility "had no windows" and would, in effect, conceal the training. However, SHAH expressed concerns with CS-1 about the location of the Warehouse given its distance from where SHAH was then residing.

14. Later, between in or about January 2004 and in or about February 2004, TARIK IBN OSMAN SHAH, a/k/a "Tarik Shah," a/k/a "Tarik Jenkins," a/k/a "Abu Musab," the defendant, and CS-1 had several discussions regarding "training," which were consensually recorded. During these discussions, at the FBI's direction, CS-1 told SHAH that he was in contact with a recruiter for jihad from the Middle East (in reality, an FBI Special Agent acting in an undercover capacity ("UC-1")) and advised SHAH that the recruiter (UC-1) was interested in someone who could train a small number of individuals overseas in hand-to-hand combat and martial arts. SHAH advised CS-1, in substance, that he was interested and that he had a close associate, a "doctor," later identified as RAFIQ SABIR, a/k/a "the Doctor," the defendant, who lived in Florida, and who would also be interested in joining the jihad. SHAH suggested that CS-1 present SHAH and SABIR as, in essence, a "package" to the recruiter and indicated again that SHAH could provide martial arts services and his "partner," a

medical doctor, could provide medical services. SHAH also indicated that he would be interested in meeting with the "recruiter" (UC-1). Later, during these discussions, CS-1 told SHAH that UC-1 was willing to meet with SHAH alone and that the meeting would probably take place in Plattsburgh, New York, which is near the Canadian border. CS-1 also advised SHAH that UC-1 was part of a cell involved in jihad and was very security conscious.

15. In connection with this investigation, I have reviewed various telephone records obtained from telephone service providers and information obtained from pen registers authorized by the Magistrate Court in the Southern District of New York for the residence and cellular telephones of TARIK IBN OSMAN SHAH, a/k/a "Tarik Shah," a/k/a "Tarik Jenkins," a/k/a "Abu Musab," and RAFIQ SABIR, a/k/a "the Doctor," the defendants. Based on those toll records, between in or about January 2004 and in or about February 2004, the time period in which SHAH had requested that CS-1 present to the jihad recruiter (UC-1), the names of SHAH and the "Doctor," i.e., SABIR, as a "package," there were over 70 calls between SHAH and SABIR.

16. On or about March 3, 2004, CS-1 and TARIK IBN OSMAN SHAH, a/k/a "Tarik Shah," a/k/a "Tarik Jenkins," a/k/a "Abu Musab," the defendant, boarded an Amtrak train at Penn Station in Manhattan bound for Plattsburgh, New York, in order to meet with the recruiter, UC-1.

17. On or about March 4, 2004, TARIK IBN OSMAN SHAH, a/k/a "Tarik Shah," a/k/a "Tarik Jenkins," a/k/a "Abu Musab," the defendant, was introduced to UC-1 by CS-1 in Plattsburgh, New York, and met with UC-1 on or about March 4, 2004, and again on or about March 5, 2004.[4] The meetings on both days were consensually recorded. During these meetings, and throughout his dealings with SHAH, UC-1 posed as a recruiter for "brothers" overseas who were seeking "brothers" to wage jihad. The following points were discussed, among others:

a. SHAH told UC-1 that SHAH has a "very very very close friend" that SHAH has known for over 20 years and that

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[4] CS-1 was not present for the entirety of all of the meetings. Because of "security concerns," UC-1 and SHAH, in essence, agreed that CS-1 (although trusted by SHAH) would pass messages between UC-1 and SHAH but that specific matters being discussed about SHAH's participation in jihad would not be discussed openly with CS-1, in order to protect CS-1.

his friend, who used to be one of SHAH's students, has "got the spirit to ... wanna be right in it." SHAH also indicated that this "friend" is willing to travel and that he is "more prepared to do that than I am right now," even though the friend "may actually have more eyes on him [i.e., law enforcement surveillance] than I have. . . ."

b. SHAH discussed how he and his "friend" attempted to go to the "mountains" [which appears to be a veiled reference to training camps in Afghanistan] in or about 1998 but were not able to reach their destination.

c. SHAH talked with UC-1 about the "end point" and indicated that he "may not really be interested in coming back here [the United States] ever." SHAH mentioned that the "very serious" brothers may see SHAH's "usefulness" and put him to use for jihad and the fight against the United States.

d. SHAH discussed his specialty in the "martial arts" and informed UC-1 that he has been trained in jujitsu, which he described as the Japanese art and culture of hand-to-hand combat, and knife and stick fighting, and that he was "blessed" to have studied with a Mujahadeen [a Muslim freedom fighter] who had previously fought a war in Malaysia in or about 1969.

e. UC-1 told SHAH that some of the "brothers" who were hand-to-hand combat trainers had been caught and were being held at Guantanamo Bay in Cuba and that they still needed trainers who could teach "close combat" at camps outside of the United States.

