

## **BALANCING CIVIL LIBERTIES WITH THE NEED FOR EFFECTIVE INVESTIGATION**

*The balance between individuals' civil liberties and the need for effective investigation is hard to maintain even during so-called normal times, let alone times of increased terrorist threat or war. It is, admittedly, a difficult balancing act.*

### Personal Capacity Disclaimer

It should be noted that I am speaking today in my personal capacity and with the limited perspective of a Special Agent and former legal counsel in the Minneapolis Division, just one of fifty-six divisions of the FBI. I am also not privy to any data being collected by FBI Headquarters on any of the Patriot Act provisions discussed herein. Nothing contained herein should therefore be construed as the views of the FBI.

### "Big Brother Is Here" or "Trust Us- We're the Government"?

Civil libertarians warn that privacy and liberty are at risk in this country, that a combination of lightning-fast technological innovation and the erosion of privacy protections threaten to transform George Orwell's "Big Brother" from an off-cited but remote threat into a very real part of American life, turning us into a "Surveillance Society."<sup>1</sup>

Government and law enforcement authorities, however, tell us that they need the additional powers and new technological tools to effectively investigate in order to bring criminals to justice and prevent acts of terrorism.

What's the truth?! Well, as with most issues of public concern, this debate has become unfortunately monopolized and polarized by the people who are the most passionate on the issue, the partisans of both extremes and those who least understand the problems and issues of the other side. (For example, the gun debate certainly exemplifies this phenomenon with one side claiming that the slightest restrictions upon the ownership of even assault weapons are the first step towards taking away their hunting rights and the other side not understanding why anyone would even want to hunt.) As a person, however, who has long seen and complained about the unwise, needless and, in some cases, even bizarre restrictions and legal technicalities placed upon law enforcement, at the expense of victims and the public, but also as someone who has reviewed enough old FBI files from the Cold War's (Communist) "Red Scare" and 60's- 70's civil unrest eras, I can appreciate not only the law enforcement perspective but how real or perceived threats and fear can easily result in authorities overreacting and endangering citizens' rights.<sup>2</sup> The following is therefore my "middling" attempt to eliminate some of the

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<sup>1</sup> From "Bigger Monster, Weaker Chains: The Growth of an American Surveillance Society" by Jay Stanley and Barry Steinhardt, January 2003, ACLU Technology and Liberty Program.

<sup>2</sup> None other than the FBI's current Director Robert Mueller has himself, in recent speeches on the same topic, chronicled the various abuses that have occurred in the United States during times of crisis: the "Palmer Raids" of 1919; the Japanese internment during World War II; and the FBI's COINTELPRO program of the 1960's-70's. See Endnote.

misinformation and hyperbole and highlight some of the valid points of both sides of the issue, in order to achieve a better understanding of the real issues and problems.

Whether or not the "truth" emerges from this middle of the road look at the civil liberties versus security debate, what's most important is that this debate proceeds, hopefully via an informed but dispassionate analysis. For only by debating the true problems facing law enforcement and national security and the true costs of law enforcement action, can we dispel public paranoia, obtain satisfactory public cooperation and thereby maximize Americans' security without too high a price in terms of their other freedoms.

### **Discussion of Most Controversial Patriot Act Provisions**

The "United and Strengthening America Act by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001" known more simply as the "Patriot Act" is 342 pages long! Because it is so massive and contains so many different provisions, (approximately 160!), very few people, including myself, are fully conversant with every change effected by this piece of legislation. It is safe to say, however, that at least some the provisions enacted by the Patriot Act are non-controversial<sup>3</sup> and that many provisions were "on the drawing table" long before 9-11 to remedy the gaps that had developed in the law due to emerging computer technology and electronic communications as well as problems that had continued to develop in combating "ordinary" crime. Other provisions were added specifically in response to 9-11 due to the new threat of terrorism and the whole package was seemingly "sold" that way<sup>4</sup> (again, despite the prior impetus of some of the provisions). For purposes of the discussion today, I will provide my thoughts about only five of the most controversial provisions of the Patriot Act, those which have been repeatedly cited in news articles and commented on civil libertarian websites as being the most pernicious from their standpoint:

#### **1) Section 215 allowing the FBI to request Foreign Intelligence Surveillance Act (FISA) Orders for business records and other "tangible things";**

The main criticisms of this provision by civil libertarians are that: 1) the FBI need not show probable cause or even reasonable suspicion; 2) it allows for investigation of United States persons based in part on their exercise of First Amendment rights; and 3) a 215 order is obtained ex parte, those served with such orders are prohibited from disclosing the fact to anyone else, and the person whose records are obtained is never notified.

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<sup>3</sup> For instance, Section 102 contains the "sense of Congress" condemning discrimination against Arab and Muslim Americans.

<sup>4</sup> This is evident from both the long and short titles of the legislation.

These criticisms can easily be countered as follows: 1) criminal subpoenas and court orders for business records and things held by third parties have never required any showing of probable cause or even reasonable suspicion because they are not "searches." They are not considered "searches" because, in the legal sense, one does not have a reasonable expectation of privacy in things one has openly entrusted to someone else. For example, bank records of someone suspected of committing bank fraud are usually obtained by the FBI through a subpoena requiring only relevance, not any level of suspicion.<sup>5</sup> It can be argued, and government officials did so successfully, that it should not be harder to investigate terrorist suspects than plain criminal suspects; 2) but it does not allow for investigation of U.S. persons based solely (and that's the key word here) on exercise of First Amendment rights. For example, the FBI would not be able to seek records about someone who merely wrote a letter to the editor criticizing government policy. (It should be noted, however, that this First Amendment protection only extends to citizens and permanent residents.); and 3) secrecy exists in almost all investigations, including criminal investigations, at least in the early phases. Grand jury subpoenas, court orders and search warrants are almost always therefore obtained ex parte. Many, if not most criminal subpoenas and court orders contain provisions prohibiting the third party from notifying the subject, and with only a few exceptions, law enforcement does not have to notify a criminal subject that they have obtained his/her records. Court orders for non-disclosure are usually available to delay any required notice until the conclusion of the investigative phase. (Otherwise, preliminary investigative steps would tip off the subject!) It is true that a criminal subject, when and if he/she is charged, will eventually learn of the evidence that the government has obtained, including any records. But if a terrorist is charged criminally, he or she would also probably learn of the fact that the Government had obtained his/her records from a third party through the FISA method.

