



U.S. Department of Justice

*United States Attorney
Southern District of New York*

*86 Chambers Street, 3rd Floor
New York, New York 10007*

March 15, 2012

BY E-MAIL

Richard Haddad
Proskauer Rose LLP
Eleven Times Square
New York, NY 10036-8299
E-mail: rhaddad@proskauer.com

Re: *ACLU et al. v. FBI et al.*, 11 Civ. 07562 (WHIP)

Dear Richard:

Pursuant to the Stipulation and Order, dated December 9, 2011, and on behalf of the Federal Bureau of Investigation ("FBI") and the United States Department of Justice ("DOJ"), we are releasing the enclosed documents in partial response to the Freedom of Information Act ("FOIA") request that is the subject of the above-referenced case.

The FBI has completed its searches for responsive records, and has completed processing of 1382 pages of documents responsive to the plaintiff's FOIA request. Of these 1382 pages, 258 are being released in full or in part. Information in the documents released in part is being withheld pursuant to 5 U.S.C. § 552 (b)(1), (b)(6), (b)(7)(c), (b)(7)(e), or because the information is outside the scope of the FOIA request. Additionally, of the 1382 pages, 1108 pages are being withheld in full pursuant to 5 U.S.C. § 552 (b)(1), or because material on those pages is outside the scope of the FOIA request. The FBI is continuing to process an additional approximately 1000 pages of potentially responsive material.

The Office of Information Policy ("OIP") has completed its searches for responsive records as well as its processing of those records. OIP identified 15 records, totaling 257 pages, of responsive material, and is releasing in full eight documents, totaling 26 pages, and withholding in full four documents, totaling ten pages, pursuant to 5 U.S.C. § 552 (b)(1), (b)(5). In addition, one of the records, totaling five pages, is a duplicate of the document that has been withheld in full by the National Security Division ("NSD") and is the subject the Government's Motion for Partial Summary Judgment, filed on February 27, 2012. Lastly, one record, totaling 13 pages, was referred to the Office of Legal Counsel ("OLC"), and two records, totaling 208 pages, were referred to the Department of Justice's Office of the Inspector General (OIG). The two OIG records are the classified versions of two OIG reports entitled, "A Review of the Federal Bureau of Investigation's Use of Section 215 Orders for Business Records," dated March 2007, and "A Review of the Federal Bureau of Investigation's Use of Section 215 Orders for Business Records in 2006," dated March 2008. OIG has referred these documents to the FBI.



Federal Bureau of Investigation

Washington, D.C. 20535

March 15, 2012

Mr. Alexander Abdo
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004

Subject: U.S. Patriot Act, Section 215 (March 9, 2006-
June 17, 2011)
FOIA No.: 1167461- 000
American Civil Liberties Union, American Civil Liberties
Union Foundation v. Federal Bureau of Investigation,
United States Department of Justice
Case No.: 1:11-cv-07562-WHP

Dear Mr. Abdo:

The enclosed material is provided in response to the subject FOIA request and litigation. For this release, the FBI reviewed 1,382 pages and 258 pages are being released. The FBI expects to make subsequent releases of material responsive to the subject request and litigation at future dates as yet to be determined.

No fee is being assessed at this time. When the final release is made, ACLU will be billed for the \$5.00 fee associated with this first release as well as the \$15.00 duplication fee for the second release, for a total of \$20.00. Each subsequent release will be made at a cost of \$15.00.

The enclosed documents were reviewed under the Freedom of Information Act (FOIA), Title 5, U.S.C. § 552. Deletions have been made to protect information which is exempt from disclosure, with the appropriate exemptions noted on the page next to the excision. In addition, a deleted page information sheet was inserted in the file to indicate where pages were withheld entirely. The exemptions used to withhold information are marked below and explained on the enclosed Form OPCA-16a:

Table with 3 columns: Section 552, Section 552a, and checkboxes. Rows include exemptions like (b)(1), (b)(2), (b)(3), (b)(4), (b)(5), (b)(6), (b)(7)(A-F), (b)(8), (b)(9), (d)(5), (j)(2), (k)(1-7).

- Document(s) were located which originated with, or contained information concerning other Government agency(ies) [OGA]. This information has been:
referred to the OGA for review and direct response to you.
referred to the OGA for consultation. The FBI will correspond with you regarding this information when the consultation is finished.

In accordance with standard FBI practice, this response neither confirms nor denies the existence of your subject's name on any watch lists.

You have the right to appeal any denials in this release. Appeals should be directed in writing to the Director, Office of Information Policy, U.S. Department of Justice, 1425 New York Ave., NW, Suite 11050, Washington, D.C. 20530-0001. Your appeal must be received by OIP within sixty (60) days from the date of this letter in order to be considered timely. The envelope and the letter should be clearly marked "Freedom of Information Appeal." Please cite the FOIA Number assigned to your request so that it may be easily identified.

The enclosed material is from the main investigative file(s) in which the subject(s) of your request was the focus of the investigation.

Sincerely yours,



David M. Hardy
Section Chief
Record/Information
Dissemination Section
Records Management Division

Enclosure(s)

EXPLANATION OF EXEMPTIONS

SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552

- (b)(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified to such Executive order;
- (b)(2) related solely to the internal personnel rules and practices of an agency;
- (b)(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
- (b)(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (b)(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (b)(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could be reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could be reasonably expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;
- (b)(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (b)(9) geological and geophysical information and data, including maps, concerning wells.

SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552a

- (d)(5) information compiled in reasonable anticipation of a civil action proceeding;
- (j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals;
- (k)(1) information which is currently and properly classified pursuant to an Executive order in the interest of the national defense or foreign policy, for example, information involving intelligence sources or methods;
- (k)(2) investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056;
- (k)(4) required by statute to be maintained and used solely as statistical records;
- (k)(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of the person who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service the release of which would compromise the testing or examination process;
- (k)(7) material used to determine potential for promotion in the armed services, the disclosure of which would reveal the identity of the person who furnished the material pursuant to a promise that his/her identity would be held in confidence.

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DATE: 01-14-2012
CLASSIFIED BY: 60324 UCBAW/STP
REASON: 1.4.10
AUTHORITY: 50 USC 3042

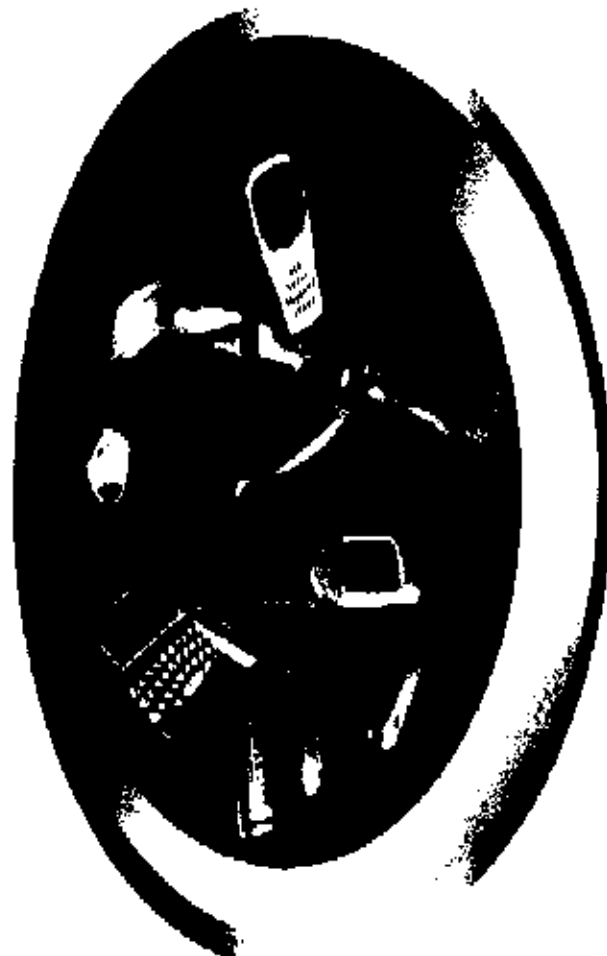
ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED EXCEPT
WHERE SHOWN OTHERWISE

Foreign

Intelligence

Surveillance

Act



CDC Springfield

ACLU Sect. 215-1215

~~SECRET~~

- **The Basics, short & sweet**



- **FISA Business Record Court Orders**



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FOREIGN INTELLIGENCE INFORMATION

1. Foreign power or Agent of foreign power

- Actual or potential hostile attack; or
- Sabotage, IT, or WMD proliferation; or
- Clandestine intelligence activities.

2. Foreign power

- National defense/security of U.S.; or
- Foreign affairs of the U.S.

NONUSPER = Relates To

USPER = Necessary

ACLU Sect. 215-1217

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- FBI Director Certification:
 - **Significant Purpose** of the FISA is to obtain Foreign Intelligence Information; and
 - Such information cannot reasonably be obtained by normal techniques; and
 - Which type of FI information; and
 - Basis for such certification.

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MINIMIZATION



- **Why?**
 - To extract "foreign intelligence information"
 - To avoid using protected information.

ACLU Sect. 215-1232

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SECRET

MINI-MAN

- Authorized User

(S)



- Must receive SMP training

ACLU Sect. 215-1233

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MINIMIZATION

- Primary Case Coordinator

- Oversees the FISA
- May be Case Agent, IA, or TFO
- Must receive SMP training
- Designates additional Case Coordinators to assist with minimization
- Ensures all Case Coordinators receive SMP training
- Reviews Case Coordinator designations every six months for updates

ACLU Sect. 215-1234

MINIMIZATION

- Case Coordinators

- Designated by the Primary Case Coordinator to apply minimization markings (sample EC)
- Must receive SMP training
- Applies minimization markings
- Ensures all copies of disseminated products are included in the dissemination sub-file

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MINIMIZATION

- Unlike Title III, FISA minimization does not occur real time, but after the fact.

(S)

No
Sniffing



ACLU Sect. 215-1236

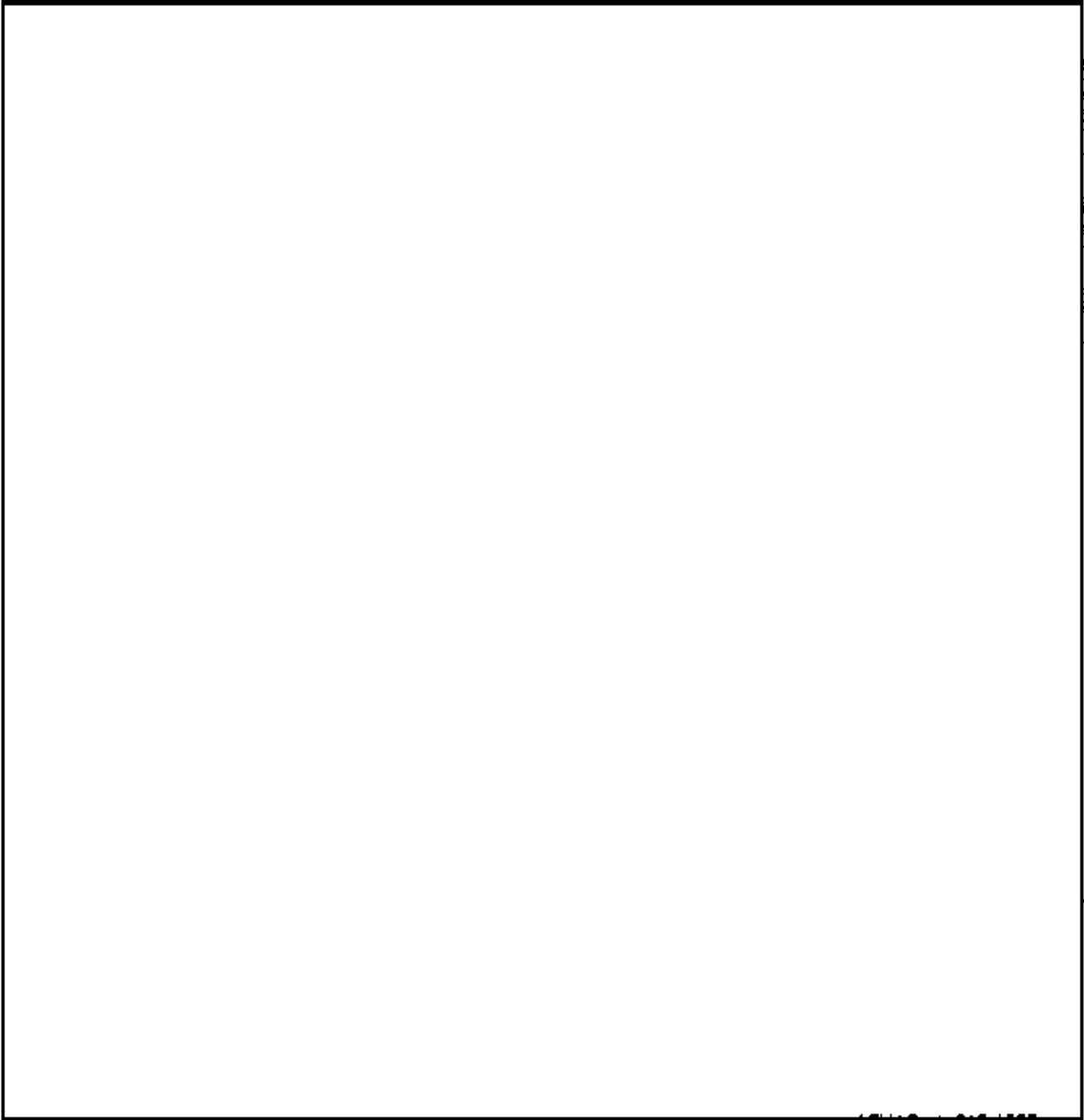
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MINIMIZATION