f. SHAH told UC-1 that he was conscious of surveillance by authorities and that, as a result, he did not talk on the phone often.

g. UC-1 discussed "the Doctor," (later identified as defendant RAFIQ SABIR, a/k/a "the Doctor") who had been "identified" to UC-1 by CS-1 after CS-1 had spoken with SHAH. SHAH indicated that his friend, the "Doctor," was experienced in "ER" and that he had spent the last twenty-five years in emergency rooms in hospitals all over New York until he moved out of the state.[5] UC-1 indicated that physicians with

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[5] Based upon my review of computerized database records, I have learned that RAFIQ SABIR is a licensed physician and that he received a medical degree from Columbia University in New York. In

emergency room experience would be needed for brothers in training who get hurt. UC-1 promised to check with the "brothers" about approaching the "Doctor" in light of SHAH's recommendation on his behalf.

h. When asked by UC-1 whether SHAH was serious about going down "this path," SHAH stated that he was sure in his "thinking and my intellect," but acknowledged that although he had performed some "serious training," he had never been "camping" before and that this was not a situation he had been in before and that it was "unknown to me [SHAH]."

i. UC-1 agreed that caution was appropriate and told SHAH that he was pleased to have met with SHAH and would tell the "brothers" overseas about the meeting.

j. During the meeting, SHAH physically demonstrated to UC-1 how he had fashioned his prayer beads into a weapon and how the prayer beads could be used to strangle a person.

18. On or about March 11, 2004, TARIK IBN OSMAN SHAH, a/k/a "Tarik Shah," a/k/a "Tarik Jenkins," a/k/a "Abu Musab," the defendant, and CS-1 had a conversation, which was consensually recorded, at SHAH's apartment. During this meeting, CS-1, at the direction of the FBI, informed SHAH that UC-1 wished to meet with SHAH and his friend, the "Doctor Rafiq," an individual later identified as the defendant RAFIQ SABIR, a/k/a "the Doctor," in Florida later in the month, if possible. SHAH indicated his availability to CS-1. Later, SHAH also brought CS-1 to the basement of his apartment and discussed its suitability for conducting martial arts training.

19. Toll and pen register records for telephones show that between the March 11 meeting of SHAH and CS-1 and on or

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or about November 2002, the FBI learned the identity of SABIR from local police in Beacon, New York, the town where SHAH was then residing. According to the Beacon police, SABIR was pulled over near the local mosque, after residents had complained about suspicious activity near the mosque. SABIR was driving in a car with Florida license plates. After being stopped, SABIR presented to the Beacon police a North Carolina driver's license. Later in the investigation, based on this information, other agents and I obtained SABIR's photograph and showed it to CS-1, who confirmed that this individual was RAFIQ SABIR, the individual later introduced to CS-1 by SHAH.

about March 18, 2004, SHAH and SABIR made approximately 22 calls to each other. Prior to this flurry of calls in or about March 2004, the records show that the last telephone call between SHAH and SABIR was several weeks prior, on or about February 21, 2004.

20. On or about April 1, 2004, and on or about April 2, 2004, TARIK IBN OSMAN SHAH, a/k/a "Tarik Shah," a/k/a "Tarik Jenkins," a/k/a "Abu Musab," the defendant, and UC-1 met in the vicinity of Orlando, Florida. These meetings were consensually recorded. The following was discussed, among other things:

a. At the outset of the meeting, SHAH informed UC-1 that his "partner" had to go out of the country at the last minute for a family emergency and could not attend the meeting and would be returning on or about April 12, 2004.[6]

b. SHAH indicated that he was not "fond" of traveling unless it was "absolutely necessary" and that he brought along his musical instrument [a bass] so as not to "bring attention" to himself.

c. UC-1 told SHAH that the reason for the meeting was to inform SHAH that UC-1 had told the "brothers" about SHAH and that UC-1 had "vouched" for SHAH. In addition, UC-1 told SHAH that, in light of SHAH's trust in his "friend," it was, in substance, an acceptable risk for UC-1 to meet SHAH's "friend."

d. UC-1 informed SHAH that the "brothers" needed "trainers" and wanted SHAH to make a demonstration videotape and to prepare a syllabus for what SHAH would be able to teach "brothers" about "close combat". Immediately after UC-1 mentioned the term "close combat," SHAH interrupted UC-1 and told him, in substance, "I understand. I understand a lot of it. You don't even have to speak to me about that." Further, SHAH stated, in substance, that "we, we, we on the same thing. We on, one hundred percent same page." SHAH indicated that just as he had told UC-1 before, "since I was pretty young, this has always been one of my dreams."