There is much concern over the potential for infringement of first amendment protection by use of Section 215 authority with libraries and bookstores to ascertain what books a person has read or purchased. This concern has even resulted in internal policies or local resolutions being adopted to mandate non-compliance with relevant provisions of the Patriot Act. However well intentioned such concern may be, it is misplaced. As a practical matter, it is easier to obtain an ordinary Grand Jury subpoena than to obtain a FISA court order under Section 215 in seeking library or bookstore records. And it must be recognized that such limited use of subpoenas has on occasion been justified- for example, when the Unabomber's "Manifesto" cited four obscure books and the FBI promptly served subpoenas on certain libraries to ascertain who had checked out those books. We know that the 9/11 hijackers relied on public access computers, including those available in libraries and stores like Kinkos, to communicate with each other via the Internet. Thus there is a legitimate need for speedy access to records of such computer usage<sup>6</sup> making it far more likely that librarians would be asked what computer a suspect has used as opposed to what books are being read by a suspect. In fact, since 9/11, FBI contact with libraries has been minimal and sporadic. In fact, in early fall, 2003, Attorney General Ashcroft

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<sup>5</sup> In fact there is a federal privacy protection law that prohibits search warrants from being used to obtain records from certain third party holders of records, those intending to publish. In those cases, the law specifies that subpoenas must be used.

<sup>6</sup> This would, of course, not include the content of any stored communications in computers, which must normally be obtained through a criminal or FISA search warrant demonstrating probable cause.

definitively announced that thus far no Section 215 Order has ever been served upon any library. In any case, long before the Patriot Act, access to computer usage and other library records was possible via the subpoena route, requiring nothing more than a showing of relevance. Although Section 215 creates an additional avenue through the FISA Court to potentially obtain these records, it does nothing to widen the government's power to acquire them and thus poses no additional risk to first amendment protection in this area.

With respect to third party records, however, it is only fair to point out that a little-noticed section of the Patriot Act, Section 505, allows FBI SACs (Special Agents in Charge of the fifty-six field offices) to issue "National Security Letters (NSLs)" to obtain three common types of records: an individual's telephone and internet service provider toll and transaction records, bank and credit records. This delegation of authority down to SACs has greatly streamlined and speeded up the process of issuing NSLs and my guess is that the number of NSLs being issued in the "war on terrorism" is probably manyfold what it was prior to 9-11. A few months ago, the Attorney General also expanded the authority to issue NSLs not only in "full investigations" but also even in "preliminary investigations." It is also only fair to note that (long-term, if not endless) secrecy accompanies the use of NSLs and the information obtained by the FBI pursuant to their authority. A further provision, tucked inside an intelligence spending bill, which the President signed on December 13, 2003, expands the ability of the FBI to obtain a whole host of third party records, from a wide range of entities such as casinos, pawn shops, investment brokers, hotels, airlines, telegraph companies, realtors, car dealers, travel agents, and the U.S. Post Office.<sup>7</sup>

**2) Section 213 clarifying and creating a uniform statutory standard for courts to authorize delayed notice in execution of certain search warrants as long as no items are actually seized;**

Despite the fact that it has been used sparingly, usually only when specific circumstances existed, making it advisable to obtain photographic evidence of a criminal plot before disrupting the scheme, so called "sneak and peak" search warrants predate the Patriot Act. Section 213 merely made the existing, but varying criminal court practices around the country uniform, for example as to the length of delay normally granted and the showing of "adverse result" necessary to obtain this type of authority. Despite the temporary secrecy associated with this authority, it must be borne in mind that there is strict judicial review of the proffered justifications and length of delayed notice necessary.<sup>8</sup> Theoretically this judicial review, along with a subject's right to pursue appropriate remedies after the fact, (e.g. suppression, civil litigation), should provide sufficient protection against abuse. Civil libertarians also ignore the fact that it happens that criminal search warrants are regularly executed when the resident(s) are not home as there is no legal requirement that a resident be present. (In such cases the only requirement is for a copy of

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<sup>7</sup> This legislative expansion was, however, far from a cakewalk. More than one third of the House, including 15 conservative Republicans, voted against what some dubbed, "Patriot Act II" stating that, "expanding the use of administrative subpoenas (NSLs) and threatening our system of checks and balances is a step in the wrong direction."

<sup>8</sup> The standard is "reasonable cause" which is defined to include endangering the life or physical safety of an individual, flight from prosecution, evidence tampering, witness intimidation, or otherwise jeopardizing an investigation.

the warrant and of the inventory to be left of any items taken.)

In July 2003 the House of Representatives voted to prohibit the use of “sneak and peak” warrants. However, even if this measure was to pass the Senate and be enacted into law, it is not clear what effect it would have as many courts had previously found inherent judicial authority to order such delayed notice in appropriate cases.

**3) Section 216 amending the pen register/trap and trace statute to apply to Internet communications and to allow for a single order valid across the country;**

This provision of the Patriot Act, more than any other, exemplifies something that was probably on the drawing board long before 9-11 and the application of pre-existing law to Internet communications. The ACLU believes this provision broadens the “pen register exception” in two “important” ways but that may be an exaggeration. On a telephone, pen/trap data are the numbers dialed into or from a target number; no search warrant establishing probable cause is necessary because courts and Congress have long determined that one does not have an expectation of privacy in the numbers alone. This type of information can therefore be obtained with a pen register court order approved by a magistrate judge. The Internet communication equivalent to pen/trap data are the to and from headers of an e-mail. It only makes sense that a pen register type court order be available to obtain the limited to/from information in the e-mail context. The subject line is, however, considered to be content and can only be obtained with a search warrant. The ACLU’s objection to the “nationwide” aspect of such orders, that is, that a judge cannot monitor the extent to which his or her order is being used, also misses the mark. No such monitoring really ever occurred with respect to regular telephone pen/trap orders. Prior to the availability of “nationwide” effectiveness, court orders had to list every conceivable communication carrier, which became more and more difficult with constant additions and changes in telecommunication carriers.

**4) Section 218 allowing law enforcement to conduct surveillance or searches under FISA if a "significant purpose" is foreign intelligence; and**