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ACLU Sect. 215-1238

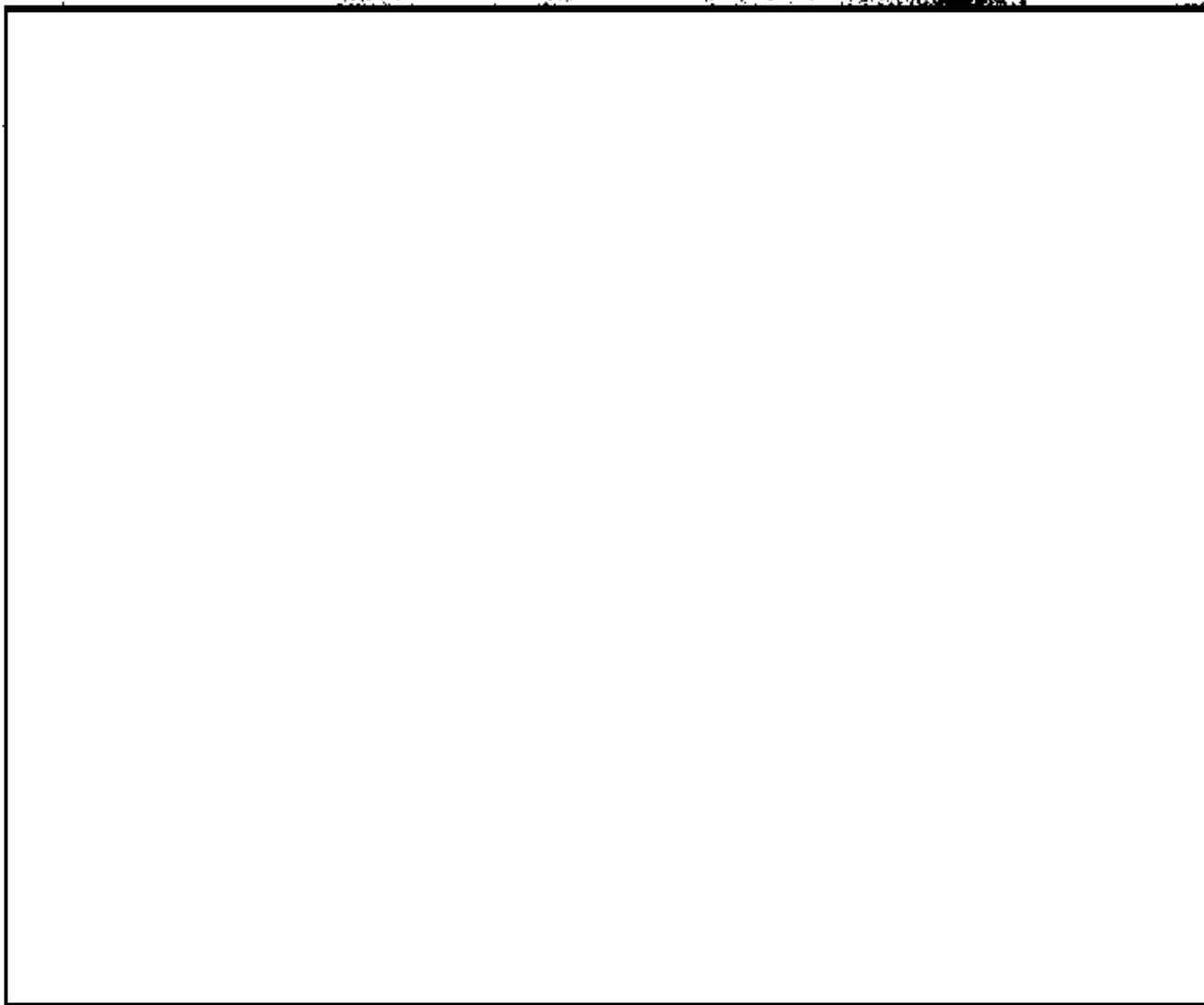
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MINI-MIZATION

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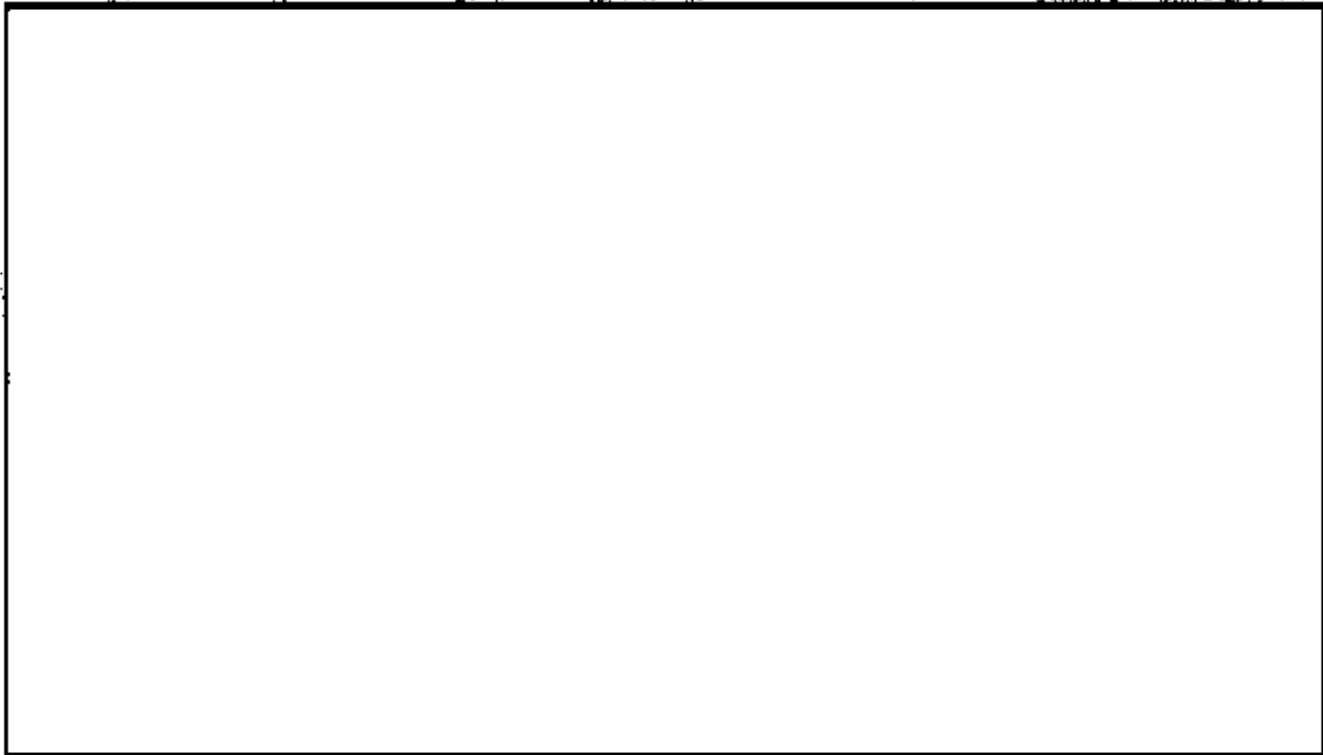
ACLU Sect. 215-1239

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MINI-MAN

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ACLU Sect. 215-1240

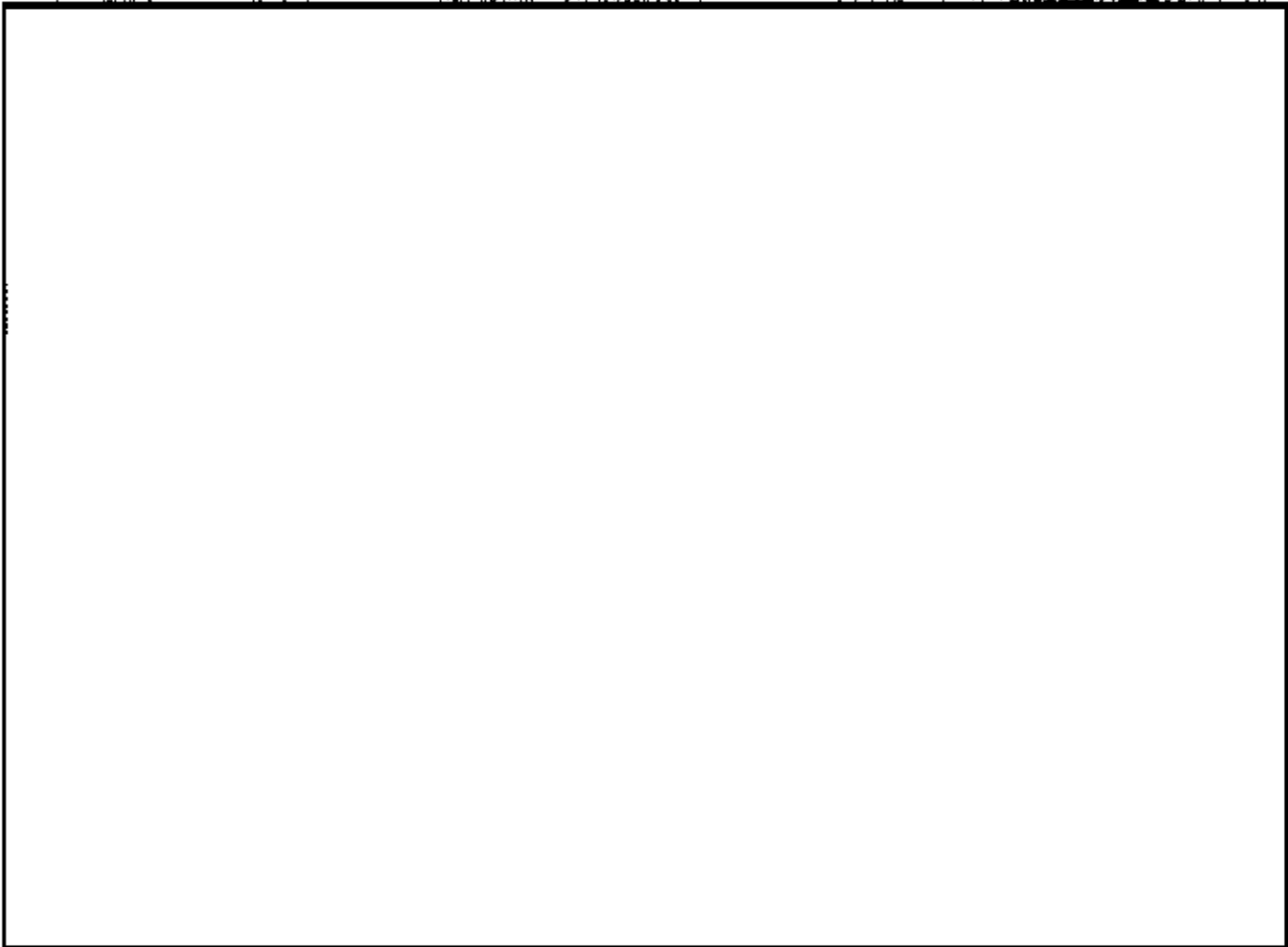
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MINISTRATION

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ACLU Sect. 215-1241

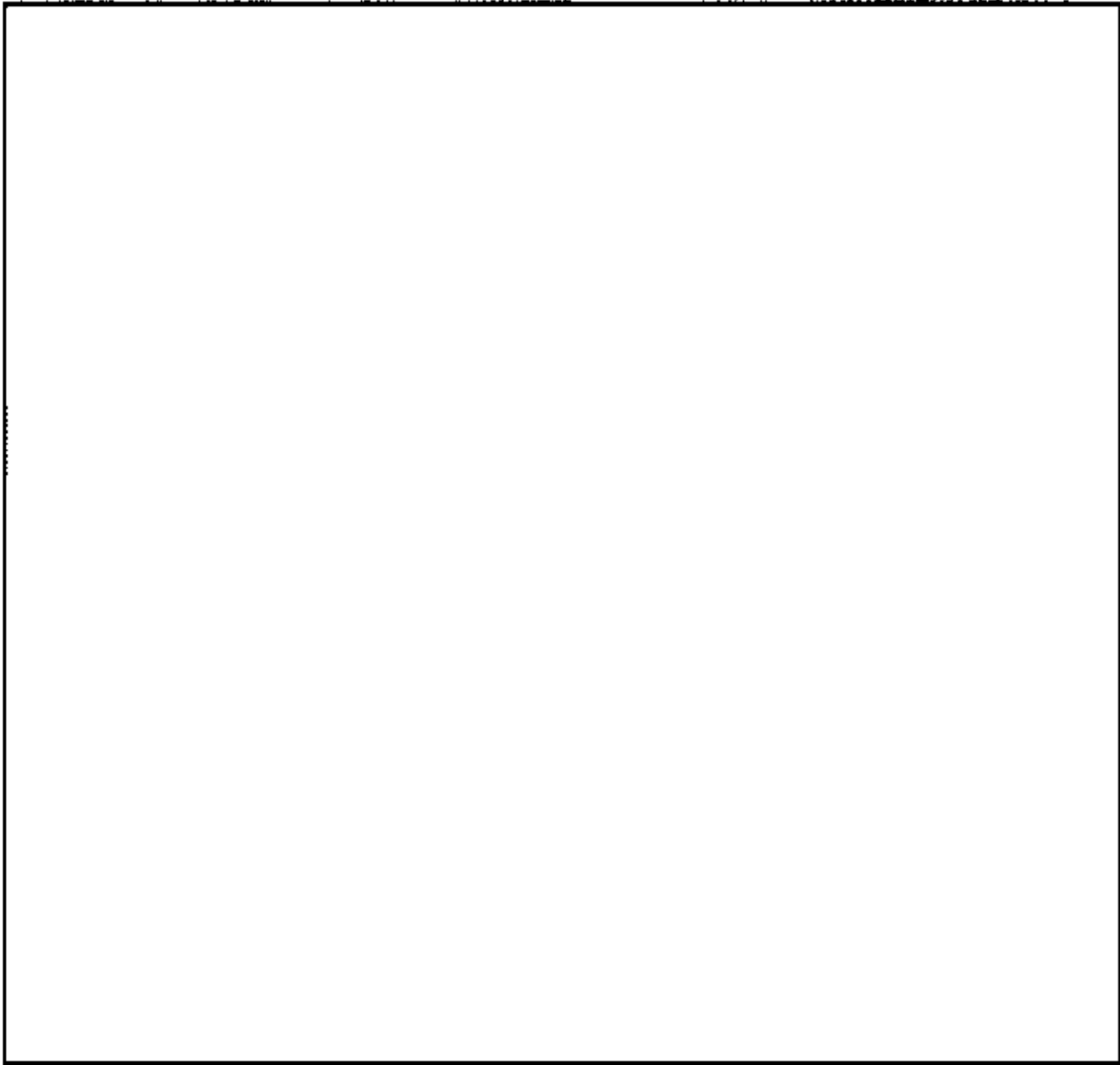
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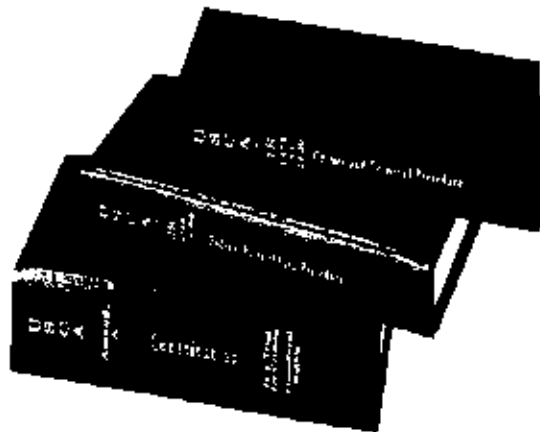
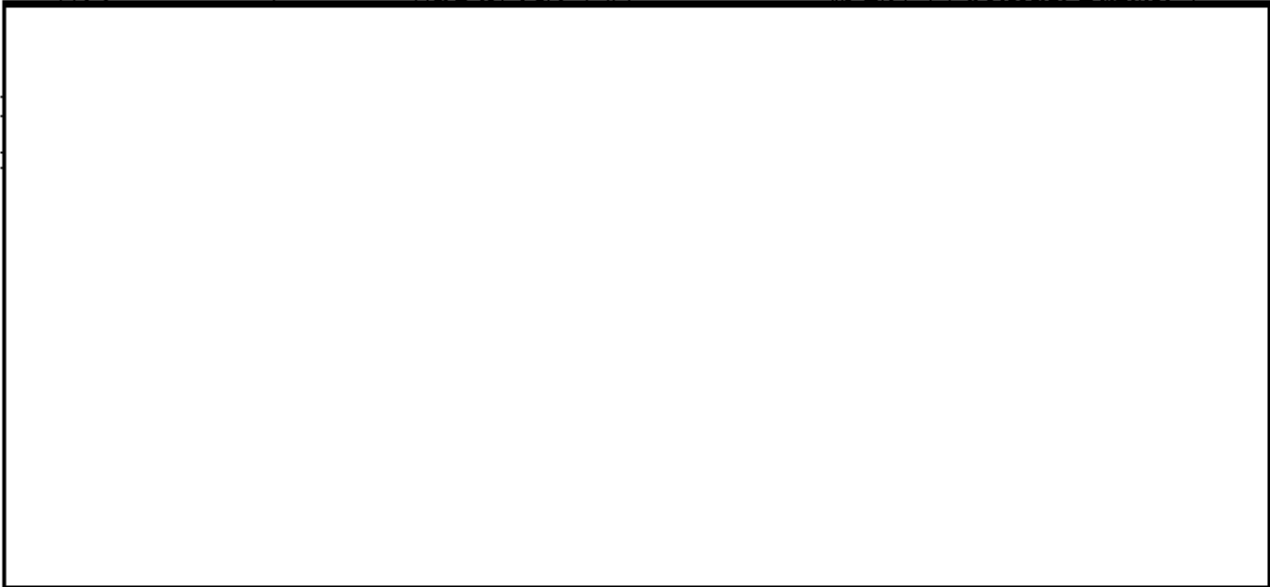
ACLU Sect. 215-1242