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[6] I have reviewed travel records which confirm that on or about April 1, 2004, RAFIQ SABIR, a/k/a "the Doctor," the defendant, traveled to Jamaica, and returned to the United States on or about April 12, 2004.

e. SHAH also discussed with UC-1 that he wanted to start a martial arts school only for Muslims, but that in America such an exclusive school would not be permitted because it was discriminatory unless SHAH were to open up the school as a private "social club." By opening up the school as a "social club," SHAH explained, "I can use the highest level of discrimination."

f. SHAH informed UC-1 that he would like to learn at the camps about "chemical stuff" and later SHAH specified that he wanted training about "explosives and firearms". UC-1 and SHAH also discussed training on AK-47 assault rifles and hand grenades.

g. SHAH explained to UC-1 that he had previously trained many "brothers" and that a "lot of my brothers" who were trained by him would "go over" and "got hooked up," although nobody ever came in and told SHAH that they were "gonna walk in a place and blow up." The "brothers," SHAH indicated, "don't even talk like that." SHAH and UC-1 then discussed martyrdom.

h. SHAH mentioned the names of several students who studied martial arts with SHAH and who had gone overseas to training camps in Afghanistan and Yemen, including Individual-1, whose name and telephone numbers were found in SHAH's possession, as discussed above in paragraph 9. In particular, SHAH indicated, in substance, that Individual-1 was "over there" [i.e., in Afghanistan] on September 11, 2001, and had to keep on traveling to "different provinces and moving around in different places" [i.e., safehouses] before ultimately being able to return to the United States. SHAH explained that Individual-1 had been given the names of people to contact in Afghanistan by a white American Muslim convert, believed to be Seifullah Chapman, whose name and telephone number were also found in SHAH's possession, as referenced above in paragraph 9. SHAH also stated that Individual-1 had told SHAH how difficult it was to be back in the United States and not to be in training.[7] SHAH stated that he would call Individual-1 to enlist his help to prepare the demonstration video requested by UC-1 and assured UC-1 that Individual-1 had SHAH's trust. SHAH told UC-1 that Individual-1 could be trusted because he was a longtime student of SHAH who

[7] Based upon Department of State travel records, it appears that Individual-1, who has been identified by the FBI, was on a return flight to the United States from Europe approximately nine months after September 11, 2001.

after leaving school, started "seeking the way to become Muhajadeen."

i. UC-1 informed SHAH that the "Sheikh" [i.e., Usama Bin Laden] was personally monitoring "all" operations, including who would be in charge.

j. UC-1 and SHAH also discussed the use of "code" in order to communicate with one another in the future so that SHAH could communicate to UC-1 that the demonstration video and syllabus for the training courses were complete.

21. During the April 1, 2004 meeting between TARIK IBN OSMAN SHAH, a/k/a "Tarik Shah," a/k/a "Tarik Jenkins," a/k/a "Abu Musab," the defendant, and UC-1, a girl standing nearby looked at SHAH and SHAH smiled back. SHAH then turned to UC-1 and stated, in substance, "I could be joking and smiling and then cutting their throats in the next second."

22. Based upon the toll and pen register records for telephones used by TARIK IBN OSMAN SHAH, a/k/a "Tarik Shah," a/k/a "Tarik Jenkins," a/k/a "Abu Musab," and RAFIQ SABIR, a/k/a "the Doctor," the defendants, approximately four days prior to SHAH's trip to visit UC-1 in Orlando, Florida, SABIR called SHAH, and later on or about April 15, 2004, once SABIR had returned from Jamaica, SABIR placed two calls to SHAH. In addition, toll and pen register records show that on or about April 2, 2004, the date of one of the meetings in which SHAH told UC-1 that he would ask Individual-1, his former student, to help SHAH make the demonstration video, SHAH called a telephone registered to Individual-1.

23. Between on or about April 14, 2004, and on or about May 6, 2004, TARIK IBN OSMAN SHAH, a/k/a "Tarik Shah," a/k/a "Tarik Jenkins," a/k/a "Abu Musab," the defendant, and CS-1 had several conversations, which were consensually recorded. During these conversations, SHAH and CS-1 discussed SHAH's e-mail communications with UC-1. In particular, SHAH told CS-1, in substance, how SHAH had recently received e-mails from UC-1 asking about the "Doctor" and that SHAH was troubled about how "open" the e-mail communications were and that UC-1 should not "allow words to flow here" because of the security risk such communications entailed.

24. Between in or about October 2004 and in or about early May 2005, RAFIQ SABIR, a/k/a "the Doctor," the defendant, was out of the United States and is believed to have been, at least during some of that time period, in Saudi Arabia, based

upon a review of flight records and immigration databases. In addition, there was a gap in communications between UC-1 and TARIK IBN OSMAN SHAH, a/k/a "Tarik Shah," a/k/a "Tarik Jenkins," a/k/a "Abu Musab," the defendant, as UC-1 informed SHAH that he would be traveling frequently and that he would be spending time in the Arabian "Peninsula."