Since this is rather a complicated, convoluted area, I will try, before launching into any discussion of the merit(s) or lack thereof of the criticism, to explain in as simple terms as possible what I feel was going on here that led to this change in the Patriot Act. As you probably know, a criminal search warrant requires probable cause that a crime has occurred and that evidence of that crime is likely to be found at a particular place. Searches for the purpose of gaining information about foreign countries’ attempts to spy on the United States don’t always jive with the purposes for conducting criminal searches (although they sometimes do, for instance when one ends up being prosecuted for the spying). A foreign intelligence officer-spy operating in the U.S. may not be breaking any criminal laws for starters and/or the U.S. authorities may wish to neutralize such an officer’s activities without prosecuting him/her. For these reasons, a separate avenue to conducting foreign intelligence surveillance and searches was created in 1978 through the Foreign Intelligence Surveillance Act (FISA). In order to get authority to search or monitor wire or electronic communications under FISA, FBI agents have to show probable cause that the target was a foreign power or acting on behalf of a foreign power instead of traditional criminal probable cause. As time went on, in my opinion, two main things

happened with the FISA process. It became harder and harder in a practical sense (and for a lot of reasons), to get a FISA warrant, perhaps even harder than it was to get a criminal warrant. I alluded repeatedly to these problems in my May 21, 2002 letter to Director Mueller and in my subsequent testimony to the Senate Judiciary Committee. My opinion is also that, practically speaking, because there is no litmus test to scientifically quantify any given legal standard, whether it be “reasonable suspicion,” or “probable cause,” meeting any of these given standards will always be somewhat subjective. The second thing that happened is that international terrorism hit the U.S. Because an international terrorist group is a “foreign power” under the FISA, the FBI was free to seek to obtain orders to search and conduct surveillance of suspected terrorists under FISA authority. But terrorist acts are inherently almost always criminal as well, which gave FBI investigators a choice. Because of terrorism falling somewhere between straight foreign intelligence and criminal, it gave the FBI options but it also caused problems because there was supposed to be a “wall” between the criminal and the intelligence investigation of any given terrorist(s). In many cases both criminal and intelligence cases would be opened, but the FBI intelligence agent could not share any information with the FBI criminal agent working on the same matter for fear that it would be seen as an “end run” around the criminal process. The FISA Court demanded strict database checking, reporting and other procedures to ensure that the “primary purpose” of any FISA order was intelligence gathering and not for purposes of gathering evidence that could be used to prosecute the terrorist criminally. Because, for the most part, this regimen had worked fine (and is as it should be) when dealing with foreign country sponsored spying, no one questioned how absolutely insane it (the “wall”) was when applied to international terrorism. That is, no one questioned it until after 9-11 and then there were plenty of questions including those engendered by the dramatic testimony of an FBI agent in the New York Office who, prior to the attacks, had been thwarted from launching a criminal fugitive investigation for two of the 9-11 hijackers for exactly this reason.

So there was plenty of reason for the Department of Justice to seek to bring the “wall” down. This was accomplished in the Patriot Act with the change of essentially one word, - instead of intelligence having to be “the” (which had been interpreted as “the primary”) purpose of a FISA order, Section 218 said it only need be a “significant” purpose. This brought the “wall” down, allowing sharing of intelligence-derived information with both criminal agents and criminal prosecutors which practice was also subsequently approved in an historic November 2002 decision by the FISA Court of Appeal. This opens the door to conducting both types of investigations, criminal and intelligence, on the same terrorist subject(s), selecting what type of criminal or intelligence method/avenue may be the most effective and then sharing the information fully with every federal investigator or intelligence officer having an interest. In fact this current ability to combine the best of the criminal and intelligence world has become one of the attributes most cited by the FBI in recent months as the main reason why the FBI ought not to be split up or have its intelligence function severed as some legislators have called for.<sup>9</sup>

But with the throttle subsequently now set at “full speed ahead” with regard to FISA initiatives in the “war on terrorism,” it is right to continue to raise the hard questions as to the

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<sup>9</sup> FBI Director Mueller repeated this argument in a speech to the ACLU on June 12, 2003, saying, “Proponents of a separate agency see an advantage in separating law enforcement and domestic intelligence. The reality is that the two functions are synergistic in the fight against terrorism.”

potential for their abuse. Of course the judges appointed to the FISA Court are the first line of defense to prevent abuse of the process but it must be recognized that, as I pointed out before, a certain amount of subjectivity is inherent in this judicial process. It may be that FISA judges are even more susceptible to greater subjectivity than regular federal district judges due to the cloak of secrecy that surrounds their decisions and the fact that, due to the ex parte nature of the proceedings, no appeal lies except in the event of any decision adversely affecting the government.<sup>10</sup> Above all, the FISA process should not become an “end run” around the normal criminal process and enough foresight and oversight should be exercised so this doesn’t happen now or somewhere down the road. It can even be argued that the perception of this occurring is enough reason to consider instituting an independent oversight review process. The possible options for greater oversight are, upon serious reflection, detailed further in the “suggestions” section of this paper.

### **5) Section 802 adding a definition of "domestic terrorism" to 18 U.S.C. 2331 and making conforming change in the existing definition of "international terrorism"**

The Patriot Act defined “domestic terrorism” as “acts dangerous to human life that are a violation of the criminal laws of the United States or of any State” and that “appear to be intended...to influence the policy of a government by intimidation or coercion.” According to civil libertarians, this “overbroad definition” “creates a new crime” which may be used against activists exercising their rights to assemble and to dissent.<sup>11</sup> But there are two problems with this comment. The first is that it’s hard to see, without further reference to another substantive provision, what “new crime” is created since Section 802 is only a definition.<sup>12</sup> Secondly, it must be pointed out that “acts dangerous to human life” is strongly limiting language, which should exclude all lawful activism. That is, for someone to be defined as a domestic terrorist, he or she must first commit a crime that is an “act dangerous to human life.” Property damage, even that of great magnitude, is not enough. Given the proclivities of some groups to engage in clandestine property damage of significant magnitude, it could actually be argued that the definition of “domestic terrorism” is not broad enough! However, it should be recognized that some types of severe property damage, for example the setting of arson fires or the spraying of gunfire into what may be believed to be an unoccupied building (as, for example, occurs repeatedly at “Planned Parenthood” clinics around the country) could be seen as so reckless in endangering human life as to fall under this Patriot Act definition. The rights of all U.S. citizens to engage in lawful protest by speaking, writing, marching and other non-violent acts must be protected. Close attention should also be paid so the use of large-scale interviewing initiatives, police monitoring of public events, including marches and other lawful protest events, the use of tipsters and other informants, and other privacy-defeating database mining initiatives do not have this effect so as to even chill our exercise of first amendment rights.<sup>13</sup> But, if and when certain

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<sup>10</sup> There has only been one appeal ever taken in the history of the FISA Court.

<sup>11</sup> From the Bill of Rights Defense Committee’s “Guide to Provisions of the USA PATRIOT Act and Federal Executive Orders that threaten civil liberties” (by Nancy Talanian).

<sup>12</sup> It’s possible that enhanced penalties apply, however, if a criminal perpetrator meets this definition.

