

STATEMENT OF

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BEFORE THE

**COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY**

CONCERNING

THE PATRIOT ACT

PRESENTED ON

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Chairman Sensenbrenner, Ranking Member Scott, and Members of the Subcommittee, thank you for inviting me to this important hearing. My name is Ken Wainstein, and I am a partner at the law firm of O'Melveny & Myers. Prior to my leaving the government in January, 2009, I served in a variety of capacities, including Homeland Security Advisor to the President, Assistant Attorney General for National Security, United States Attorney, General Counsel and Chief of Staff of the FBI, and career federal prosecutor.

During that time, I was honored to work alongside the men and women who devote themselves to protecting our national security, and to participate -- along with my two distinguished co-panelists -- in what has been a very constructive national discussion over the past decade about the intersection of national security operations and the protection of privacy and civil liberties. I commend the Subcommittee for continuing this important dialogue about the appropriate parameters of the government's investigative capabilities in our country's fight against international terrorism.

We will soon mark the ten-year anniversary of the PATRIOT Act, the legislation that significantly boosted our counterterrorism capabilities in the aftermath of the 9/11 attacks. It is fitting that the Subcommittee takes this occasion to reflect on the utility of that statute over the past decade and its impact on privacy and civil liberties.

1. Passage of the PATRIOT Act

In assessing the PATRIOT Act, it is important that we first recognize the historical context in which it was passed. Before the morning of September 11, 2001, the Nation had not fully awakened to the deadly threat we faced from international terrorists. As a result, we had not developed the national counterterrorism apparatus to meet the threat from organizations like al Qaeda. Our counterterrorism operations were limited in size and scope, and there were impediments to effective coordination among the agencies running those operations.

That all changed with the attacks of September 11, 2001. Our Nation immediately put itself on a war footing against al Qaeda -- a war that the government is vigorously pursuing to this day -- and undertook to mobilize the Nation's resources toward the goal of preventing another 9/11 attack. That effort has resulted in comprehensive changes across the government -- from the commitment of significant new counterterrorism resources to the wholesale reorganization of the government's intelligence apparatus.

A crucial part of that mobilization effort also took place up here on Capitol Hill, where Congress undertook the important task of evaluating and enhancing the investigative tools available to our counterterrorism personnel. Immediately after the 9/11 attacks, Congress took stock of our national security authorities and found them inadequate for several reasons: (1) they were designed more for the traditional adversaries of the Cold War and less for the asymmetrical terrorist threat we face today; (2) they did not permit sufficient coordination and information sharing between law enforcement and intelligence personnel; and (3) they did not provide to national security professionals many of the basic investigative tools that had long been available to law enforcement investigators. The upshot was that agents on the front lines of our

counterterrorism program lacked the tools they needed to identify, investigate and neutralize plots before they matured into terrorist attacks.

Congress recognized that this situation was unacceptable and acted quickly, drawing up an omnibus package of authorities and passing the original PATRIOT Act on October 25, 2001. The passage of this legislation marked a sea change in our approach to international terrorism, and its effect could immediately be felt throughout our counterterrorism operations in a variety of ways.

For one, it gave our national security professionals a number of important tools that had long been available only to criminal investigators. For example, Section 206 of the PATRIOT Act allowed the FISA Court to authorize “roving” surveillance, an authority that permits the government to maintain surveillance coverage on a target as he or she moves from one communication device to another. While law enforcement personnel investigating crimes like drug offenses and racketeering have been using roving wiretaps since 1986, national security agents trying to prevent terrorist attacks only received this authority with the passage of the PATRIOT Act. Similarly, Section 215 of the PATRIOT Act gave national security personnel the authority to compel production of business records and other tangible things, a tool that is comparable to the criminal prosecutor’s longstanding ability to acquire such items with a grand jury subpoena.

Second, the PATRIOT Act enhanced the government’s ability to anticipate and prevent terrorism by refining certain existing tools to make them more useful in identifying suspects and plots in the early stages of investigation. For instance, the statute reduced the evidentiary threshold for issuance of Section 215 orders and National Security Letters (“NSLs”) for third-party records about a person, allowing agents to use these tools to investigate leads and connect the dots at the first indication that that person might somehow be relevant to a national security investigation.

Third, the PATRIOT Act reduced a number of the administrative burdens that had complicated and slowed the pace of our national security investigations by, for example, extending the duration of FISA wiretap orders, delegating the authority to issue NSLs down to the field office level, and permitting agents to obtain search warrants for electronic communications information that can be served in any judicial district around the country.

Fourth, the PATRIOT Act greatly facilitated the sharing of certain types of national security information between criminal investigators and intelligence agents. It removed the previous prohibition on sharing information from a criminal wiretap with intelligence agents, and it expressly authorized criminal investigators to share any foreign intelligence information that they come upon in their investigations with interested national security personnel.

Finally -- and arguably most significantly -- the PATRIOT Act lowered the perceived “wall” between our law enforcement and Intelligence Community personnel -- a set of rules and procedures that prevented those two groups from coordinating operations and sharing information about terrorist suspects.

This wall grew out of the requirement in the Foreign Intelligence Surveillance Act (“FISA”) that the collection of foreign intelligence had to be “*the* purpose” of a wiretap or search authorized by the FISA Court. Over the decades after the 1978 passage of FISA, that statutory provision became interpreted to require that intelligence agents could obtain a FISA surveillance or search order only if they showed the FISA Court that collecting foreign intelligence was “the *primary* purpose” of the surveillance or search authority they sought. In order to make that showing, it became necessary for intelligence agents to limit coordination with criminal investigators so as to avoid the risk that the FISA Court might suspect that criminal investigation and prosecution was actually their primary purpose.