25. On or about March 20, 2005, UC-1 called TARIK IBN OSMAN SHAH, a/k/a "Tarik Shah," a/k/a "Tarik Jenkins," a/k/a "Abu Musab," the defendant, using a cellular telephone with a Yemen country code. SHAH then stated, in substance, that he thought from looking at his cellular telephone that the call was from his "friend" [i.e., RAFIQ SABIR, a/k/a "the Doctor," the defendant] who was in the Middle East.[8] UC-1 told SHAH that he was traveling and SHAH said, in substance, that he could tell by the area code where UC-1 was calling from. UC-1 spoke with SHAH in code about the training manual and videotape. SHAH indicated that the video was not finished but that the handbook was almost complete and that he was still interested in UC-1's "business" proposal. SHAH further explained that he was moving into a new apartment and that CS-1 would be moving into SHAH's new apartment building. SHAH indicated to UC-1 that his friend "Rafiq" currently worked as a doctor at a hospital in Saudi Arabia and that perhaps Rafiq [SABIR] could meet with UC-1 in Saudi Arabia.

26. On or about March 28, 2005, and on or about April 14, 2005, TARIK IBN OSMAN SHAH, a/k/a "Tarik Shah," a/k/a "Tarik Jenkins," a/k/a "Abu Musab," the defendant, and CS-1 had two conversations, which were both consensually recorded. During these conversations, SHAH mentioned to CS-1 that he had recently received an e-mail from UC-1 and had also spoken with UC-1 over the telephone. CS-1 inquired whether SHAH was still interested in UC-1's "proposal" and SHAH answered that he was but that his schedule had prevented him from being able to "put the rest of the stuff together that I have to put together [i.e., the instructional manual and training video for martial arts and hand-to-hand combat]."

27. Based upon my review of flight records and immigration databases, on or about May 1, 2005, RAFIQ SABIR, a/k/a "the Doctor," the defendant, returned to the United States from Saudi Arabia. According to CS-1, who relayed this information to me in or about May 2005, upon SABIR's return to

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[8] From my own training and experience, I know that the country code for Saudi Arabia is 966 and that the country code for Yemen is 967.

the United States, SABIR was staying with TARIK IBN OSMAN SHAH, a/k/a "Tarik Shah," a/k/a "Tarik Jenkins," a/k/a "Abu Musab," the defendant, at SHAH's new apartment in the Bronx (the "Bronx Apartment"). UC-1 also notified SHAH by telephone that UC-1 would return to the United States and wished to meet with SHAH.

28. On or about May 20, 2005, TARIK IBN OSMAN SHAH, a/k/a "Tarik Shah," a/k/a "Tarik Jenkins," a/k/a "Abu Musab," the defendant, met with CS-1 and UC-1 at CS-1's apartment which was on the first floor of the Bronx Apartment. Soon after the meeting had begun, RAFIQ SABIR, a/k/a "the Doctor," the defendant, arrived and joined the meeting.[9] This meeting was consensually recorded. During this meeting, the following, among other things, was discussed:

a. UC-1 explained to SHAH and SABIR that UC-1 was going to Iraq in order to coordinate jihad efforts in that country.

b. SHAH and UC-1 discussed training camps in Yemen and spoke generally about jihad.

c. SHAH explained to UC-1 that he could not currently travel overseas at the time because of his legal troubles but that he was training people and attempting to persuade them to fight jihad. Specifically, SHAH told UC-1 that he had recently traveled to Phoenix, Arizona, in order to meet with an individual ("Individual-2") to discuss jihad but that SHAH's goals and Individual-2's goals were not the same and it did not work out.[10]

d. UC-1 discussed how much SHAH trusted SABIR and that UC-1 was glad to finally meet him. SABIR told UC-1 that he works at a Saudi military base in Riyadh as a doctor and that he was able to, in essence, move around freely with his credentials. UC-1 told SABIR that he had "brothers" in Riyadh and that the "brothers" could help SABIR if he needed assistance.

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[9] CS-1 was not present for the entire meeting. As before, given the "safety" concerns, CS-1 left the room soon after the meeting began.