<sup>13</sup> Unfortunately, there are recent indications that the FBI failed to pay close attention when, in anticipation of large anti-war protests in Washington DC and San Francisco, it issued an intelligence bulletin to law enforcement officers around the country that seemingly blurred the distinction between First Amendment protected speech activity and acts of terrorism. The FBI’s October 15, 2003 “Intelligence Bulletin,” which has since been

lines are crossed, and certainly I would think the commission of “acts dangerous to human life” is a line we can all agree on, than first amendment rights should not be used to shield the perpetrator(s). For instance, because Kathleen Soliah (who later named herself Sara Jane Olson) spoke at protest rallies in the early 70’s, the exercise of those first amendment rights should not serve to obscure what else she did nor protect her from being brought to justice for her participation in a pipe-bomb murder attempt, bank robbery and other crimes. Unfortunately, there are always a few persons who, at some point lose patience with non-violent, lawful methods of advocating on behalf of their cause or are otherwise driven to cross the line to domestic terrorism. Sometimes such persons seek to employ their first amendment and other civil rights as cover for their behind-the-scenes criminal acts. This does make it more difficult, but not impossible, for law enforcement to ferret out. Civil libertarians, however, need to try to appreciate these realities when commenting on the proper line/definition drawing.

### **Other Government Initiatives- Could We All End Up Being Under Surveillance?**

In addition to the Patriot Act provisions discussed above, Department of Justice (DOJ) initiatives aimed at "interrogating" large numbers of young Arab men fitting certain criteria have received harsh criticism from civil liberties circles as have its announced-but-never-implemented "Operation TIPS" (Terrorist Information and Prevention System) and the Pentagon-proposed "Total Information Awareness" project (recently renamed to the less-threatening-to-the-average-American, "Terrorist Information Awareness" program). The loosening of Attorney General Guidelines allowing FBI Agents to enter public places, including churches and mosques, and to surf the net have also met with criticism from civil libertarians.

*“How often, or on what system, the Thought Police plugged in any individual wire was guesswork. It was even conceivable that they watched everybody all the time. But at any rate, they could plug in your wire whenever they wanted to.”<sup>14</sup>*

The danger of reaching and living this 1984 scenario in terms of heightened surveillance potential and consequent loss of privacy cannot be overstated. One doesn’t have to be an alarmist to agree with Steven Aftergood, head of the Project on Government Secrecy at the Federation of American Scientists that, “it is safe to say there is an enormous temptation to expand surveillance and information gathering. And unless there is an effective system of

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posted on the FBI’s public website, and which purpose it is to “provide law enforcement with current, relevant **terrorism** information developed from counterterrorism investigation and analysis,” discusses how protestors have sometimes used “training camps” to rehearse for demonstrations, the Internet to raise money and gas masks to defend against tear gas. Whether due to over-zealousness or simple carelessness, this Bulletin blended lawful protest activities, civil disobedience and terrorism all together, providing little in the way of constructive “guidance” and perhaps unnecessarily confused the nation’s law enforcement officers who are responsible for policing such events. In fact, if news reports are to be believed detailing excessive use of force and ill treatment of protestors by police the following month during demonstrations organized around the Free Trade Area of the Americas (FTAA) meeting in Miami, this “guidance” amounted to more than a tree falling in a forest with no one to hear it. Miami police are reported to have unjustifiably fired rubber bullets and used batons, pepper spray, tear gas canisters and concussion grenades on FTAA crowds. For example, see “Judge: I saw police commit felonies” article in the Miami Herald.com by Amy Driscoll.

<sup>14</sup> 1984 by George Orwell.

checks and balances, sooner or later this kind of surveillance is going to get out of control.” The topic definitely deserves much fuller treatment than I can afford here. But here are a few comments for what they’re worth.

The ACLU is right by pointing out that the increase in surveillance is as much due to the private sector as it is due to the government and that the danger stems not from a single government program, but from a number of parallel developments in the worlds of technology, law, and politics.<sup>15</sup> If I may, I will just relate some of my own experience last year in discovering just how little privacy any of us retain. Despite having an unlisted telephone number, my driver’s license and cars not registered to my home address and a prior attempt on my part to remove my name from a major commercial database, the national news reporters were on my doorstep within an hour of my letter to Director Mueller leaking. I joked that they seemed more effective in tracking persons down than the FBI. They told me it only took a couple of keystrokes on the computer to find me. During a Lexis-Nexis training session a few months later, I had the instructor put my name in, and despite my earlier attempts to be unlisted, my name, address, telephone number, and children’s names popped up immediately along with how much we had paid for our house. A ton of information has been gathered on almost everyone by private businesses as well as government entities and it is now just a question of “mining” it, to exploit its value. It should also be noted that the cameras that capture your visits and travels in all types of public venues are not usually those of any law enforcement or government officer, but of security-conscious private entities. For example it was just announced that Minneapolis police plan to install 20 to 30 “crime-fighting surveillance cameras” downtown next month with \$250,000 of the cost being paid for by the Target Corporation. The fear, of course, exists that such cameras, if misused by public officials, could chill public protest activity protected by the first amendment or otherwise invade persons’ privacy. But the key to whether these initiatives will ultimately be a good or bad thing probably lies in the “mining” of the stored data, that is, “mining” it only when properly predicated. For example, it turned out to be a good thing recently that a Californian had a surveillance camera fixed on his neighbor’s property which was able to record a portion of the kidnapping of his neighbor’s child. It also proved beneficial that a surveillance camera apparently recorded a snatch of Timothy McVeigh’s vehicle in his bombing of the Oklahoma Federal Building. Additionally, the banking industry and the FBI have long and good experience in the use of footage from bank surveillance cameras to identify bank robbers.

Exercise of good discretion should similarly be required as to what level of follow-up is afforded all information obtained from citizen tipsters. Even without a formal program of registering citizens who furnish tips, the (at times panic-struck) public has been more than willing to call in information and tips to the FBI and other law enforcement agencies. In calling for greater vigilance, citizens and non-citizens alike have been repeatedly encouraged to report what they see or know. Only a small percentage of this information may turn out to be valuable in actually uncovering a terrorist or terrorist plot, but even that small percentage may justify law enforcement’s continued encouragement of the citizen reporting and a certain amount of time and manpower invested by law enforcement in tracking down such tips (or, “leads,” as they are called once received and acted on by law enforcement). Solid discretion must be exercised,