This led to the situation where intelligence agents who were tracking a terrorist target felt they could not share information or coordinate operations with law enforcement agents who were pursuing a criminal investigation against the very same target -- thereby bifurcating our counterterrorism operations just when we needed them to be fully integrated to meet the growing threat of international terrorism. This situation prevailed as al Qaeda was expanding its reach and attacking our interests around the world, and the wall was still firmly in place when the terrorists struck on 9/11.

Congress rectified this situation in the PATRIOT Act by eliminating the “primary purpose” test and providing that a FISA order was appropriate so long as the collection of foreign intelligence was a “significant” purpose of the surveillance or search. It also expressly permitted agents using intelligence tools like FISA to consult and coordinate activities with their law enforcement counterparts who were pursuing the same terrorists, spies and other national security targets.

The lowering of the wall and the new information-sharing authorities in the PATRIOT Act led to fundamental changes in the conduct of our Nation’s counterterrorism program. Our analysts can now gather, synthesize, and disseminate terrorist threat information around the law enforcement and intelligence communities without jeopardizing the ability to secure FISA orders; our FBI and Intelligence Community leaders can freely share information and coordinate operations on a daily basis; and our federal government can fully partner with the 700,000-odd law enforcement officers who are the eyes and ears of our counterterrorism effort within the United States.

With these changes, we now have the ability to deploy all of our national counterterrorism personnel and assets in a coordinated, worldwide campaign against what the President has described as al Qaeda’s “far-reaching network of violence and hatred.”

2. The Reauthorization Act of 2006

It is worth noting that all of these significant legislative improvements were drafted, considered and enacted within a mere 45 days of the 9/11 attacks. Congress is to be commended for moving with urgency and speed and producing such a well-considered piece of legislation. Congress was also wise to take the hurried enactment into account and to build into the law the sunset provisions that required a future examination of these authorities and their implementation.

Starting in 2005, Congress undertook the process of re-examining each of these authorities and engaged in a vigorous debate over their reauthorization. To its credit, Congress went through a lengthy process of carefully scrutinizing each provision and identifying those where additional limitations or oversight could provide valuable protection against misuse without reducing their operational effectiveness. This process resulted in the 2006 Reauthorization Act, which added significant new safeguards for many of the primary authorities in the original PATRIOT Act. Examples include:

- Revising the NSL authorities to provide that NSL recipients can challenge the NSLs and their nondisclosure provisions and to require the Justice Department Inspector General to review the Department's use of the NSL authority for potential misuse; and
- Addressing concerns raised about Section 215 orders by providing a means for challenging the legality of a Section 215 order and its nondisclosure provision and by requiring high-level approval within the FBI before such an order could be sought for sensitive records like library circulation records, library patron lists, book sales records, book customer lists, firearms sales records, tax return records, educational records, or certain medical records.

3. Oversight within the Justice Department

In addition to these new safeguards and the various provisions for legislative and judicial oversight built into the PATRIOT Act authorities, the Executive Branch has substantially increased its own internal national security oversight. That effort can be seen in a number of initiatives that have been pursued by the FBI and the National Security Division in Main Justice. Besides generally enhancing the coverage and frequency of oversight efforts -- especially in the aftermath of the Inspector General's 2007 report finding serious flaws in the FBI's use of the NSL authority -- both components established strong offices devoted to monitoring the FBI's compliance with all regulations and laws governing its national security program.

In 2007, the FBI established its Office of Integrity and Compliance, an office reporting to the Deputy Director that is tasked with establishing and implementing compliance policy throughout the Bureau, monitoring and ensuring compliance audits within the Bureau's operational programs, and instilling a set of procedures and a culture of constant respect for compliance within the Bureau.

That same year, the National Security Division -- my old division in the Justice Department -- established a new section devoted to oversight of the FBI's national security operations. While DOJ attorneys previously had a role in conducting oversight into certain areas of those operations, that role was limited. It was only upon the stand-up of the Oversight Section that Justice Department attorneys were given the complete mandate to examine all aspects of the FBI's national security program. Since then, the Oversight Section has worked closely with the FBI's Office of the General Counsel to conduct field office compliance reviews, in which FBI and DOJ attorneys travel to an FBI field office and conduct a thorough file review to ensure that agents in that office are following all applicable laws, regulations, and policies in their use of national security investigative authorities.

These two new offices reflect a genuine commitment to compliance, and have gone a long way toward institutionalizing and embedding effective oversight within the operations of our national security program.

4. Conclusion

Over this past decade, the Executive Branch and Congress have succeeded in building the investigative infrastructure and capabilities that are necessary to protect our national security. Thanks to the determined efforts of our law enforcement and intelligence leadership and personnel, we now have a formidable counterterrorism program that has succeeded in preventing another 9/11 attack and keeping al Qaeda off balance. And thanks to Congress' forceful -- but careful -- effort to bring our national security authorities in line with today's threat from international terrorism, we now have a well-balanced legislative framework governing our counterterrorism operations. In light of this history, we have every reason to approach the ten-year anniversary of the PATRIOT Act with confidence that its authorities and safeguards will continue to contribute both to the defense of our national security and to the protection of our civil liberties.