[10] In connection with this investigation, on or about September 9, 2004, law enforcement agents surveilled SHAH as he disembarked at the airport in Phoenix, Arizona, following a flight from New York. Later, on or about September 12, 2004, SHAH was surveilled at the airport in Phoenix boarding a flight back to New York.

e. UC-1 and SABIR discussed SHAH and SABIR's attempt to visit "the mountains," i.e., the training camps in Afghanistan, in or about 1998 and SABIR responded, in substance, that Allah allows you to go where he wants you to go and that the path at the time was not clear.

f. UC-1, SHAH, and SABIR discussed the problems facing those involved in jihad, including those "brothers" who are too "emotional" (i.e., those acting without orders) and those brothers who are in jail for life because of their "fervor." SHAH indicated his belief that those jailed "brothers" had been going about "things in a way that is too open."

g. UC-1 explained that Usama Bin Laden gives orders from the top and stated that he wanted only brothers who were committed to al Qaeda.

h. SHAH assured UC-1 that the room was "safe" and that nothing was "hooked up."

i. UC-1 indicated to SHAH and SABIR that "they" needed people like them and further explained that a doctor would be useful to treat "wounded brothers" overseas since they could not go to a hospital to receive treatment.

j. SHAH explained to UC-1 how SHAH and SABIR are close friends and how they have been persecuted for many years. In particular, SHAH recounted how SHAH and SABIR had been kicked out of a mosque in the Bronx, where SABIR was an assistant Imam, after SABIR brought SHAH and another individual to the mosque in order to teach urban warfare to other "brothers".

k. SHAH and SABIR both complained about law enforcement scrutiny. SHAH indicated that he had once taken a call from Queens and thought that someone was attempting to record the call and, as a result, did not call the person back. SABIR stated, in substance, that upon his recent return to the United States from the Middle East, he was questioned for approximately three hours and was asked about contact numbers in his possession. SABIR also explained that the United States government was attempting to train their agents to pose as "Muhajadeen" and SHAH added that the "Jews" were already doing this.

l. SABIR asked UC-1 to have a "brother" in Riyadh contact him over there and wrote down SABIR's number on a piece of paper for UC-1 so that a "brother" could contact him in

Saudi Arabia. Shortly thereafter, SHAH took the paper back, which was then ripped up, and told SABIR to write down an alias on a new piece of paper with his telephone number instead. UC-1 then explained to SABIR and SHAH how to use a numeric code in order to safely pass messages. Later, UC-1 told SHAH and SABIR that UC-1 would be in the Middle East. SHAH asked how they would be able to contact UC-1 and UC-1 told them that they would not be able to contact him directly but that another "brother" would contact SHAH and SABIR. UC-1 then gave a "code" so that SHAH and SABIR could, in essence, identify the "brother" who contacted them and/or give them orders.

m. SHAH asked UC-1 whether he was familiar with the "brothers" in Washington, D.C., and then indicated that SHAH knew one of the brothers who was "fully prepared." SHAH indicated that this brother was a paramedic and that SHAH was happy because this brother followed his orders. SHAH stated that the paramedic took SHAH to meet with another brother in D.C., right after September 11 and that he met a "white brother" [Seifullah Chapman, referenced above] who had done training with the "Muhajadeen" and had extensive knowledge about al Qaeda. SHAH also indicated, in substance, that the "brother was taking brothers out" for paintball training exercises.

n. SHAH indicated to UC-1 that he had the training manual and videotapes "from past stuff" but that he did not have it here [i.e., CS-1's apartment] and assured UC-1 that they were in a safe place. SHAH stated that the "book" was not finished yet. SHAH also indicated that the videotape that he had in his possession had depicted SHAH without a mask and that he would have to make another tape with a mask for safety reasons.

o. UC-1 told SHAH and SABIR that he would tell his people that SABIR was willing to assist wounded brothers and thanked SABIR for volunteering, adding that he might never get called. UC-1 also stated that "Sheikh Usama" (i.e., Usama Bin Laden) considered doctors to be very important to the cause. In response, SABIR stated that UC-1 should not expect him to "give you anybody else's name since I do not feel comfortable selecting" anyone else and that "I am only going to give myself."

p. UC-1 told SHAH and SABIR that al Qaeda needed trusted people in the organization and that he was authorized to deliver a message from his leader. UC-1 explained to SHAH and SABIR that he was authorized to give bayat, i.e., the oath of loyalty to al Qaeda. UC-1 further explained that "brothers" had caused problems by attempting to commit jihad and martyrdom without permission from the leadership and that "Sheikh Usama"

(i.e., Usama Bin Laden) and "Dr. Ayman" (i.e., Ayman al Zawahiri) would give the orders, which would help to limit infiltration. UC-1 stated that they must be willing to accept these principles of bayat before taking it and if they did not wish to take bayat, then there would not be a problem. In response, SHAH stated, in substance, that he had been "preparing this for a long time" and that he had been listening to Usama Bin Laden's speeches from the camps and during Ramadan.

q. UC-1 explained bayat and then SHAH committed himself to the path of Holy War, to the oath of secrecy, and to abide by the directives of al Qaeda. SHAH indicated that he understood the oath and agreed that he would obey the guardians of the oath, namely Sheikh Usama Bin Laden.