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MINIMIZATION

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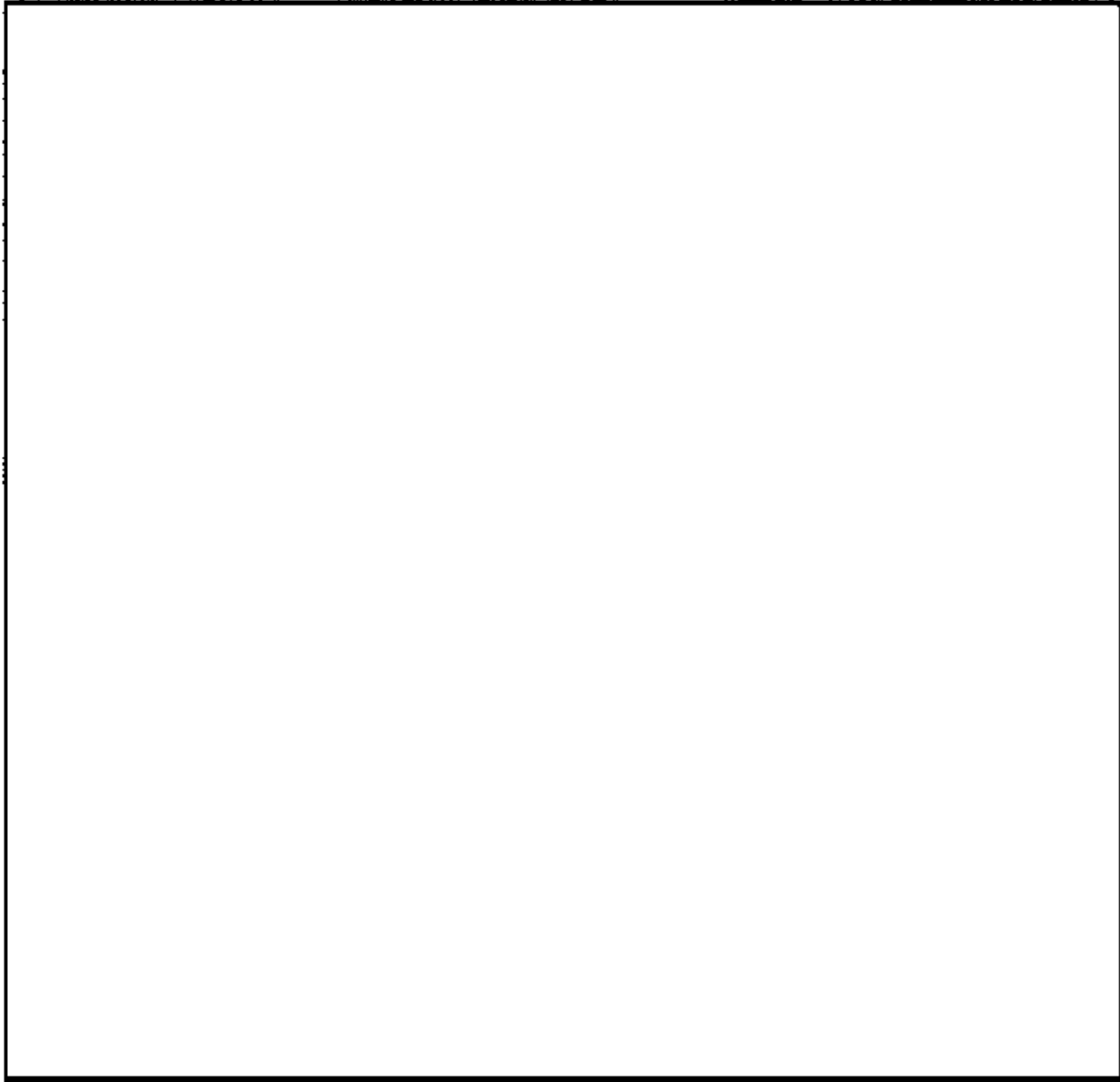
ACLU Sect. 215-1243

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MINI-ZION

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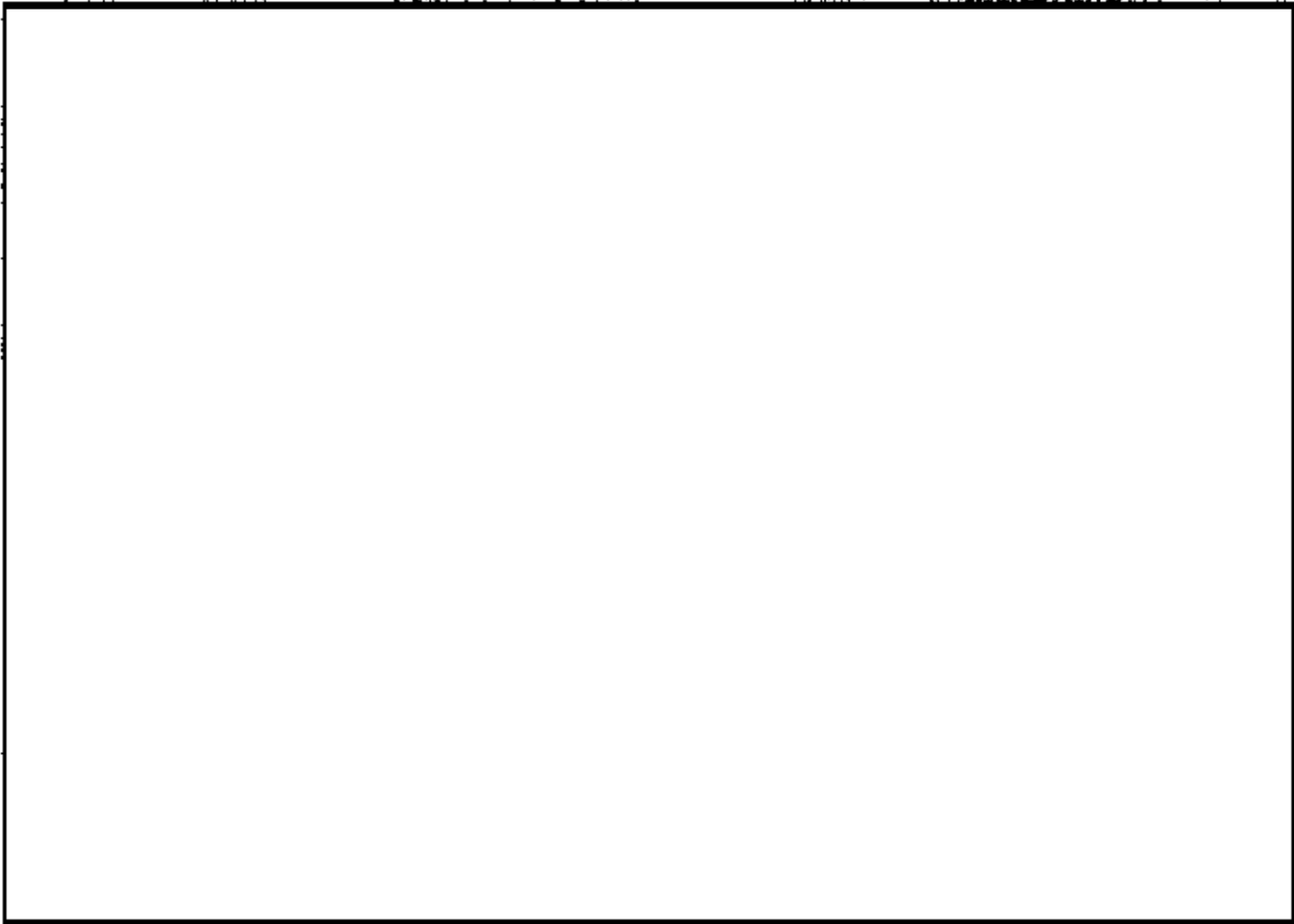


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MINI-REPORT

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ACLU Sect. 215-1245

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MINI-SESSION

- For Prosecutor Review

- Potential criminal stuff
- Potential discoverable stuff



- Copies of any info provided to the AUSA must be maintained in the dissemination sub-file.

ACLU Sect. 215-1246

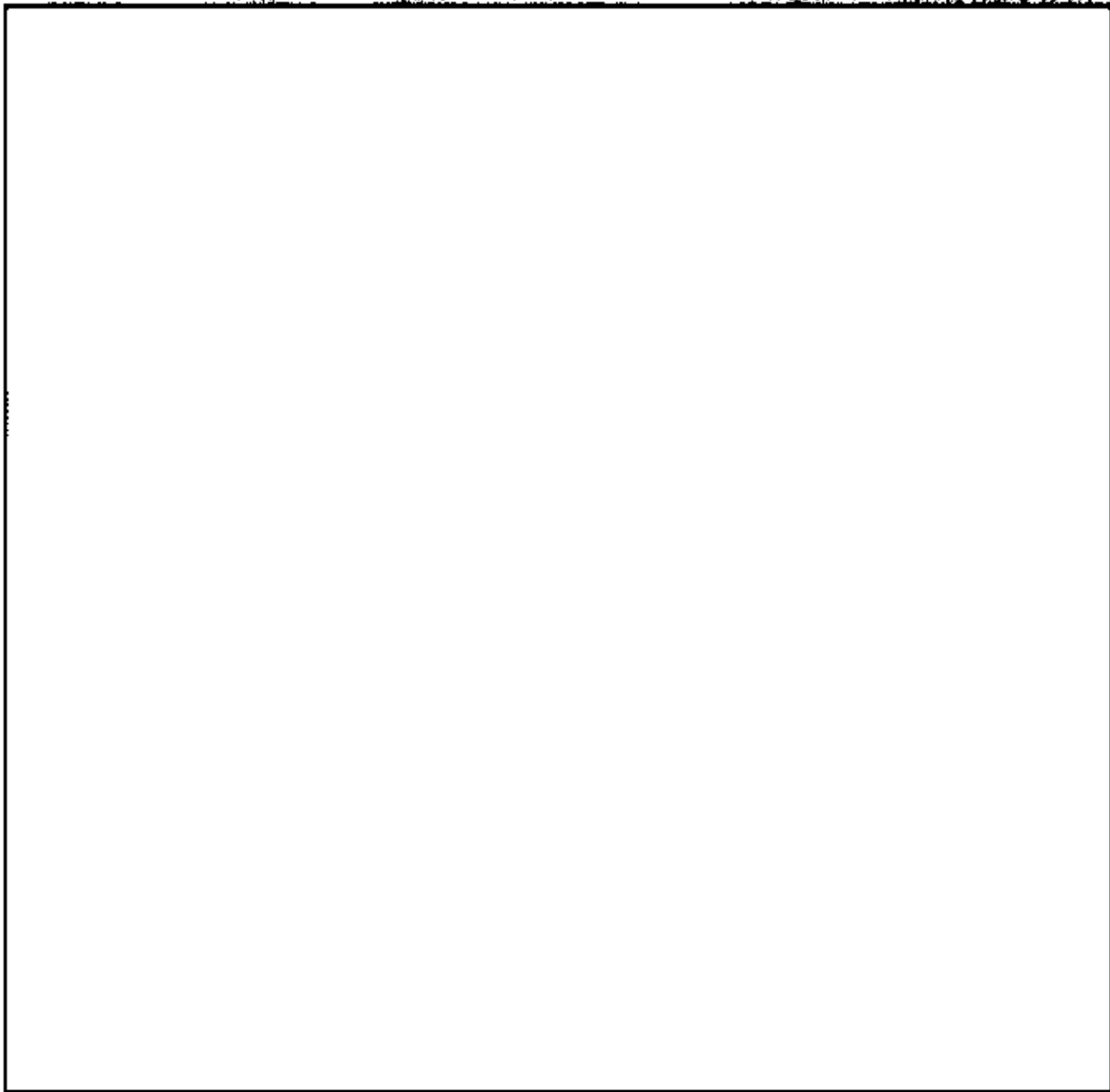
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MINIMIZATION