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<sup>15</sup> Ibid FN1

however, by law enforcement, in not only determining which leads to prioritize and/or to follow up on, but also in how much documentation should be made/retained of the report and any law enforcement follow up. Criticism has actually erupted internally in the FBI that the exercise of such discretion has been taken away due to FBI management's worry that some clue may be overlooked. U.S. News and World Report's "Special Report- Inside the FBI" of May 26, 2003, quotes unnamed supervisors saying, "You used to look at threats; you knew what had validity; you'd get to them after you got all these other things out of the way. Now no matter how bizarre or how routine, you go after them." Similarly FBI spokesman Bill Carter was recently quoted as saying, "At one time, when information came to us, a lot of times based on experience, the investigator would say, 'Nah, this is not something we will follow through on,' but after the September 11 attacks, the director has stated that no counterterrorism lead will go uncovered."<sup>16</sup> This strategy, however, ignores the mounting number of documented instances of federal agents, facing intense pressure to avoid another terrorist attack, who have acted on information from tipsters with questionable backgrounds and motives, touching off needless scares and upending the lives of innocent suspects.<sup>17</sup> (Such things have happened even in nice Minnesota! Only a few weeks after 9-11, we were surprised to find out the true motives of a caller to our FBI command post who thought she had come up with a clever way to track down and retrieve her car that she had unwisely lent to a boyfriend who had failed to return it. She told the FBI that she had overheard a man (the errant boyfriend) plotting a terrorist act at the Mall of America. After several hours of diverting precious law enforcement resources to this seemingly urgent but false tip, the FBI did locate the boyfriend and the tipster's car. But it turned out not to be the best idea for the trickster as she was subsequently prosecuted for having furnished false information.) Although federal officials defend their strategy of running most such terrorist tips to the ground, calling it critical to thwarting another attack, the bottom line is we have to be careful that we do not abdicate our responsibilities in evaluating "citizen tips" and informant information before acting in a way that impacts negatively upon innocent persons, no matter how worried we may be and no matter how difficult any preliminary evaluation process is.<sup>18</sup>

Coupled with this broad net (no-tip-will-go-uncovered) approach is the Attorney General's announcement in November 2003, of new national security guidelines, which allow the FBI to conduct a "threat assessment" of potential terrorists or terrorist activity without initial evidence of a crime or national security threat. Although justified by DOJ officials as necessary to prevent acts of terrorism before they occur, the ACLU and others have criticized these broader powers as "the notion that the government can put your life under a microscope without any evidence that you're doing anything wrong." Additionally, a study released in December 2003

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<sup>16</sup> For example in his September, 2003 speech at the "Border Terrorism Conference" in San Antonio, Texas, FBI Director Mueller stated, "our job is to run down each and every threat- quickly and without fail. That means getting the facts, conducting the interviews, doing the polygraphs, and the like. Terrorism is our top priority, and it is clear within the FBI: there must not be a single counterterrorism lead or threat that goes unaddressed."

<sup>17</sup> See New York Times article on June 19, 2003 entitled, "False Terrorism Tips to F.B.I. Uproot the Lives of Suspects" by Michael Moss who accurately identifies this key problem.

<sup>18</sup> And as I stated in my letter to Director Mueller dated 2/26/2003 (published in NY Times March 6, 2003), there is a downside to alarming the public unless there is adequate reason to do so. Increased vigilance must be encouraged when needed, but the FBI's Joint Terrorism Task Forces can easily get bogged down in attempting to pursue all the leads engendered by panicky citizens. This, in turn, draws resources away from more important, well-predicated and already established investigations.

by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University using Justice Department statistics appears to confirm this notion. Of the thousands of people referred by the FBI and other federal investigators to prosecutors in connection with terrorism since September 11, 2001, only a handful have been convicted and sentenced to long prison terms.<sup>19</sup> Although the FBI objected to the report's data being "taken out of context" due to the administrative requirement for every case investigated to be referred to prosecutors, (many times with little investigative effort expended) before being closed, it's hard to deny that the TRAC data graphically illustrates the results of the broad net (no-tip-will-go-uncovered) approach.

In the same vein, large interview or other projects<sup>20</sup> undertaken by law enforcement entities at their own initiative must be afforded close scrutiny to ensure they truly serve the needs of public safety and the initiative in question is properly explained ahead of time, to include the voluntary nature of participation, if that is the case. It must be recognized, at the same time, that a "right not to be talked to" has never existed in our country and "it is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement."<sup>21</sup>

Mass detention initiatives especially must be placed under the microscope. As I previously noted in an earlier letter to FBI Director Mueller, "the vast majority of the one thousand plus<sup>22</sup> persons 'detained' in the wake of 9-11 did not turn out to be terrorists. They were mostly illegal aliens. We have every right, of course, to deport those identified as illegal aliens during the course of any investigation. But after 9-11, Headquarters encouraged more and more detentions for what seem to be essentially PR purposes. Field offices were required to report daily the number of detentions in order to supply grist for statements on our progress in fighting terrorism...from what I have observed, particular vigilance may be required to head off undue pressure (including subtle encouragement) to detain or "round up" suspects—particularly those of Arabic origin."

In a larger sense, the temptation exists to fall into an "us versus them" attitude reserving the most aggressive initiatives for Middle Eastern males. Rather than the deliberately false tip I described above, which is problem enough, the most common "citizen tip" we receive is something to the effect of, "I don't want you to think I'm prejudiced because I'm not, but I just have to report this because one never knows and I'm worried and I thought the FBI should check it out." This precedes a piece of general information about an "Arab" or "Middle-Eastern" man who the tipster lives by or works with that contains little or nothing specific to potential terrorism

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19 From article entitled, "Figures show 'hype' of terror war" published 12/8/2003 by Shaun Waterman, United Press International Homeland and National Security Editor.

20 Most noteworthy among these other projects have been "Special Registration" rules which news reports describe as requiring nationals from 22 countries to sign up with immigration authorities resulting in over 13,000 Arab and Muslim immigrants in deportation proceedings, mostly for routine immigration violations, like not registering a change of address.

21 Originally from two Supreme Court decisions, Washington v. Glucksberg, 521 U.S. 702 at 721 (1997) and Miranda v. Arizona, 384 U.S. 436 at 477-478 (1966) and recently cited again in Chavez v. Martinez, 2003 U.S. LEXIS 4274.

22 My figure of 1000 plus detainees was based on the FBI's daily press statements issued after 9-11. The Department of Justice's Office of Inspector General report actually counted 762 illegal aliens detained after 9-11. The OIG report released in July, 2003, regarding these detentions was fairly critical of the FBI.

activities. Should such a “tip” be followed up (and thereby be converted into a “lead”)? Or would that be little more than racial profiling? That is the 100 million dollar question today and one that no doubt will be debated tomorrow. Noteworthy, however, is the Attorney General’s recent determination not to apply the Department of Justice’s new and rather strict anti racial-profiling policy to the “war on terrorism.” Although it’s possible this decision to exempt DOJ’s anti racial-profiling policy from being applied to terrorism matters may have been partly based upon the logic behind the mantra heard on right-wing talk shows across the country that “All Muslims aren’t terrorists, but all the terrorists were Muslims,” it is more likely that the other mantra about the need to prevent all future acts of terrorism was more behind the decision.<sup>23</sup> One should not forget, however, that prior to 9-11, the single most dangerous terrorist groups in the U.S. were Christians, albeit of the radical Christian Identity type (which Timothy McVeigh had ties to). Sure, not all Christians were terrorists, but all the terrorists were Christians. Did we post FBI agents at every Sunday church service? Of course not. The FBI targeted the radical factions who perverted Christianity for their own evil purposes. The better approach would thus be to concentrate law enforcement efforts on the extremist groups and violent individuals that are suspect based on specific, reasonable evidence, be they radical Muslims, Christians or animal/environmental rights believers.