r. UC-1 then indicated that he was prepared to offer bayat to SABIR but that it was up to SABIR whether he wanted to take it or not. In response, SABIR stated, in substance, that SABIR and SHAH had spoken about this for a long time and that he would be abandoning his brother about "everything that we had agreed upon," if he didn't proceed. SABIR also stated, in substance, that in the "very beginning we agreed upon it in the first place." SHAH answered, in substance, that SABIR would not be abandoning him since they were "partners."

s. Thereafter, UC-1 asked SABIR whether he understood the full meaning of bayat. In response, SABIR indicated that he understood bayat and that it came from the Koran and meant "pledging support." SABIR also stated that both he and SHAH had asked Allah for the oath and now they both had it. SABIR also stated, in substance, that "we have a saying that you should be careful what you ask for because you might get it; I cannot complain in what I ask for." Thereafter, SABIR pledged his loyalty to al Qaeda and took bayat in the same manner as SHAH.

t. After taking bayat, both SHAH and SABIR embraced UC-1. Before UC-1 left to go to the "airport," SHAH brought UC-1 down to the basement of the Bronx Apartment to show UC-1 where they could train "brothers." SHAH stated that to avoid suspicion, he would also train "outsiders" too while secretly training the "brothers." SHAH also escorted UC-1 up to his apartment in order to show UC-1 some of his books, including one entitled "Path to Jihad." At SHAH's apartment, SHAH showed UC-1 a weapon and told UC-1 how SHAH could use the weapon to hit someone in the face.

29. Based upon my review of flight records and conversations with other law enforcement agents, I learned that RAFIQ SABIR, a/k/a "the Doctor," the defendant, has reservations on or about June 2, 2005, for a flight leaving from Florida to JFK Airport in New York, and transferring to a subsequent flight from JFK to Saudi Arabia.

WHEREFORE, deponent prays that arrest warrants issue for TARIK IBN OSMAN SHAH, a/k/a "Tarik Shah," a/k/a "Tarik Jenkins," a/k/a "Abu Musab," and RAFIQ SABIR, a/k/a "the Doctor," the defendants, and that they be imprisoned or bailed, as the case may be.

BRIAN J. MURPHY
Special Agent
Federal Bureau of Investigation

Sworn to before me this
27th day of May, 2005

HENRY PITMAN
UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF NEW YORK

CR 12 (Rev. 5/03)

WARRANT FOR ARREST

United States District Court	DISTRICT: SOUTHERN DISTRICT OF NEW YORK
UNITED STATES OF AMERICA v. TARIK IBN OSMAN SHAH,: a/k/a "Tarik Shah,"a/k/a "Tarik Jenkins," a/k/a "Abu Musab"	DOCKET NO.: 05 MAG MAGISTRATE'S CASE NO.: 956 NAME AND ADDRESS OF INDIVIDUAL TO BE ARRESTED: TARIK IBN OSMAN SHAH,: a/k/a "Tarik Shah,"a/k/a "Tarik Jenkins," a/k/a "Abu Musab"
WARRANT ISSUED ON THE BASIS OF: ☐ Order of Court ☐ Indictment ☐ Information X Complaint	DISTRICT OF ARREST
TO: UNITED STATES MARSHAL OR ANY OTHER AUTHORIZED OFFICER	CITY

YOU ARE HEREBY COMMANDED to arrest the above-named person and bring that person before the United States District Court to answer to the charge(s) listed below.

DESCRIPTION OF CHARGES

Conspiracy to provide material support to designated foreign terrorist organization

U. S. DISTRICT COURT FILED MAY 27 2005 S. D. OF N.Y.

IN VIOLATION OF	UNITED STATES CODE TITLE 18	SECTION 2339B
BAIL	OTHER CONDITIONS OF RELEASE	MAY 27 2005
ORDERED BY HENRY PITMAN United States Magistrate Judge Southern District of New York	SIGNATURE (FEDERAL JUDGE/U.S. MAGISTRATE)	DATE ORDERED
CLERK OF COURT	(BY) DEPUTY CLERK	DATE ISSUED

RETURN

This warrant was received and executed with the arrest of the above-named person.

DATE RECEIVED	NAME AND TITLE OF ARRESTING OFFICER	SIGNATURE OF ARRESTING OFFICER
DATE EXECUTED		

Note: The arresting officer is directed to serve the attached copy of the charge on the defendant at the time this warrant is executed.

CR 12 (Rev. 5/03)

WARRANT FOR ARREST

United States District Court	DISTRICT SOUTHERN DISTRICT OF NEW YORK	
UNITED STATES OF AMERICA v. RAFIQ SABIR, a/k/a "the Doctor"	DOCKET NO 05 MAG	MAGISTRATE'S CASE NO 956
	NAME AND ADDRESS OF INDIVIDUAL TO BE ARRESTED RAFIQ SABIR, a/k/a "the Doctor"	
WARRANT ISSUED ON THE BASIS OF: ☐ Order of Court ☐ Indictment ☐ Information X Complaint	DISTRICT OF ARREST	
TO: UNITED STATES MARSHAL OR ANY OTHER AUTHORIZED OFFICER	CITY	

YOU ARE HEREBY COMMANDED to arrest the above-named person and bring that person before the United States District Court to answer to the charge(s) listed below.