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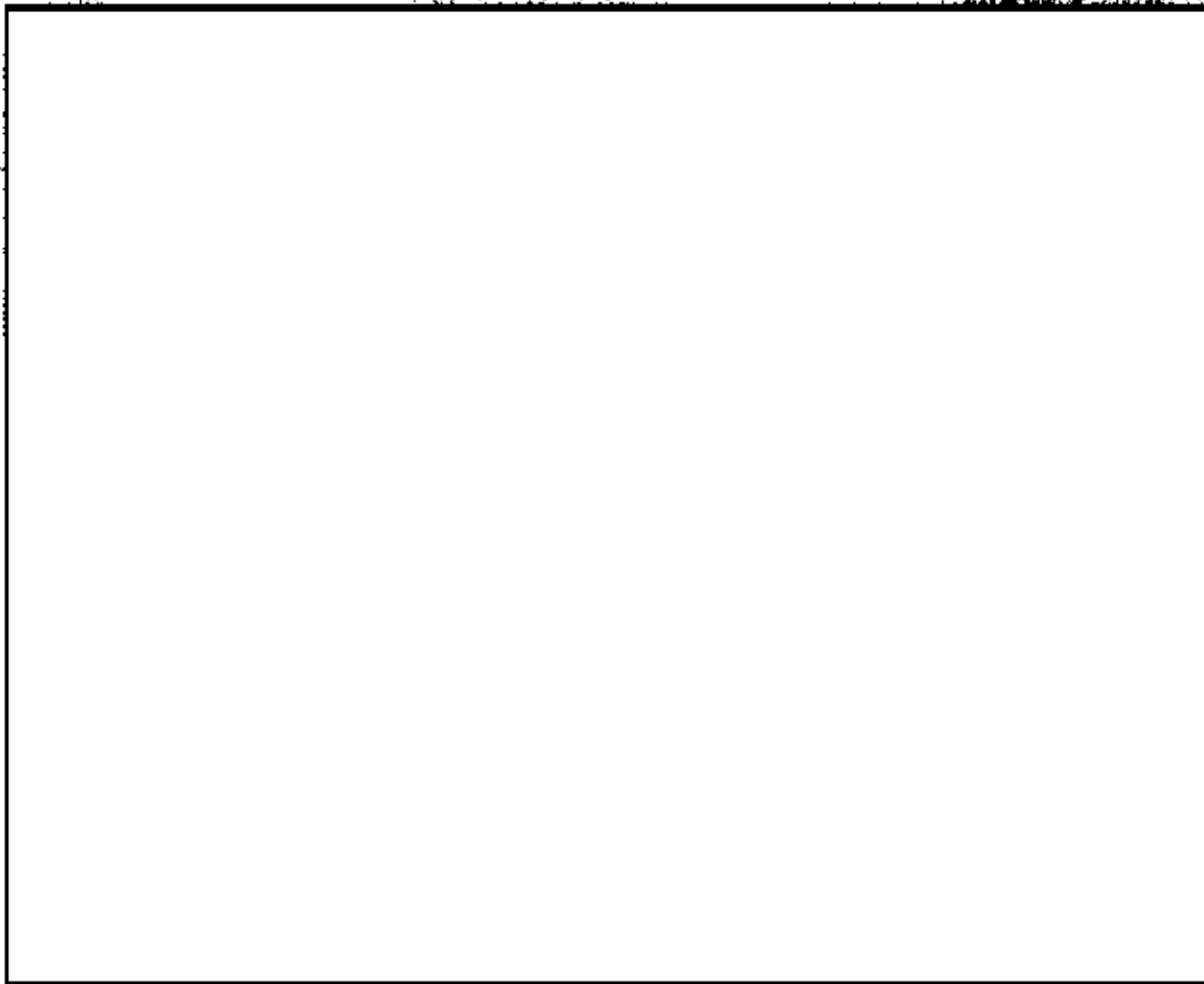
ACLU Sect. 215-1247

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MINI-REPORT

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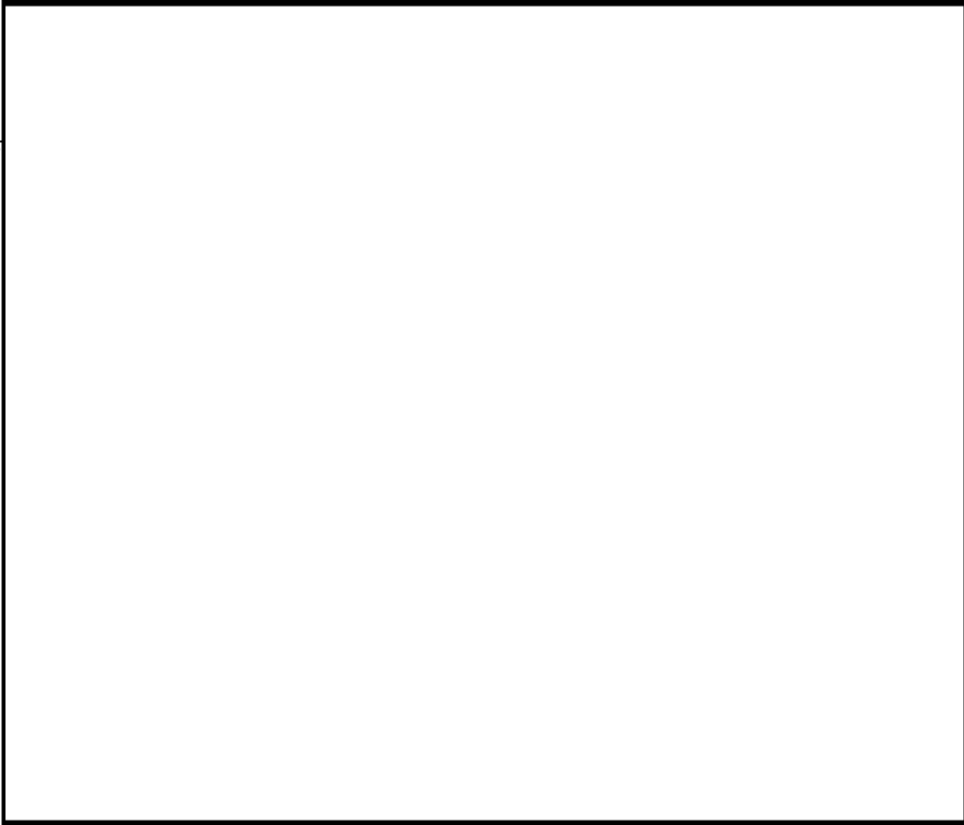
ACLU Sect. 215-1248

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MINIMIZATION

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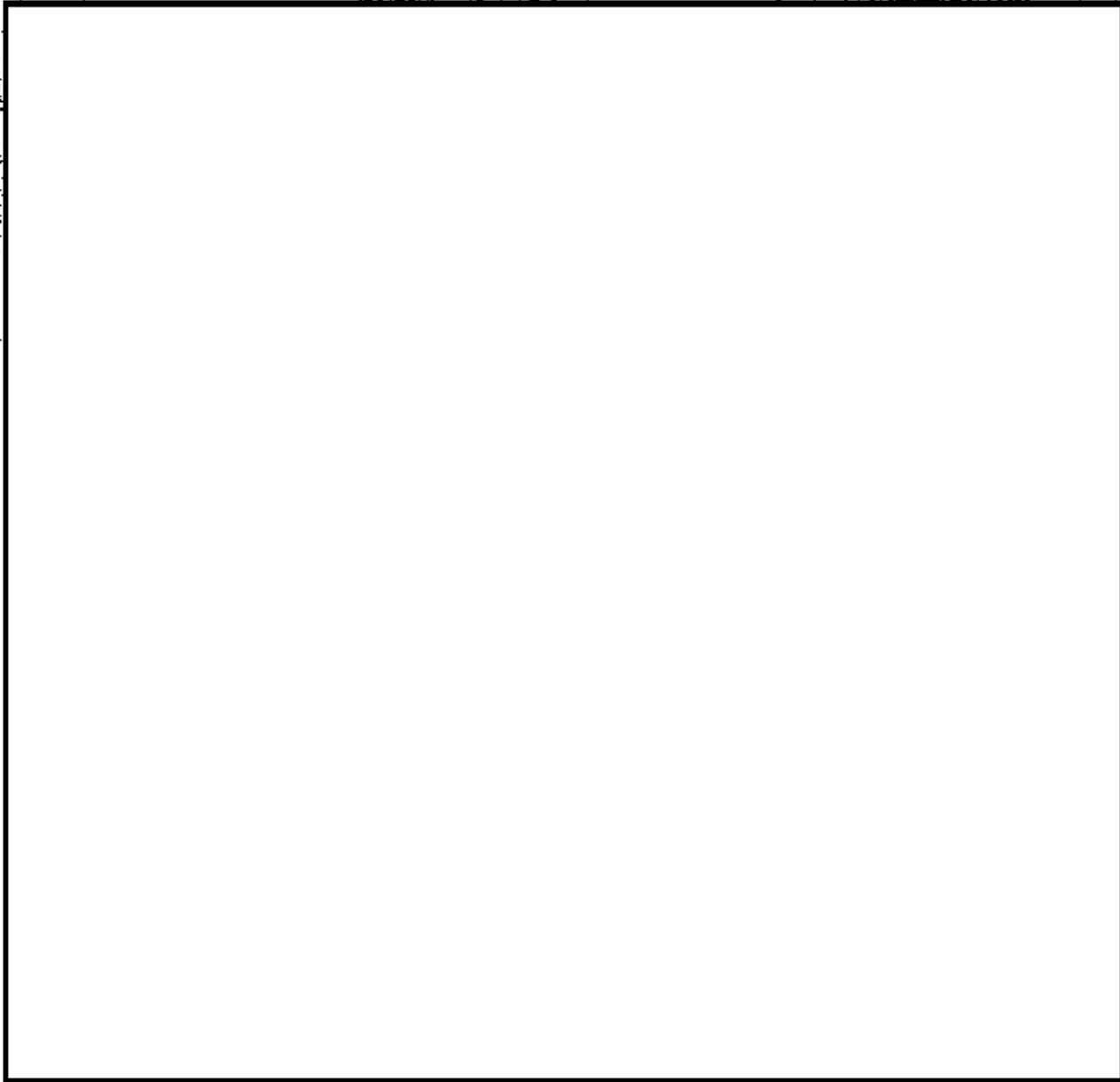
ACLU Sect. 215-1249

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MINI-REPORT

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ACLU Sect. 215-1250

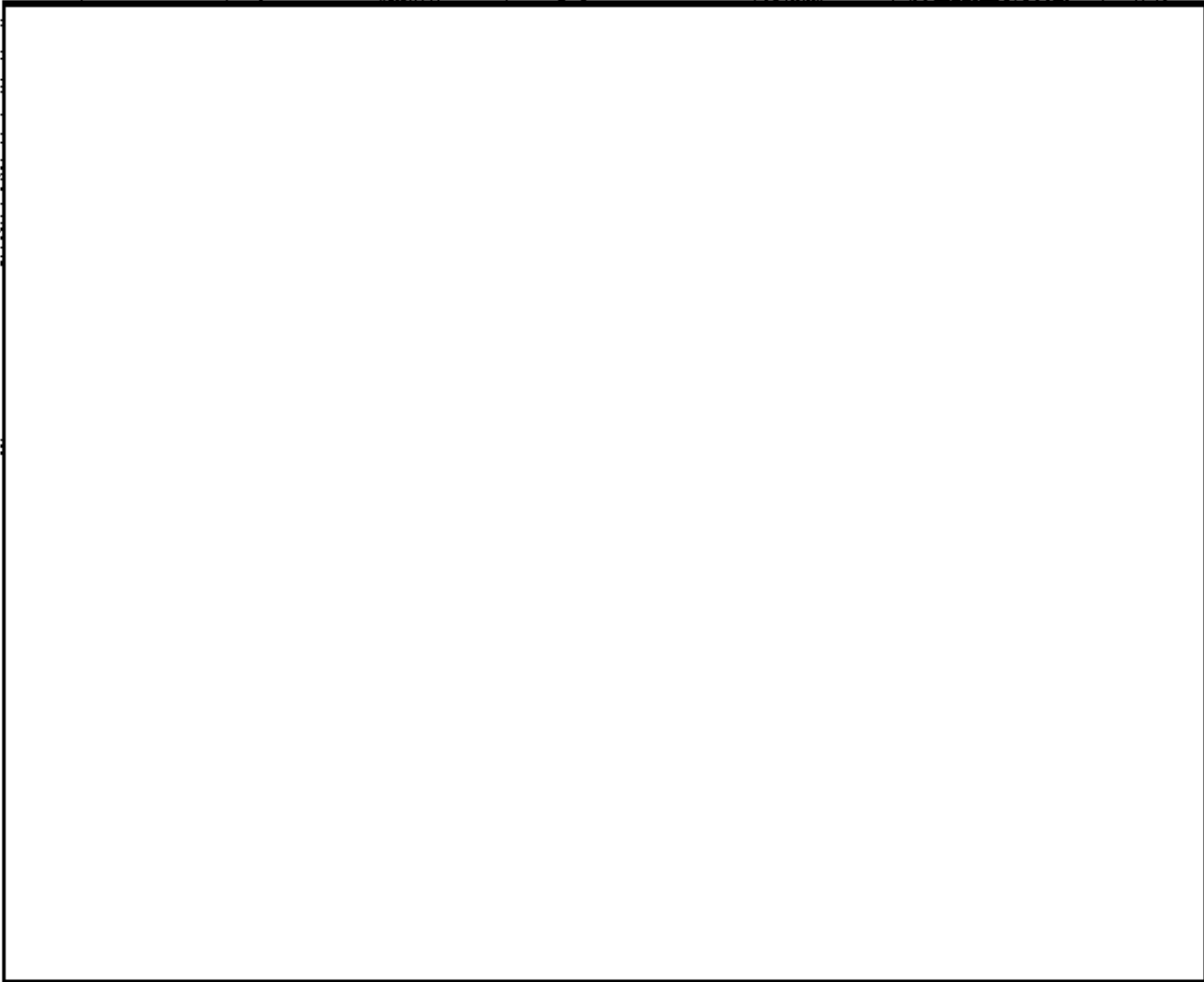
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MINIMIZATION