### **General Thoughts About the Pendulum**

It was clear to some experts ahead of time and to almost all experts and non-experts alike in hindsight, that our country was a bit too complacent and asleep at the wheel in a variety of ways prior to 9-11. Very few people believed that foreign terrorists would strike on U.S. soil to the extent they did. This mindset made most "emergency" law enforcement actions and court orders for the purposes of national security to be so rare as to be almost nonexistent. Prior to 9-11 and other terrorist type incidents (including the anthrax letters and the Washington D.C. sniper shootings), we would therefore probably not have tolerated the myriad intrusions/restrictions upon our personal lives and affronts to dignity that we now all seem quite willing to put up with (including airport searches involving removing one’s shoes and airport scanners that look into one's body cavities!). The criminal justice system (in my opinion) suffered over the years from having been "gamed" too much, becoming apathetic to individual victims and de-emphasizing the prevention of crime.<sup>24</sup>

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<sup>23</sup> Of note also is the oft-repeated excuse that DOJ and FBI management have no choice here, that the American people and Congress expect we must do everything in our power to learn of the next attack before it happens and to do something about it despite the fact that a lot of false leads will be pursued. That may be true but if it is true, it is probably because the public does not have a realistic appreciation of all of the real difficulties and costs involved in “preventing all acts of terrorism.” Finally it should be noted that “the violent attacks of September 11 and their aftermath have created a real-world experiment for social scientists (which thus far) shows that the more positively people feel toward their country, the more likely they are to hold anti-Arab prejudices.” (“Making Enemies” by Solana Pyne, published at [villagevoice.com](http://villagevoice.com), 7/9-15/2003).

<sup>24</sup> Even to the extent that certain court decisions, i.e. the Illinois Court of Appeals in Illinois v Liberatore, refused to recognize the "public safety exception" in its holding that an FBI agent was wrong to ignore a kidnaper's "Miranda rights" in his efforts to save the life of the kidnapped baby! This decision stands as such an example of mistaken judicial balancing of liberties and security, that I had to bring it up in my June 6, 2002, testimony to the Senate Judiciary Committee.

What's happened since 9-11? The pendulum has swung, really swung, at least with respect to all things "terrorism-connected." Unfortunately, (or fortunately if you happen to believe it's swung too far), however, the pendulum hasn't corrected itself much with respect to garden-variety crime which creates an unwarranted distinction between the criminal and terrorism worlds. And it's quite likely that, without adequate oversight, the pendulum risks swinging too far in terms of violating some citizens' and immigrants' rights without appreciable gains in terms of greater security.

So what are we actually talking about in terms of possibly giving up "civil liberties"? Well people may all be created equal, but it's pretty obvious that our rights to "life, liberty and the pursuit of happiness" are not equal. Rather, (and in the same order they're listed), life is a lot more important than liberty which in turn is more important than one's pursuit of happiness. The oft-recited quote that "the Constitution is not a suicide pact" reflects this ordering. Since our right to life, and thus to security, is itself a "liberty," and the most precious and important one at that, the weighing of "civil liberties versus security" is, in essence, a false debate. One's privacy rights or right to an attorney, for example, as nice as they may be, have little value if you become a homicide statistic. The tradeoffs between life security or the lesser "civil liberties" which are almost inherent in increasing security and in preventing acts of terrorism can only be avoided by improving the ability of law enforcement to hone in on the real criminals and terrorists. But law enforcement does not presently have the ability to divine criminal intent by reading minds (the premise of a recent futuristic police movie) and our ability therefore to accurately identify the real culprits is always limited by fixed factors, most importantly, by the state of forensic science and the amount of existing "inside information" furnished by informants/confidential sources.<sup>25</sup> In an ideal world, this means there would be efficient methods of narrowing a given pool of suspects without having to interview, surveil them, ask others about their activities and/or in some cases subject them or their possessions to interception, seizure or forensic testing. Because doing those things to all those suspects who consequently "wash out" as being innocent have probably not only inconvenienced, embarrassed, affronted and/or infringed on the innocent persons' rights, but they have been a distraction and waste of law enforcement's time and resources in finding the real "bad guy(s)." Unfortunately the ideal world does not presently exist and identifying criminals and terrorists still requires use of these methods.

One can also argue that how these investigative actions are done is equally or perhaps even more important as whether they're done. For example, given the present reality that honing in still requires the use of many of these standard law enforcement activities, (such as following up on citizens' tips; use of informants and cooperating sources; documenting the results of investigation about individuals in files; physical surveillance in public places and sometimes use of court-authorized electronic surveillance in private places; obtaining and reviewing all types of records; interviewing; conducting searches, seizures and forensic testing, etc.), the intrusion can be greatly alleviated and minimized if done in a professional, respectful manner as opposed to a bullying, non-respectful, non-professional manner.<sup>26</sup> In some instances, how an investigative

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<sup>25</sup> Perhaps, in balancing, it should also be noted that, at the inception of any investigation into a secretive, terrorist organization, real "inside information" will be a scarce commodity and will make the "honing in process" more difficult.

<sup>26</sup>For this reason, many FBI agents were afforded "sensitivity training" (for lack of a better term) post 9-11 in order to improve how interviews of persons of mid-eastern origin were conducted in an effort to minimize the

action is done may actually prevent what is only a potential risk to civil liberties from being realized, i.e. the difference between “interviewing” and “interrogating.” Even the impact of true liberty deprivations such as detaining and/or arresting individuals can be greatly alleviated by being done in the most professional, respectful manner appropriate to the circumstances<sup>27</sup>. Efforts on the part of the FBI Director and other FBI management to reach out to the most effected groups in the Muslim community have also gone a long way towards improving how such law enforcement actions are perceived.