DESCRIPTION OF CHARGES

Conspiracy to provide material support to designated foreign terrorist organization

DOC #3

U.S. DISTRICT COURT FILED MAY 27 2005 S.D. OF N.Y.

IN VIOLATION OF	UNITED STATES CODE TITLE 18	SECTION 2339B
BAIL	OTHER CONDITIONS OF RELEASE	
ORDERED BY HENRY PITMAN United States Magistrate Judge Southern District of New York	SIGNATURE (FEDERAL JUDGE/U.S. MAGISTRATE) /s/ Henry Pitman	DATE ORDERED MAY 27 2005
CLERK OF COURT	(BY) DEPUTY CLERK	DATE ISSUED

RETURN

This warrant was received and executed with the arrest of the above-named person.

DATE RECEIVED	NAME AND TITLE OF ARRESTING OFFICER	SIGNATURE OF ARRESTING OFFICER
DATE EXECUTED		

Note: The arresting officer is directed to serve the attached copy of the charge on the defendant at the time this warrant is executed.

ORIGINAL

CR 12 (Rev 5/03)

WARRANT FOR ARREST

United States District Court	DISTRICT SOUTHERN DISTRICT OF NEW YORK
UNITED STATES OF AMERICA v. TARIK IBN OSMAN SHAH,: a/k/a "Tarik Shah,"a/k/a "Tarik Jenkins," a/k/a "Abu Musab"	DOCKET NO. 05 MAG< MAGISTRATE'S CASE NO 956
WARRANT ISSUED ON THE BASIS OF: ☐ Order of Court ☐ Indictment ☐ Information X Complaint	NAME AND ADDRESS OF INDIVIDUAL TO BE ARRESTED TARIK IBN OSMAN SHAH,: a/k/a "Tarik Shah,"a/k/a "Tarik Jenkins," a/k/a "Abu Musab" DISTRICT OF ARREST
TO: UNITED STATES MARSHAL OR ANY OTHER AUTHORIZED OFFICER	CITY

YOU ARE HEREBY COMMANDED to arrest the above-named person and bring that person before the United States District Court to answer to the charge(s) listed below.

DESCRIPTION OF CHARGES

Conspiracy to provide material support to designated foreign terrorist organization

DOC #

DISTRICT COURT FILED MAY 31 2005 S.D. OF N.Y.

IN VIOLATION OF	UNITED STATES CODE TITLE 18	SECTION 2339B
BAIL	OTHER CONDITIONS OF RELEASE	
ORDERED BY HENRY PITMAN United States Magistrate Judge CLERK OF COURT Southern District of New York	SIGNATURE (~~FEDERAL JUDGE~~/U.S. MAGISTRATE) (BY) DEPUTY CLERK	DATE ORDERED MAY 31 2005 DATE ISSUED MAY 27 2005

RETURN

This warrant was received and executed with the arrest of the above-named person.

DATE RECEIVED 5/26/05	NAME AND TITLE OF ARRESTING OFFICER SA Robert Fillion	SIGNATURE OF ARRESTING OFFICER
DATE EXECUTED 5/27/05		

Note: The arresting officer is directed to serve the attached copy of the charge on the defendant at the time this warrant is executed.

IH-14

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA
against
Tarik Ibn Osman Shah

(Alias) _____

Please PRINT Clearly

U. S. DISTRICT COURT FILED MAY 31 2005 S.D. OF N.Y.

05 Mag. 952
DOCKET NO. ASSIGNED
JUDGE OR MAGISTRATE JUDGE

NOTICE OF APPEARANCE

DOC #: 5

TO: ***CLERK OF COURT S.D.N.Y.***

SIR: YOU ARE HEREBY NOTIFIED THAT I APPEAR FOR THE DEFENDANT INDICATED ABOVE IN THE ENTITLED ACTION.

I AM APPEARING IN THIS ACTION AS (Please check one)

1. [ ] CJA 2. [✓] RETAINED 3. [ ] PUBLIC DEFENDER (Legal Aid)

ADMITTED TO PRACTICE IN THIS COURT [ ] NO [✓] YES - IF YES GIVE YOUR DATE OF ADMISSION. MO. 01 YR. 97

I DO HEREBY CERTIFY THAT I HAVE FILED OR WILL FILE A CERTIFICATE OF GOOD STANDING FROM THE NY STATE COURT, PURSUANT TO CRIMINAL RULE 1 OF THE LOCAL RULES FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK.