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ACLU Sect. 215-1251

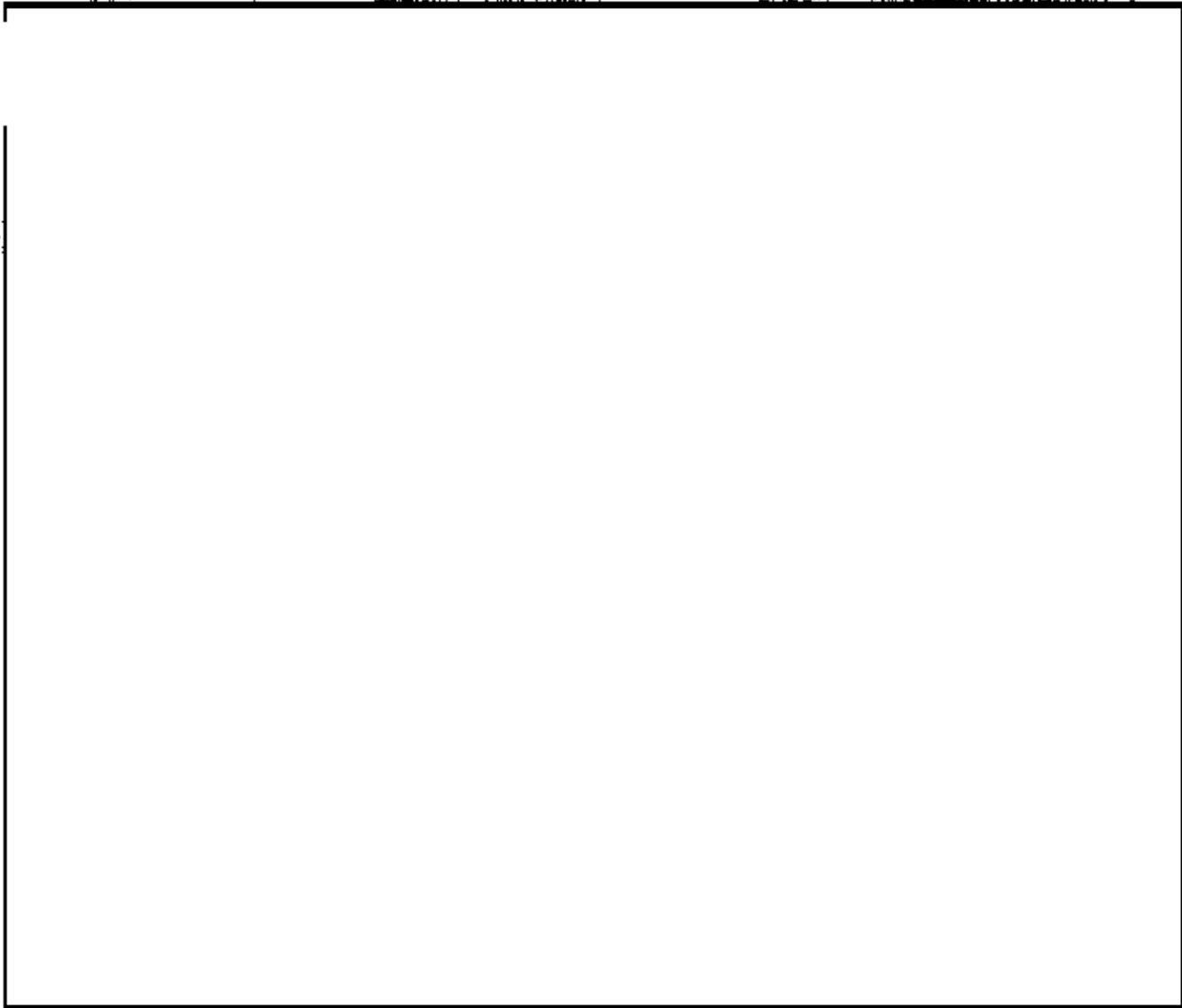
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DISSEMINATION

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ACLU Sect. 215-1252

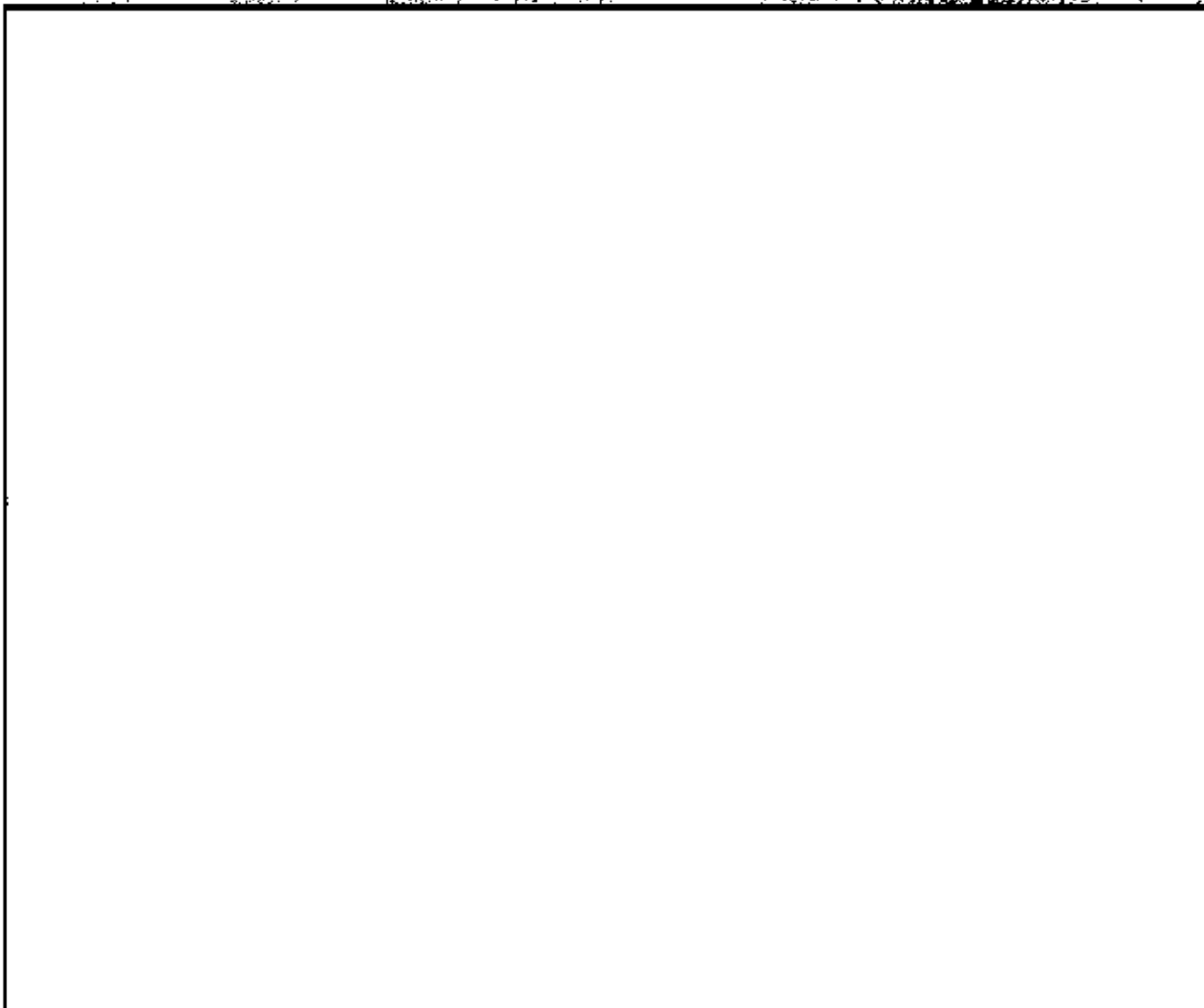
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DISSEMINATION

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ACLU Sect. 215-1253

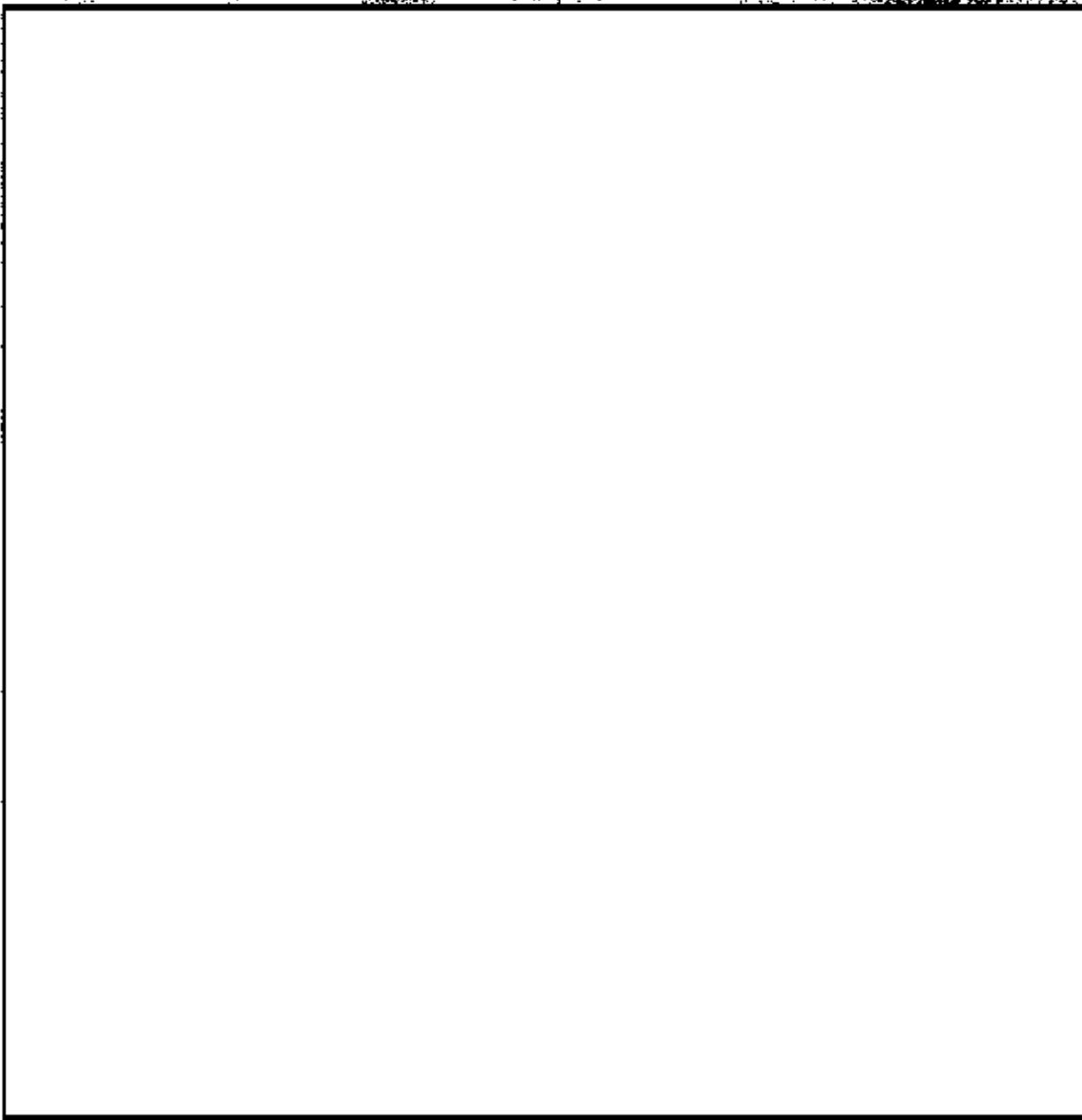
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DISSEMINATION

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ACLU Sect. 215-1254

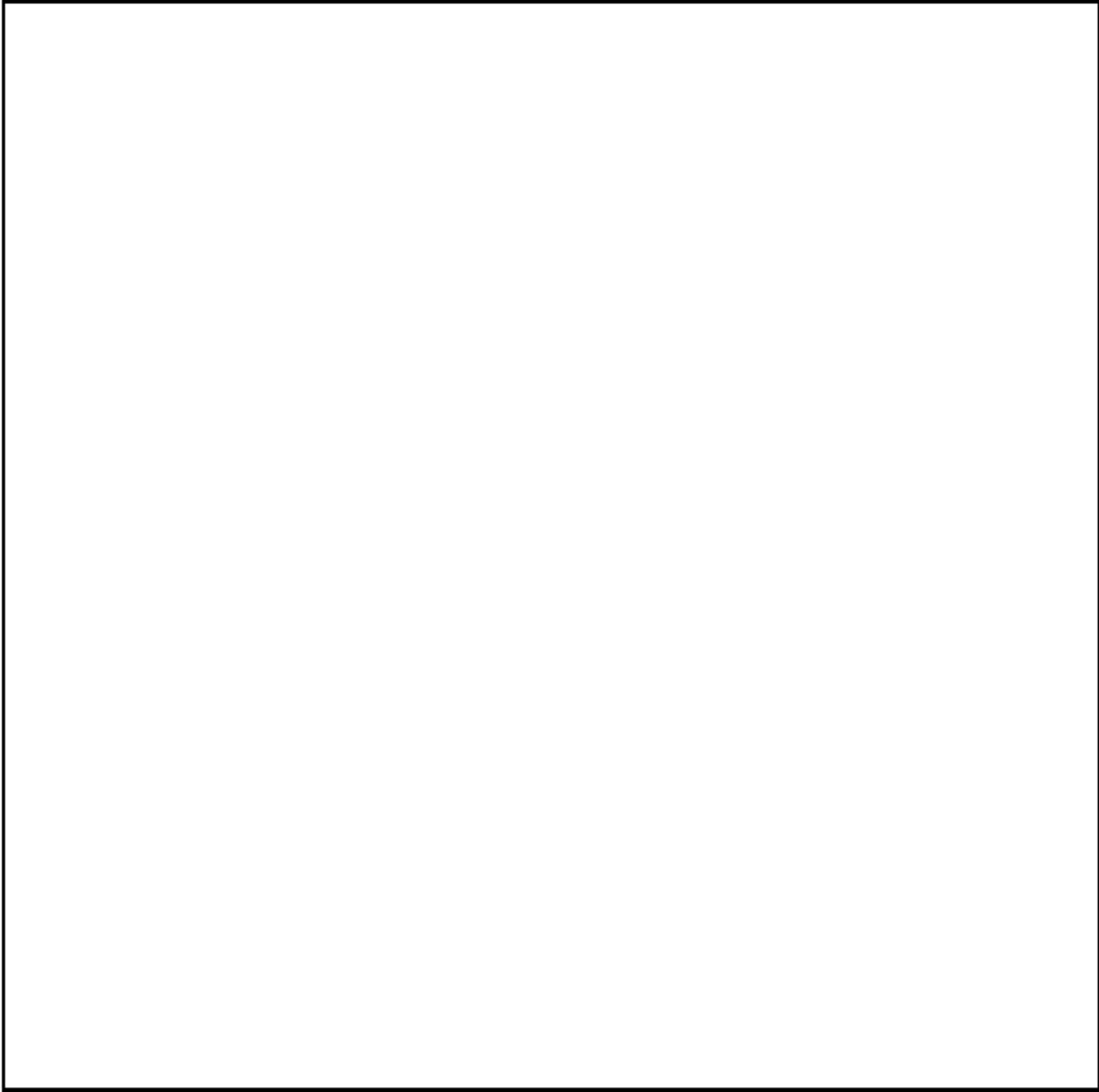
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DISSEMINATION