It has been shown, on the contrary, for example in Northern Ireland, that the negative impact on civil liberties of certain draconian efforts to combat terrorism actually backfired and created an environment where terrorism became more probable and led to more bombings.<sup>28</sup>

### **Suggestions Regarding Greater Oversight**

It's been said that public trust between the government and the electorate is the bedrock of democracy that ultimately rests on the informed consent of the governed. At the very least, secrecy serves to increase the paranoia fog that makes even more difficult the already tough job of analyzing the costs and benefits of the actions currently being conducted and/or proposed in the "war on terrorism." Yes, matters of national security require a certain degree of secrecy, but terrorist matters that do not involve foreign country sponsorship perhaps require less degree of secrecy (and/or shorter duration of secrecy) since they are more like criminal than traditional intelligence matters. Secondly, there should be no reason that sufficient generic data cannot be provided to key congressional oversight committee members such as the number of times each particular technique is used, within some general descriptive categories. For example it is my understanding that a congressional reporting requirement already exists regarding the use of the previously discussed Section 216 pen register/trap orders. More detailed information of an actual classified nature pertaining to the use of the most controversial techniques could be reviewed by a "special congressional or GAO staff" unit possessing the proper security clearances and (ideally) some prior law enforcement, legal and/or intelligence experience (not unlike the "Special Staff" hired by the Joint Intelligence Committee in 2002 to conduct the 9-11 inquiry). Another possibility would be to form a unit in the Department of Justice's Office of Inspector General or create an Office of Special Counsel whose sole task would be to conduct a kind of "quality assurance" review on an ongoing basis regarding the basis for and use of the most sensitive, intrusive techniques and especially those techniques not receiving judicial oversight.

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possible negative feelings and attendant costs of such contacts.

<sup>27</sup>Professionalism of this nature is actually something FBI agents are historically known for. In most instances, a kind and respectful attitude in interacting with suspects, witnesses and victims is one of the things that prove most beneficial to the investigative process.

<sup>28</sup>A point made in an article entitled, "Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland" by University of St. Thomas law professors Celia Rumann and Michael P. O'Connor published April, 2003, in Volume 24, Number 4 of the "Cardozo Law Review."

Admittedly, the Freedom Of Information Act (FOIA) process is largely viewed as a nuisance by government officials and, possibly sometimes, as worse than a nuisance by law enforcement/intelligence officials charged with protecting national security. But even if it is thus sometimes seen in a negative light, it should be seen as fulfilling a necessary "watchdog" function. Luckily litigation determinations involving FOIA requests are usually decided by a small cadre of Washington D.C. judges who are quite experienced with the balancing of interests required under the FOIA. Even without resort to the FOIA process, information generally made available to the public by American law enforcement agencies through the media, following arrests of individuals is what separates democratic countries like ours from countries like Chile in the 1970s whose citizens seemingly just disappeared off the face of the earth.

Better legal protection for government "whistleblowers" should be enacted. At present the federal laws are either inapplicable or ineffective for many government employees such as FBI agents. As I said in a recent letter to certain Senators in support of proposed legislation designed to remedy this problem:

*Prior to my personal involvement last year in a specific matter, I did not fully appreciate the strong disincentives that sometimes keep government employees from exposing waste, fraud, abuse, or other failures they witness on the job. Nor did I appreciate the strong incentives that do exist for government agencies to avoid institutional embarrassment... Unfortunately, the cloak of secrecy which is necessary for the effective operation of government agencies involved with national security and criminal investigations fosters an environment where the incentives to avoid embarrassment and the disincentives to step forward combine. When this happens, the public loses. We need laws that strike a better balance, that are able to protect effective government operation without sacrificing the agencies' accountability to the public.*

My final suggestion may be seen as heresy (or at least as rolling the clock back) by the Department of Justice hierarchy who so strongly argued the need to tear down the "FISA wall," but I think certain questions need to be asked and seriously considered regarding the differences in the FISA and regular criminal processes for obtaining electronic/wire surveillance/search authority such as:

1) Is the standard for obtaining an order under FISA easier or just different? (I would say that, historically, one could argue that it hasn't been that much easier to obtain FISA orders; in fact one could observe that at times it's actually been more difficult!) But has it become easier in light of 9-11? And if so, is that due to Patriot Act provisions or more to the new prevailing prevention-at-all-costs mindset?

2) Isn't the investigation of criminal acts and/or the planning of criminal acts by terrorists, especially "lone wolf" ones, a lot more like the investigation of plain criminals than the cloak and dagger world of country-sponsored spies? (Isn't that perhaps one of the main reasons why the FISA court and former DOJ personnel who worked with the FISA process were so reticent, prior to 9-11, to using the FISA process to combat terrorism?) Given that the dual objectives of gaining intelligence to prevent terrorist acts and disrupting terrorists through prosecution are inextricably intertwined, why can't the variation in standards and minimization procedures between the FISA process and the regular criminal process be reduced? (That would serve to

negate the argument that using FISA is an "end run" around the normal process. For example, it would be nice to see removal of the inherent guesswork associated with criminal Title III minimization procedures to make them more like FISA's "post" minimization procedures. This happens, by the way, to be in line with the way the rest of the civilized world's law enforcement, including Canadian law enforcement, conducts minimization of court-authorized electronic/wire intercepts.) Another possible way to minimize the chance of abusing the FISA process would be to allow the FISA Court to authorize surveillance upon a showing of the criminal Title III standard in cases where the government's primary purpose had clearly changed to prosecution. Finally when FISA-derived interceptions/evidence is used in a criminal prosecution, it should be subject to the same rules of discovery and criminal procedure that govern evidence obtained through normal criminal search warrants or criminal Title III electronic surveillance.<sup>29</sup> In any event, maintaining the two different avenues in their present form, FISA and criminal, with their current differences will only keep the "end run" issue alive to possibly fuel criticism about abuse of the FISA process at a later point in history.

### **Conclusion**

With the stated, universally-desired and generally accepted goal of preventing acts of terrorism comes a much greater potential for intrusions of all sorts upon ordinary, innocent American citizens, and especially upon immigrants and travelers in America. While many of these potential intrusions are nothing more than that, just potential, and even the ACLU and other civil libertarians are careful to admit the same, care must be taken so that the potential is not realized. **It must also be recognized that any further terrorist attack on American soil in the near future that is somehow not prevented will greatly magnify the difficulty of accomplishing this balance. (And if this occurs, if history is any guide, abuses may become more than just "possible" or "likely;" they may be all but guaranteed.)** The hope then of doing this right, to keep the pendulum from swinging so far back and forth, lies largely in focusing attention, over and above mere lip-service and assurances from on high, on the hard questions involved in the balancing of everyone's rights and in concrete proposals for employing additional safeguards.<sup>1</sup> All of this requires free, open and informed debate with an eye to enhancing, rather than eroding, mutual trust. In June of 2002, I testified to the Senate Judiciary Committee about problems I saw with the FBI's bureaucracy, roadblocks and intelligence gathering/handling. The final portion of my statement to the Committee was on the importance of INTEGRITY and concluded as follows:

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<sup>29</sup> The effect of the key provision of the USA Patriot Act allows information from surveillance approved for intelligence gathering to be used to convict a defendant in criminal court, but the government's application-which states the basis for authorizing the surveillance- isn't available for defendants to see, as in traditional law enforcement surveillance cases.