DATED: NEW YORK, NEW YORK
5/31/05

SIGNATURE [signature]
PRINT THE FOLLOWING INFORMATION CLEARLY
Tarik Shah
Attorney for Defendant
Dorne Idson, Chillmast & McDonnell, LLP
Firm name if any
103 E. 125th St., #1102
Street address
New York, NY 10035
City State Zip
(212) 722-4900
Telephone No

NOTE: PLEASE COMPLETE THIS NOTICE OF APPEARANCE AND SUBMIT TO THE CLERK.
SNY CR. FORM REV. 0186

DISPOSITION SHEET

Victor How
AUSA

DATE OF ARREST 5/28/05 ☐ VOL. SURRENDER ☐ ON WRIT

TIME OF ARREST 6AM

MAGISTRATE'S DOCKET NUMBER 05-M-956

TIME OF PRESENTMENT 12:30 PM

PROCEEDING: ☑ Rule 5 ☐ Rule 9 ☐ Rule 40 ☐ Detention Hearing ☐ Other:

A/W issued 5/26/05

☐ INTERPRETER NEEDED LANGUAGE:

DEFENDANT'S NAME: Tarik Abdul Osman Shah

COUNSEL'S NAME: [illegible] ☑ RETAINED ☐ LEGAL AID ☐ CJA

Glika Edwards

BAIL DISPOSITION

☑ DETENTION ☐ ON CONSENT W/O PREJUDICE ☐ SEE DETENTION ORDER
☐ DETENTION HEARING SCHEDULED AT DEFENDANT'S REQUEST FOR
☐ AGREED BAIL PACKAGE
☐ $ PRB
☐ FRP
☐ $ CASH/PROPERTY:
☐ TRAVEL RESTRICTED TO SDNY/EDNY/
☐ SURRENDER TRAVEL DOCUMENTS (& NO NEW APPLICATIONS)
☐ REGULAR PRETRIAL ☐ STRICT PRETRIAL ☐ DRUG TESTING/TREATMENT
☐ HOME INCARCERATION ☐ HOME DETENTION ☐ CURFEW ☐ ELECTRONIC MONITORING:
CONDITIONS:
☐ DEFENDANT TO BE RELEASED UPON FOLLOWING CONDITIONS:

REMAINING CONDITIONS TO BE MET BY
☐ OTHER:

FOR RULE 40 CASES:
☐ ID HEARING WAIVED ☐ PRELIMINARY HEARING WAIVED
☐ DEFENDANT TO BE REMOVED ☐ ON DEFENDANT'S CONSENT

DATE FOR PRELIMINARY HEARING 6/28/05 ☐ ON DEFENDANT'S CONSENT
COMMENTS AND ADDITIONAL PROCEEDINGS:

DATE May 31, 2005

UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF NEW YORK

WHITE (ORIGINAL) - DEFENDANT'S FILE PINK - U.S. ATTORNEY'S OFFICE YELLOW - U.S. MARSHAL GREEN - PRETRIAL SERVICES AGENCY
REV. (2001) IH - 2

ORIGINAL

CR 12 (Rev. 5/03)

WARRANT FOR ARREST

United States District Court	DISTRICT: SOUTHERN DISTRICT OF NEW YORK	
UNITED STATES OF AMERICA v. RAFIQ SABIR, a/k/a "the Doctor"	DOCKET NO. 05 MAG	MAGISTRATE'S CASE NO. 956
	NAME AND ADDRESS OF INDIVIDUAL TO BE ARRESTED: RAFIQ SABIR, a/k/a "the Doctor"	
WARRANT ISSUED ON THE BASIS OF: ☐ Order of Court ☐ Indictment ☐ Information X Complaint	DISTRICT OF ARREST	
TO: UNITED STATES MARSHAL OR ANY OTHER AUTHORIZED OFFICER	CITY	

YOU ARE HEREBY COMMANDED to arrest the above-named person and bring that person before the United States District Court to answer to the charge(s) listed below.

DESCRIPTION OF CHARGES

Conspiracy to provide material support to designated foreign terrorist organization

IN VIOLATION OF	UNITED STATES CODE TITLE 18	SECTION 2339B
BAIL	OTHER CONDITIONS OF RELEASE	
ORDERED BY HENRY PITMAN United States Magistrate Judge Southern District of New York	SIGNATURE (~~FEDERAL JUDGE~~/U.S. MAGISTRATE)	DATE ORDERED NOV 2 2 2005
CLERK OF COURT	(BY) DEPUTY CLERK	DATE ISSUED NOV 2 2 2005

RETURN

This warrant was received and executed with the arrest of the above-named person.

DATE RECEIVED	NAME AND TITLE OF ARRESTING OFFICER	SIGNATURE OF ARRESTING OFFICER
DATE EXECUTED		

Note: The arresting officer is directed to serve the attached copy of the charge on the defendant at the time this warrant is executed.