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ACLU Sect. 215-1255

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DISSEMINATION

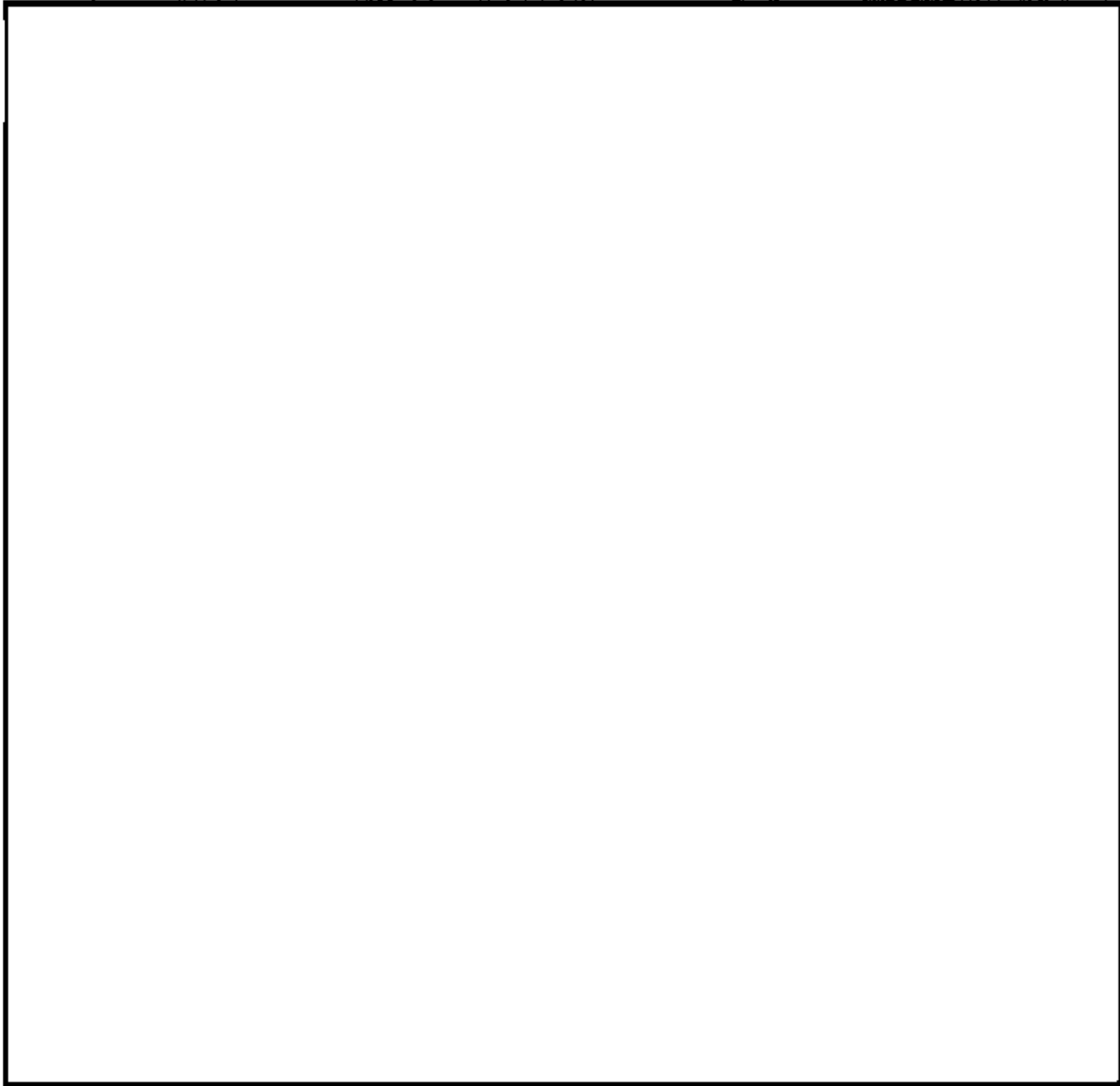
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DISSEMINATION

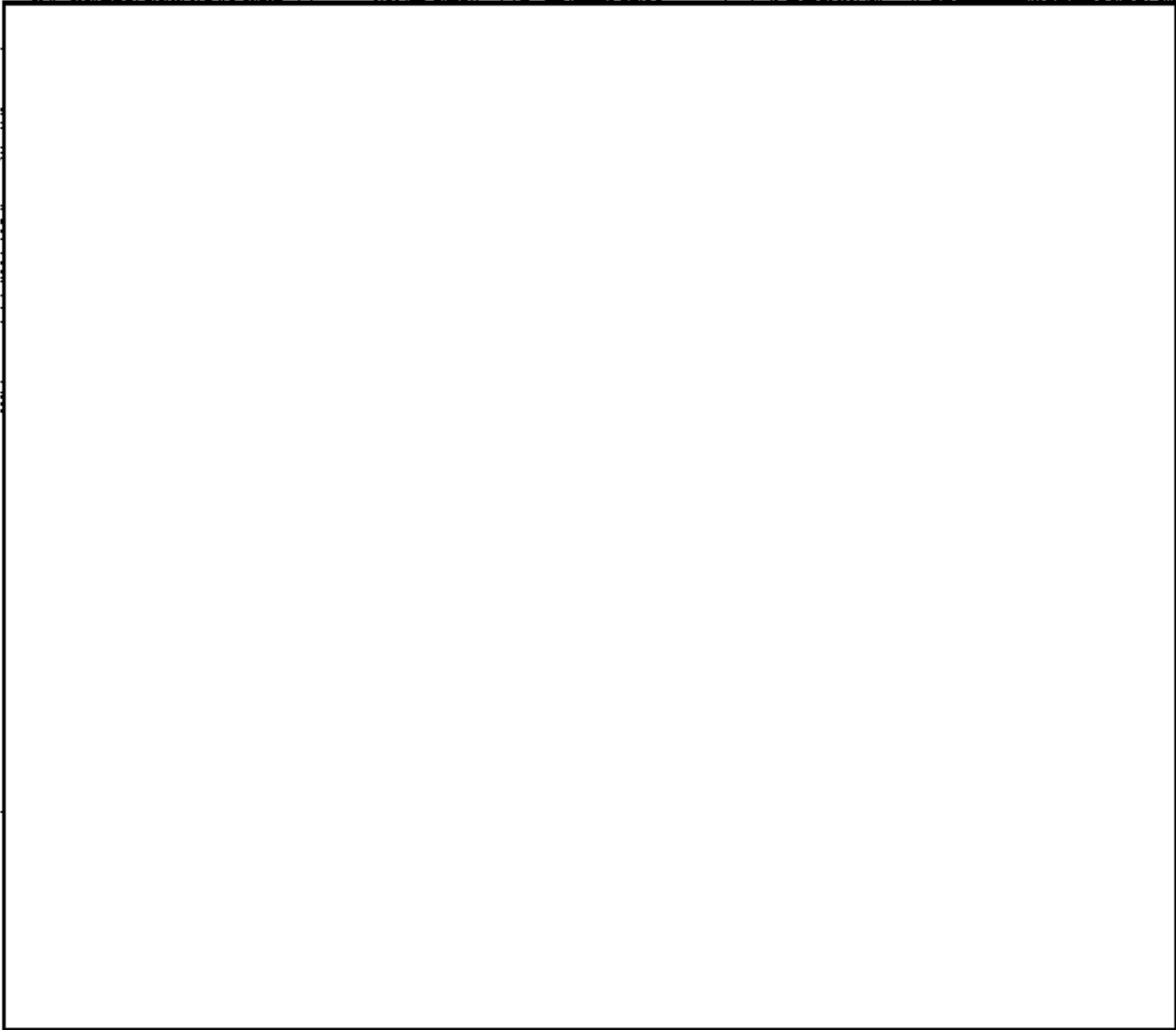
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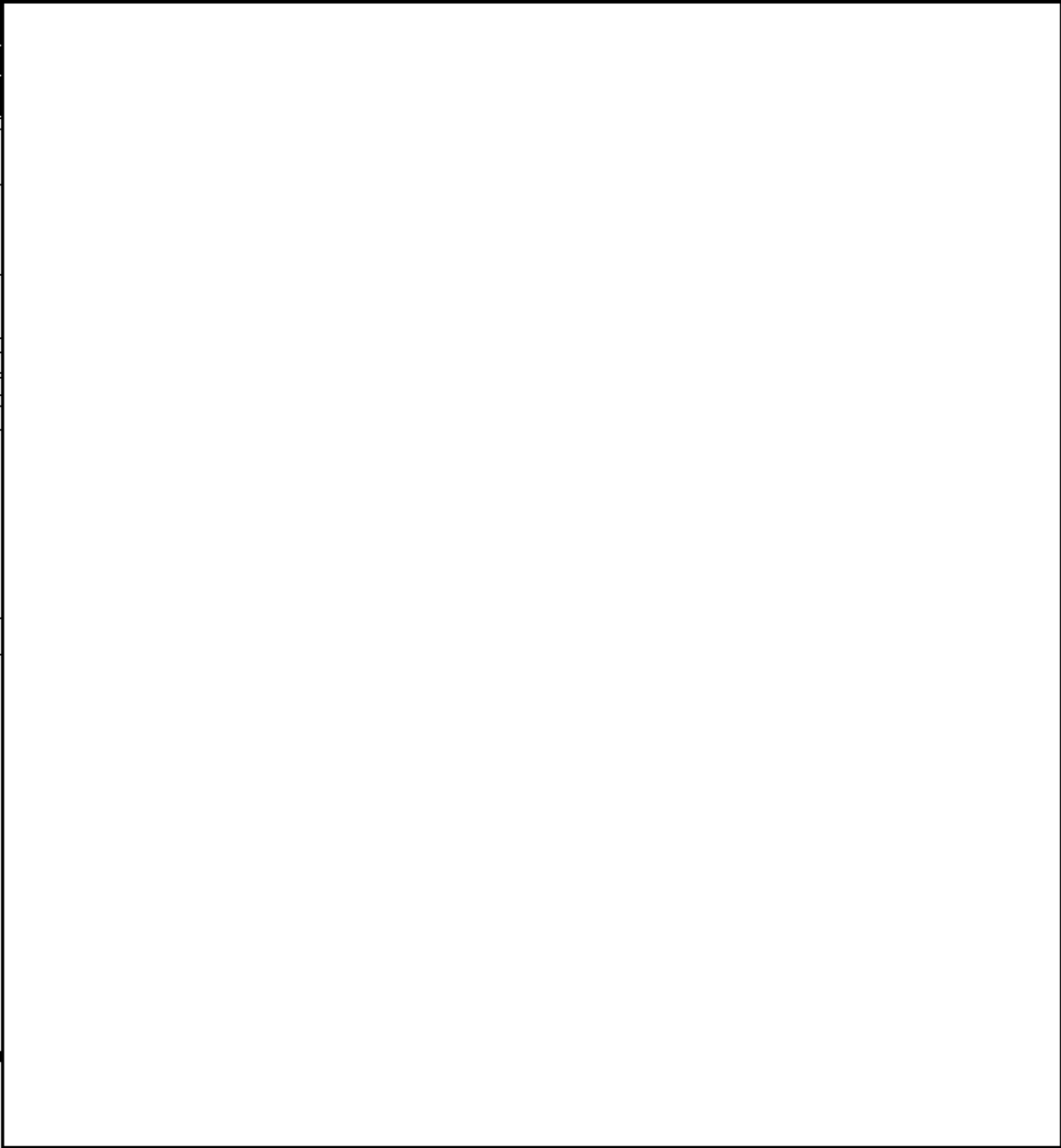
DISSEMINATION

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Assistant United States Attorney/Criminal Division, _____ in case:

Name: _____

Telephone: _____

5. Has the material sought to be used in a declassified? _____

If not, are there any anticipated problems or objections to declassification of the material? If so, please explain: _____

7. Will use of this information disclose or otherwise affect other FISA surveillance or other foreign intelligence investigations? If so, please explain: _____

8. Attach a brief description of the foreign intelligence investigation that produced the FISA-derived information. Describe the FISA-derived material for which use authorization is sought (or attach the tech cuts) and explain how the FISA-derived information will be used in the proceeding.

Approval: This form should be approved by an Assistant Director.

ACLU Sect. 215-1261

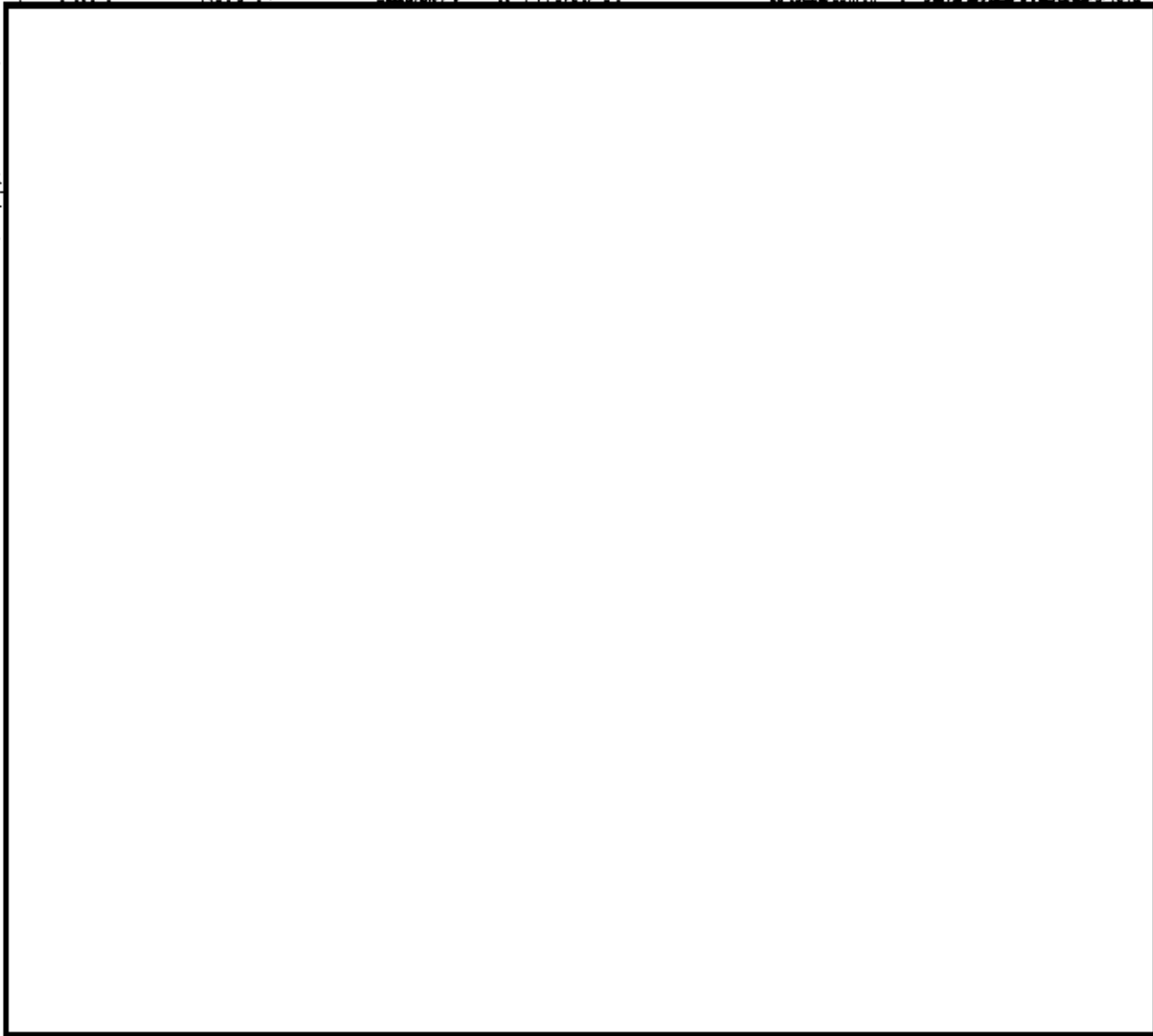
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USE APPROVAL

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ACLU Sect. 215-1262

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USE APPROVAL

- However, use in some routine investigative processes are at a lower use approval level
 1. Non-compulsory requests for documents from 3rd parties who are not subjects
 2. FGJ subpoenas for 3rd party docs, when the 3rd party is not a subject
 3. FGJ testimony by custodian of records (see #2)
 4. Pen/Trap applications (limited to a phone number or other relevant identifiers)

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USE APPROVAL

- AUSA submits Notification of Use or Disclosure of FISA Information Form to NSD (in these 4 situations)
- AUSA must consult with FBI first, to avoid compromising an investigation

ACLU Sect. 215-1264

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(unclassified when blank)

only for use for SECRET information on SIPRnet

NOTIFICATION OF USE OR DISCLOSURE OF FISA INFORMATION FORM

This form is to be used when notifying the National Security Division regarding the use or disclosure of information obtained or derived from collection authorized by the Foreign Intelligence Surveillance Act of 1978 (FISA), as amended, in accordance with Section 7 of the Attorney General's Revised Policy on the Use or Disclosure of FISA Information (relating to the use or disclosure of FISA information with respect to certain investigative processes). Federal prosecutors may notify the National Security Division by sending the completed form to: fisa-use@nd.usdoj.gov (SECRET or below information only) or by secure faxing the form to 202-514-9262.