*The final reason I can think of for the FBI to adhere to the highest standards of integrity is another self-serving one. Since joining the FBI, I can't tell you how many debates, both public and private, I've engaged in about where the line should be drawn between the needs of effective criminal investigation and preserving the rights of innocent citizens. The trick is to be as surgical as possible in identifying the criminals and those dangerous to our country's security without needlessly interfering with everyone else's rights. From what I've seen in the last 21 1/2 years, I can safely assure you that the FBI usually does a pretty darn good job of this. Although such debates, (and the last one I had was with a Minnesota criminal law professor just after passage of the Patriot Act), always begin with addressing specific provisions of the policy or law in question, they almost always boil down, in the final analysis, to one thing: trust. It's hard to win the debate if the person on the other side simply refuses to trust what you're saying about how the law or policy is applied in practice. The Government, in fighting the current war on terrorism, has already asked for and received further investigative powers. Although it can be argued that many of the new powers are simply measures to apply prior law to new computer technology or (as with some of the modifications to the Attorney General Guidelines) are things that any private citizen can do, some members of the public remain apprehensive that the FBI will go too far and will end up violating the rights of innocent citizens. It may be necessary to ask for certain other revisions of policy or even law. The only way the public's distrust can be alleviated, to enable us to do our job, is for the FBI, from the highest levels on down, to adhere to the highest standards of integrity.*

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1. FBI Director Robert Mueller himself alluded to much of this in a speech (the Jackson H. Ralston Lecture in International Law) he gave on October 18, 2002, to the Stanford University Law School, (and which he delivered several months later to the ACLU) a pertinent excerpt being as follows:

Jackson Ralston, later in his life, as Kathleen pointed out, served as the Chairman of the ACLU in Northern California, and I would venture to say he might have been surprised that an award bearing his name is being given to the Director of the FBI, particularly at a time in our nation's history when the tension between our civil liberties, on the one hand, and our national security, on the other, has been thrust to the forefront. I do believe, though, that Mr. Ralston would be rather pleased by the fact that we are here today talking about these issues, both this evening and earlier today in various seminars, and also I think he would believe that there is that capability of supporting civil liberties and assuring the national security of the United States. I do believe that they are not mutually exclusive.

I will say at the outset, as we all know, our nation does not have an unblemished record of protecting constitutional freedoms during times of crisis. In 1919, in the midst of a "Red Scare," and following the detonation of bombs in eight American cities, President Wilson's Attorney General, Alexander Palmer, arrested thousands of "leftists" and "radicals," during what was called the "Palmer

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Raids."

During World War II, thousands of Japanese Americans, based solely on their ancestry, were confined in relocation camps. In 1944, the Supreme Court in the Korematsu case, as we all know, ruled that all members of a single ethnic group could be confined, even without individualized evidence, because some members of that group might be disloyal and pose a threat to the nation.

And for the FBI, as recently as the 1960s and the '70s, we were found to have run a counterintelligence program, infamously known as COINTELPRO that targeted persons involved in civil disobedience with investigative measures that crossed the line.

We live in perilous times, but as these examples illustrate, we are not the first generation of Americans to face threats to our security. And like those before us, we will be judged by future generations on how we react to this crisis. And by that I mean not just whether we win the war on terrorism, because I believe we will, but also whether, as we fight that war, we safeguard for our citizens those liberties for which we are fighting.

We are a nation of laws, and every Special Agent of the FBI is sworn to uphold and protect those laws. The men and women who serve in the FBI do just that every working day of their lives. But we are also aggressive, and we do not -- and I do not -- shy from using every arrow that Congress has put in our quiver.

In the wake of the September 11th attacks, Congress granted us new and enhanced authority to investigate terrorism. The USA Patriot Act, passed in October of 2001, tore down many of the walls that formerly inhibited information sharing between law enforcement and the intelligence community, and I welcomed those changes. And we use the Patriot Act to our fullest advantage, but not at the expense of the constitutional rights of our citizens.

Still, questions abound. At the heart of these questions is this: How do you prevent, how do you deter, or how do you disrupt terrorist attacks before they have been initiated? How aggressively should the FBI investigate suspicious activity that might be related to terrorism? When is surveillance or a wire tap necessary or warranted? These are not always easy questions to answer, particularly when the prevailing terrorist threat originates from, and therefore our primary investigative focus is directed at, a group of terrorists who generally share a common ethnic and religious background.

In that regard, let me start with the premise that I believe firmly, and that is the overwhelming majority of Muslims, whether in this country or overseas, are peaceful, law-abiding citizens. However, a small number of Muslims are members of radical fundamentalist sects sworn to the destruction of the United States, and this presents a dilemma for those charged with protecting against the next attack, raising very difficult investigative issues for which there often is no clear answer.

An example, when, if ever, would it be appropriate to put leaders of Muslim mosques under surveillance? Are calls to kill Americans in strident sermons a lawful exercise of free speech or something more, warranting not only investigation, but also court-approved electronic surveillance?

The answer to these and many similar questions, I believe, in part, is to assure that for us there is an adequate predication for each step of an investigation. We do not target individuals or groups by reason of their country of origin or nationality. Rather, we take investigative steps when there is a factual basis justifying that step.

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Can we be too aggressive? Or in the post-September 11th world, is there such a thing as too aggressive? I would say, yes, I believe there is. But by assuring that there is adequate predication for each step of an investigation, we protect against over aggressiveness and avoid the excesses of the past.

These are issues that we wrestle with every day in the FBI, whether it be Agents in the field or personnel back at headquarters. I should point out we are not the policy makers, and some of the questions and debates, and probably questions perhaps that I will get this evening, are beyond our purview. What we in the FBI must concentrate upon is obtaining the facts and then presenting them in an objective, unbiased manner to other decision makers, whether they be the prosecutors at the Justice Department or the policy makers in the National Security Council, or even the President.

I must say, in the same breath, however, that in seeking those facts, the FBI must use the tools that Congress gives us, all of the tools consonant with our obligation to protect the citizens of the United States and the Constitution. For either, without the other, is of little value. We must not shy away from investigating aggressively any real threat. And because there are no perfect answers to any of these difficult questions posed in the course of these counterterrorism investigations, we have but one option, and that is to investigate vigorously any threat to the citizens and interests of this nation, whether at home or abroad, while carefully observing the constitutional rights of all.

For the FBI and for the United States, the war on terrorism is a complex and perplexing issue. It is as complex and perplexing as any threat this country has ever faced. Whether the threat comes in the form of anthrax-laced letters or the deadly sniper attacks in the neighborhoods around the nation's capital or in the form of a devastating bomb blast in faraway Bali, it is imperative that we use the full weight of the law, every arrow in our quiver, to bring these terrorists to justice.

I know we will be judged by history, not just on how we disrupt and deter terrorism, but also on how we protect the civil liberties and the constitutional rights of all Americans, including those Americans who wish us ill. We must do both of these things, and we must do them exceptionally well.