In addition, federal prosecutors are encouraged to contact at any time the NSD Office of Intelligence Litigation Section at (202) 514-5600, the Counterterrorism Section through the designated trial attorney or the Regional A/TAC Coordinator at (202) 514-3849, or the Counterespionage Section through the designated trial attorney or at (202) 514-1187. NSD duty attorneys can be reached after business hours through the DOJ Command Center at (202) 514-5000.

Blank versions of this form are unclassified. This fillable PDF form is only for use with SECRET or below information on the SIPRnet system. Please add classification markings as appropriate.

Name of FISA target(s): _____

FISA Court docket numbers for the orders authorizing the collection that produced the information sought to be used or disclosed (list all):

Nature of activity for which the FISA information will be used or disclosed (e.g., investigative process (please specify type), criminal proceeding, non-criminal proceeding): _____

Title and court of proceeding (if applicable):

Target(s) and subject(s) of the investigation (list all):

USAO point of contact:

Name: _____

Telephone and Fax (unclassified and secure): _____

E-mail address (unclassified and classified): _____

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(unclassified when blank)

ACLU Sect. 215-1265

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BUSINESS RECORD

- The FISA version of a subpoena duces tecum

- Court order for "any tangible things" for an investigation

- To obtain foreign intelligence information not concerning a United States person, or
- To protect against international terrorism or clandestine intelligence activities.

- 50 USC 1861(a)(1)

ACLU Sect. 215-1266

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BUSINESS RECORDS

• Legal Standard

- **Relevance** – “reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation”
50 USC 1861(b)(2)
- Things are “presumptively relevant” if they pertain to:
 - A foreign power or an agent of a foreign power, or
 - An individual in contact with, or known to, a suspected agent of a foreign power who is the subject. 50 USC 1861(b)(2)

ACLU Sect. 215-1267

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BUSINESS RECORD

- Approval

- ADs and DADs of CI, CT, and Cyber
- General Counsel and Deputy GC of NS



- Except Sensitive records.

ACLU Sect. 215-1268

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BUSINESS RECORDS

- Sensitive Records

- Library
- Book sales
- Firearms sales
- Tax returns
- Educational records
- Medical records (if they contain PII)



- Approval = EAD for NS (50 USC 1861(a)(3))

ACLU Sect. 215-1269

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BUSINESS RECORDS

- Non disclosure included in all orders
- Minimization still applies



ACLU Sect. 215-1270

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BUSINESS RECORDS

- Both the application and order are classified.
- But how do we serve a classified court order on someone who does not have a security clearance?
- I'm glad you asked!

ACLU Sect. 215-1271

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BUSINESS RECORDS

Service on uncleared peoples:

1. Identify the person who will receive the order
 1. The order will include this persons name (custodian)
2. Preliminary background check on the custodian
 1. ACS, NCIC, State systems, etc.
3. SAC will sign approval for service on custodian
4. Security briefing to the custodian
5. Custodial Trust Receipt - both the custodian and serving Agent will sign (they may keep a copy)

ACLU Sect. 215-1272

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BUSINESS RECORDS

- Service on uncleared peoples
 6. Certificate of service - by serving Agent
 7. The custodian will be allowed to read the order and take notes, but not keep the court order
 8. Custodian's attorney may read the order, IF we also conduct a prelim background on that person
 9. Notes are limited to identifiers/accounts
 10. Upon compliance with the order, we take the custodian's notes

ACLU Sect. 215-1273

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FEDERAL BUREAU OF INVESTIGATION

John Doe
1234

1234 Street, NW
Washington, DC 20004

SMALL PHONE COMPANY
TEXT MAY BE RECORDED
WITHOUT OUR PERMISSION (S)

May 29, 2003

FEDERAL BUREAU OF INVESTIGATION - WISA DOCUMENT - CI-1234

This document serves as acknowledgment that [redacted] (Small Phone Company), the undersigned authorized representative of (Small Phone Company), has been provided with authorized access to the classified original Court Order of the Foreign Intelligence Surveillance Court, Docket No. 03-0000, entered by Judge JAMES H. HAYES on MAY 2, 2003. As more fully provided in that Order, (Small Phone Company) has been ordered to assist the Federal Bureau of Investigation (FBI) in conducting certain court authorized activities specified in the Order.

Because (Small Phone Company) does not have an approved government security storage agreement, the original Order will be retained by the FBI Washington Field Office. As necessary, this Order will be made available for review by the undersigned representative of (Small Phone Company) or his designated and cleared legal representative at future mutually convenient times. The undersigned FBI representative or his designee will assume responsibility to act as the trustee for (Small Phone Company) in maintaining the Order.

I, [redacted], acknowledge that the above mentioned Order has been provided to me for my review and that I have read the Order in its entirety. Pursuant to the terms of that Order and the non-disclosure agreement(s) that I have read and signed, I understand that I shall not disclose the existence of the Order or this investigation to the subject of the investigation or any other person except as may be required by legal process and then only after prior notification to the FBI representative and with the approval of Attorney General of the United States. I also understand that an unauthorized or improper disclosure of this sensitive national security information may be a criminal violation of Title 18 U.S.C. § 793.

[redacted] Security Supervisor
(Small Phone Company)

Date

NSA XXXX XXXX
FBI Washington Field Office
202/278-2000

ACLU Sect. 215-1274
Date

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FISA

**The End is Near,
In fact, it's here**

ACLU Sect. 215-1293

~~SECRET~~

FEDERAL BUREAU OF INVESTIGATION
FOIPA
DELETED PAGE INFORMATION SHEET

No Duplication Fees are charged for Deleted Page Information Sheet(s).

Total Deleted Page(s) ~ 31
Page 5 ~ Outside the Scope
Page 6 ~ Outside the Scope
Page 7 ~ Outside the Scope
Page 8 ~ Outside the Scope
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DATE: 02-09-2010
CLASSIFIED BY: 65179 UCBAW/STW/STW
REASON: 1.4.C.1
DECLASSIFY ON: 02-09-2017

PAGE 1 OF 1

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FISA Order Report

FISA Management System

Creator:
Creator Office Role: FISA Order Handler

Generation Date: Feb 16, 2010 11:41 AM

Note: This report was generated at the time specified above and the data is valid only up to that time.
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ACLU Sect. 215-1180

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Parameters

Start Date: Jul 1, 2007 12:00 AM
 Activation Due Date: Jul 1, 2007 12:00 AM
 Coverage Type:
 Activation Date (est): Dec 1, 2007 2:00 AM
 Completion Date: Dec 1, 2007 2:00 AM

File Request ID	Subject	Case File	Coverage Type	Subject Type	Office of Origin	Program	Status	Phase	Activation Date	Start Date	Completion Date
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Department Of Justice

FISA Request

(S)

[Redacted Content]

FBI Headquarters

FISA Request

(S)

[Redacted Content]

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DATE: 02-16-2016
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REASON: 1.4.F.1
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FISA Order Report

FISA Management System

Creator:
Creator Office Role: FISA Order Herder

Generator Date: Feb 16, 2016 11:47 AM

Note: This report was generated at the time specified above and the data is valid only up to that time.
Additionally, the report was generated by the specified user, while acting in the given role.
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ACLU Sect. 215-1178

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Parameters

Start Date: Jul 2005 12:00 AM
 Activation Date: Jul 1, 2005 12:00 AM
 Coverage Type:
 Activation Date: Dec 31, 2005 12:00 AM
 Completion Date: Dec 31, 2005 12:00 AM

Esia Request ID	Subject(s)	Case File	Coverage Type	Subject Type	Office of Origin	Program	Status	Phase	Activation Date	Start Date	Completion Date
	Department Of Justice										

(S) TISA Requests



FBI Headquarters



(S) TISA Requests



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DATE: 02-07-2010
CLASSIFIED BY: 65196 GWS/PTL/MLP
REASON: 1.4 (c)
DECLASSIFY ON: 02-07-2037

PAGE 1 OF 1



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FISA Order Report

FISA Management System

Created:
Creator Office Role: FISA Order Handler

Generation Date: Feb 18, 2010 11:57 AM

Note: This report was generated at the time specified above and the data is valid only up to that time. Additionally, the report was generated by the specified user, while acting in the given role. Requests to which the creator does not have access will not be included in the report.

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ACLU Sect. 215-977

PAGE 1 OF 1

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Page 2 of 3

Parameters

Start Date: Jul 1, 2009 12:00 AM
 Actual Start Date: Jul 1, 2009 12:00 AM
 Coverage Type:
 Scheduled Date End: Dec 31, 2009 12:00 AM
 Completion Date: Dec 31, 2009 12:00 AM

Case Request ID	Subject	Case File	Coverage Type	Subject Type	Office of Origin	Program	Status	Phase	Schedule Date	Start Date	Completion Date
	Department Of Justice										

(S) FISA Request

FBI Headquarters

HSA Request

(S)

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ACLU Sect. 215-978

Page 2 of 3

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CLASSIFICATION

ENCLOSURE

<u>Fisa Request ID</u>	<u>Subject</u>	<u>Case File</u>	<u>Coverage Type</u>	<u>Subject Type</u>	<u>Office of Origin</u>	<u>Program</u>	<u>Status</u>	<u>Phase</u>	<u>Activation Date</u>	<u>Start Date</u>	<u>Expiration</u>
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CLASSIFICATION

ACLU Sect. 215-979

ENCLOSURE

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**Digest of Director's Hearing
Before the House Judiciary Committee
March 16, 2011**

On Wednesday, March 16, 2011, the House Judiciary Committee held a hearing on FBI Oversight. Director Mueller was the only witness. Twenty Members attended the hearing.

Chairman Lamar Smith (R-TX):



PATRIOT – With regard to the PATRIOT Act, Chairman Smith asked what would happen if the three expiring provisions are not made permanent. The Director responded that 215 is an important authority that has been used over 300 times since 2001. Roving wiretaps reduce manpower burdens and are already available on the criminal side. The lone wolf provision allows us to obtain a FISA warrant on an individual who is a terrorist but whose affiliation with a particular group cannot be proven (such authorities would have enabled the FBI to review Moussaoui's laptop).



Ranking Member John Conyers (D-MI):



Congressman James Sensenbrenner (R-WI):



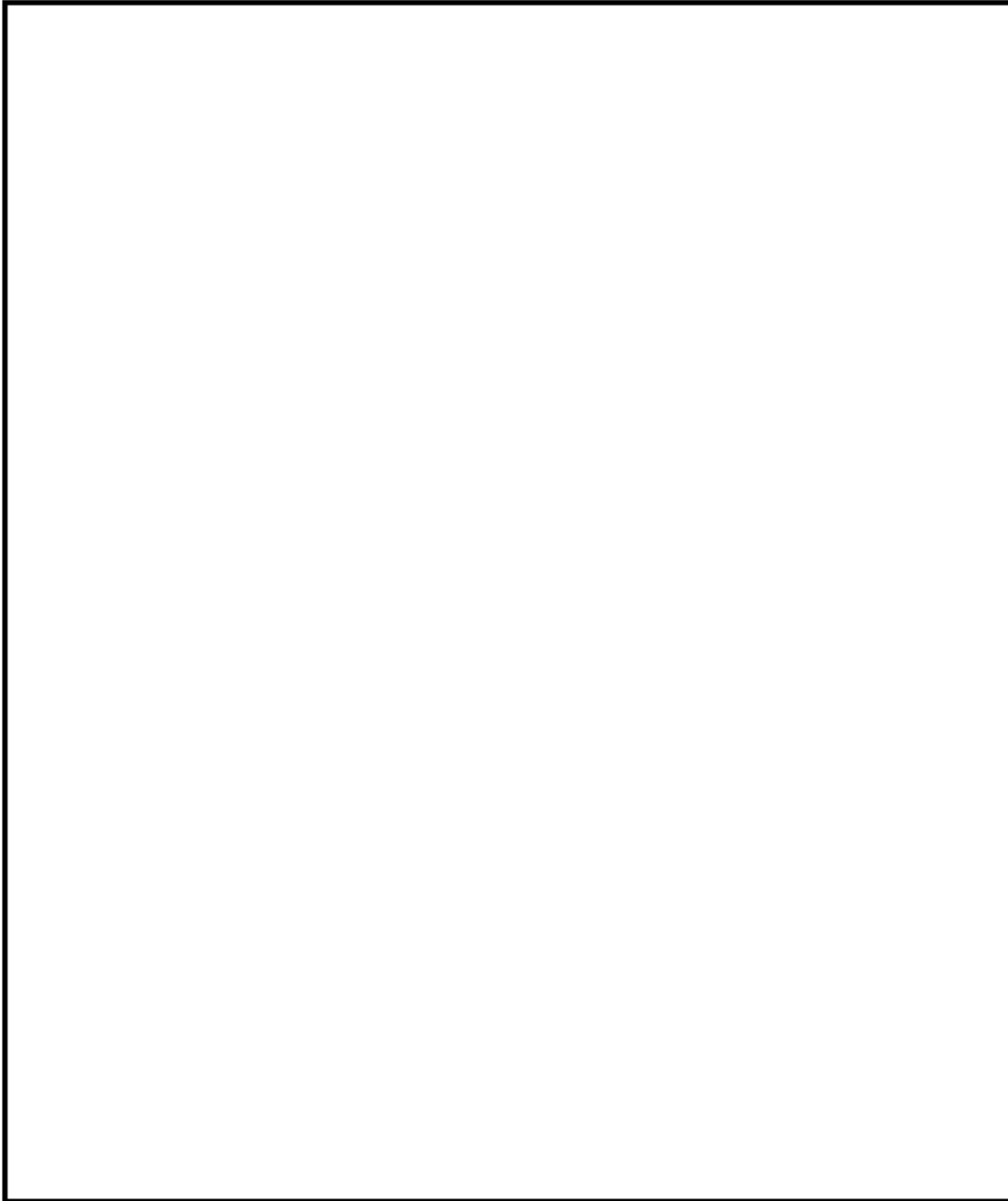
Congresswoman Maxine Waters (D-CA):



Congressman Dennis Ross (R-FL):

PATRIOT – Congressman Ross asked what the FBI’s recourse would be if roving wiretaps were not reauthorized. The Director responded that the FBI would have to continuously return to the court each time new information was received that the person in question had thrown away a cell phone (likely each day). This process would, in turn, result in Agents missing numerous conversations and potentially useful information. When asked if he has met any resistance with regard to 215 records, Director Mueller stated that there have been pockets of resistance. For example, the FBI may be given some information, but not the information to which we believe we’re entitled under the National Security Letter provision, which requires us then to go to the 215 proviso to obtain the records – another time-consuming process.





Congressman Marino (R-PA):

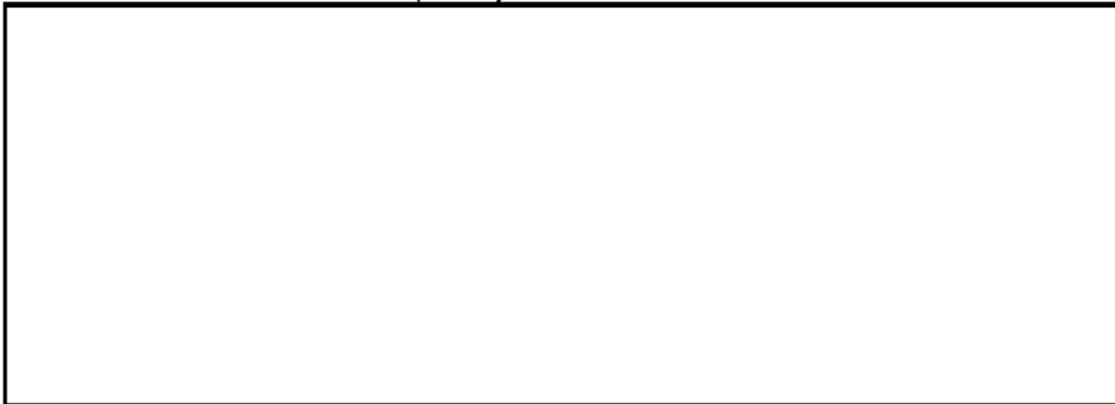
PATRIOT – With regard to the Senate’s use of the term ‘specific facts’ required for National Security Letters (NSLs) and 215 records, Congressman Marino wanted to know if either the FISA Court or the FBI had defined the term. Director Mueller responded that neither has defined the term and he prefers reauthorization of the provisions without the introduction of confusing phrases and terms. When asked if the interpretation of same at some point in the future could open the door to future Office of Inspector General (OIG) reviews of whether or not facts were specific enough, the Director stated that the

ACLU Sect. 215-806

FBI works very closely with the OIG. However, that is certainly a possible outcome that would have to be worked out between the FBI and OIG.

11/11/2014 11:11:11 AM

Congressman Louie Gohmert (R-TX):



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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 15, 2011

The Honorable Lamar Smith
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Enclosed please find responses to questions for the record arising from the appearance of FBI Director Robert Mueller before the Committee on May 20, 2009, at an oversight hearing. We apologize for the lengthy delay and hope that this information is of assistance to the Committee.

Please note that these responses are current as of August 19, 2009. The Office of Management and Budget has no objection to our submitting these responses to the Committee with that caveat. Please do not hesitate to call upon us if we may be of additional assistance.

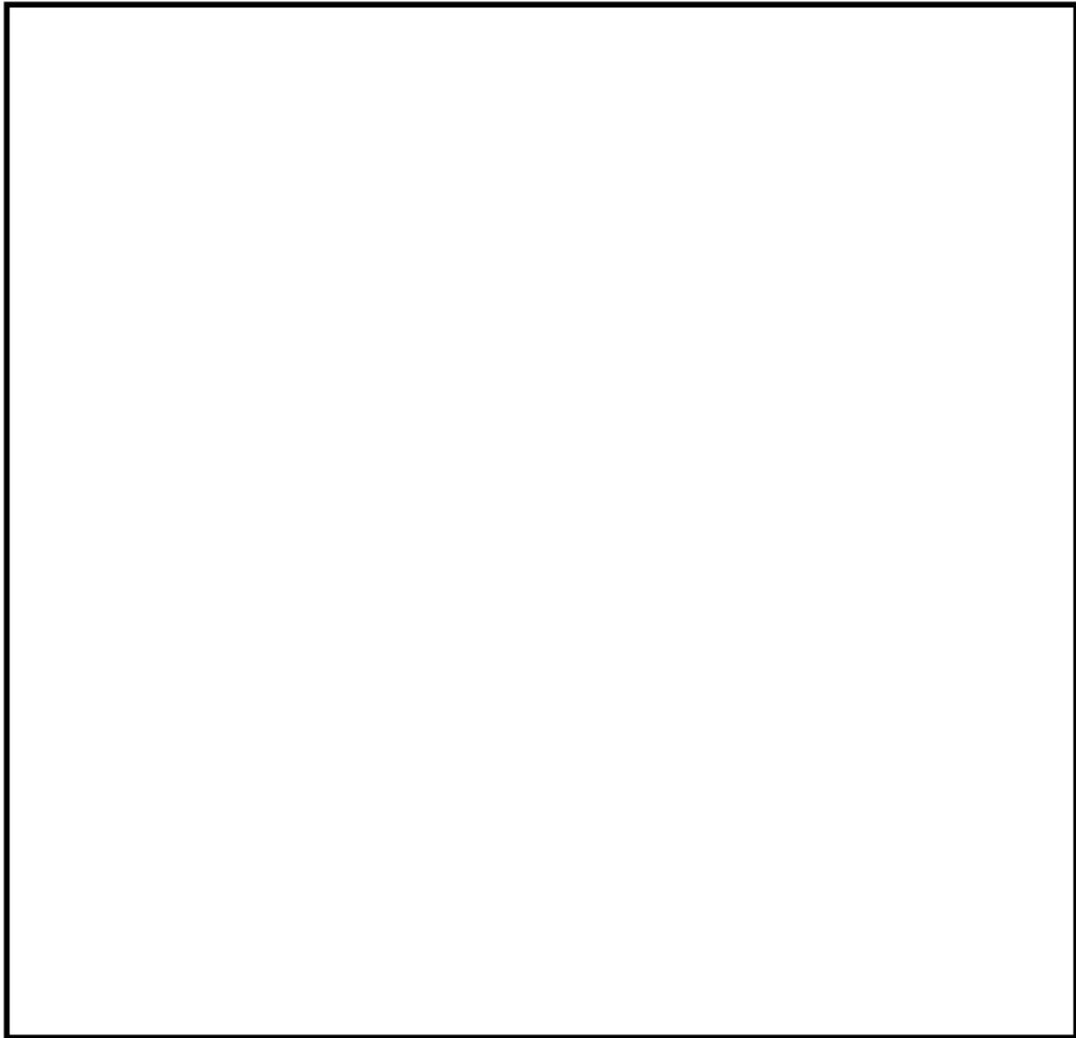
Sincerely,

A handwritten signature in black ink, appearing to read "R Weich".

Ronald Weich
Assistant Attorney General

Enclosure

cc: The Honorable John Conyers, Jr.
Ranking Minority Member



The Inspector General's 2008 Report Regarding the FBI's Use of Section 215 Orders in 2006

23. The 2008 Inspector General (IG) Report noted that when FBI agents submitted Section 215 requests processed in 2006, they encountered similar processing delays as those identified in the IG's 2007 report. These delays were caused by unfamiliarity with Section 215 orders, too few resources to handle requests expeditiously, the multi-layered review process, and substantive issues regarding whether the application met the statutory requirements. What is the FBI doing to address these problems?

Response:

The FBI has worked diligently to expedite the accurate and timely processing of Section 215 requests. The Foreign Intelligence Surveillance Act (FISA) Management System, which is the FBI's computerized tracking and management system for the handling of FISA electronic surveillance and search warrant requests, has been modified to accept Section 215 requests, reducing reliance by the FBI and of DOJ's Office of Intelligence on e-mail to process requests for Section 215 orders. In addition, the in-house training for the FBI attorneys responsible for drafting these requests has been improved and the related experience level of FBI field offices has increased.

24. The 2008 IG report also recommended that the FBI develop procedures that require FBI employees to review materials received from Section 215 orders to ensure that the material they receive pursuant to Section 215 is authorized by the Section 215 order itself. What has the FBI done to implement this recommendation?

Response:

In addition to applying the Standard Minimization Procedures (SMPs) for business records that are required by the USA PATRIOT Improvement and Reauthorization Act of 2005, the FBI's policy implementing the new Attorney General (AG) Guidelines for Domestic Investigations requires that the case agent review all documents produced in response to a 215 request to determine whether they are responsive to the order before uploading the documents or data received into FBI databases. This policy also requires that non-responsive information mistakenly provided to the FBI pursuant to a 215 order be sequestered and that the case agent determine the best way to return the unresponsive material to the producing party and to obtain responsive material. The FBI's policy also addresses the steps to be taken by the case agent in the event of overproduction. In addition, new SMPs for business records are being drafted for the AG's approval and for review by the FISC that will further address the FBI's procedures for reviewing production in response to 215 orders.

[Redacted]

FOIA(b)(7)(C) - Exemption

[Redacted]



31. Questions [29] and [30] address the nondisclosure requirements for NSL recipients. Those receiving requests for information under Section 215 of the USA PATRIOT Act also are prohibited from disclosing receipt of that request.

a. Is the reciprocal notice procedure used by the FBI for NSLs being used for nondisclosure requirements issued under Section 215 of the USA PATRIOT Act?

If yes, since what date has the FBI used this procedure for recipients of Section 215 orders? How many Section 215 orders have been issued since that date? Has anyone given notice to the government of their intention to challenge a nondisclosure requirement in a Section 215 order? If so, has the government gone to court to enforce a nondisclosure requirement in a Section 215 order pursuant to notice being given that the recipient wished to challenge? If so, what was the result of the government going to court and asking the court enforce the nondisclosure requirement?

If no, what is the FBI's justification or argument for not using the reciprocal notice system in the context of Section 215 orders? Does the FBI plan to use that system for recipients of Section 215 orders in the future?

b. If this reciprocal notice procedure is being used for Section 215 orders, please provide a copy of the notice the FBI is sending to recipients of Section 215 orders that informs them of their right to challenge the nondisclosure provision.

Response to subparts a and b:

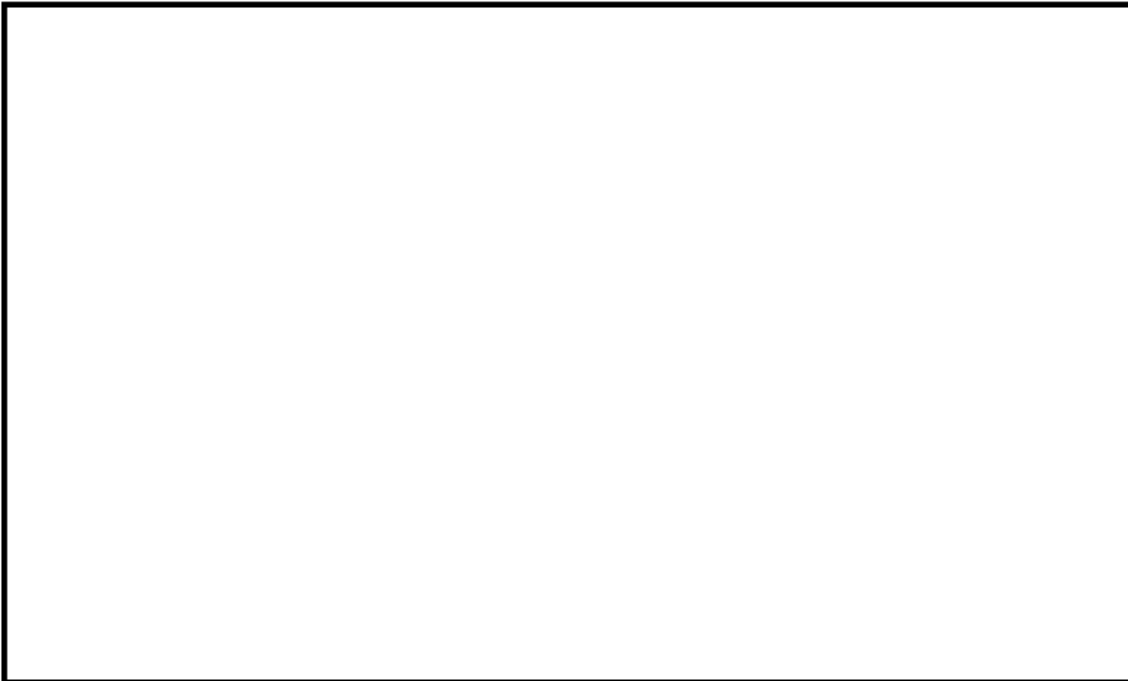
A reciprocal notice procedure is not used in court orders obtained under Section 215. Section 215 orders, which are issued by the FISC, differ from NSLs, which are issued by the FBI.

In order to obtain a Section 215 order, the FBI must present to the FISC an application demonstrating the relevance of the tangible items sought to an authorized national security investigation. Only after considering that application will the FISC issue an order directing the production of the requested items and

directing the recipient not to disclose the existence of the order. This nondisclosure requirement is identical to that used for years without controversy or legal challenge with respect to FISA electronic surveillance and search orders (50 U.S.C. §§ 1805, 1824), FISA pen register orders (50 U.S.C. § 1842), Title III electronic surveillance orders (18 U.S.C. § 2518), and Title 18 pen register/trap and trace orders (18 U.S.C. § 3123). Because there are long-standing noncontroversial processes for the judicial imposition of non-disclosure requirements, the FBI does not believe it would be appropriate to import the Doc concept of "reciprocal notice" into FISA Section 215 orders.

NSLs, in contrast, can be issued by the FBI when we determine that the requirements specified in the NSL statutes have been met. Because the nondisclosure requirement imposed in this context is not accomplished through a court order, the government did not appeal the Doc decision and agreed that the use of the reciprocal notice suggested by the court would be appropriate.

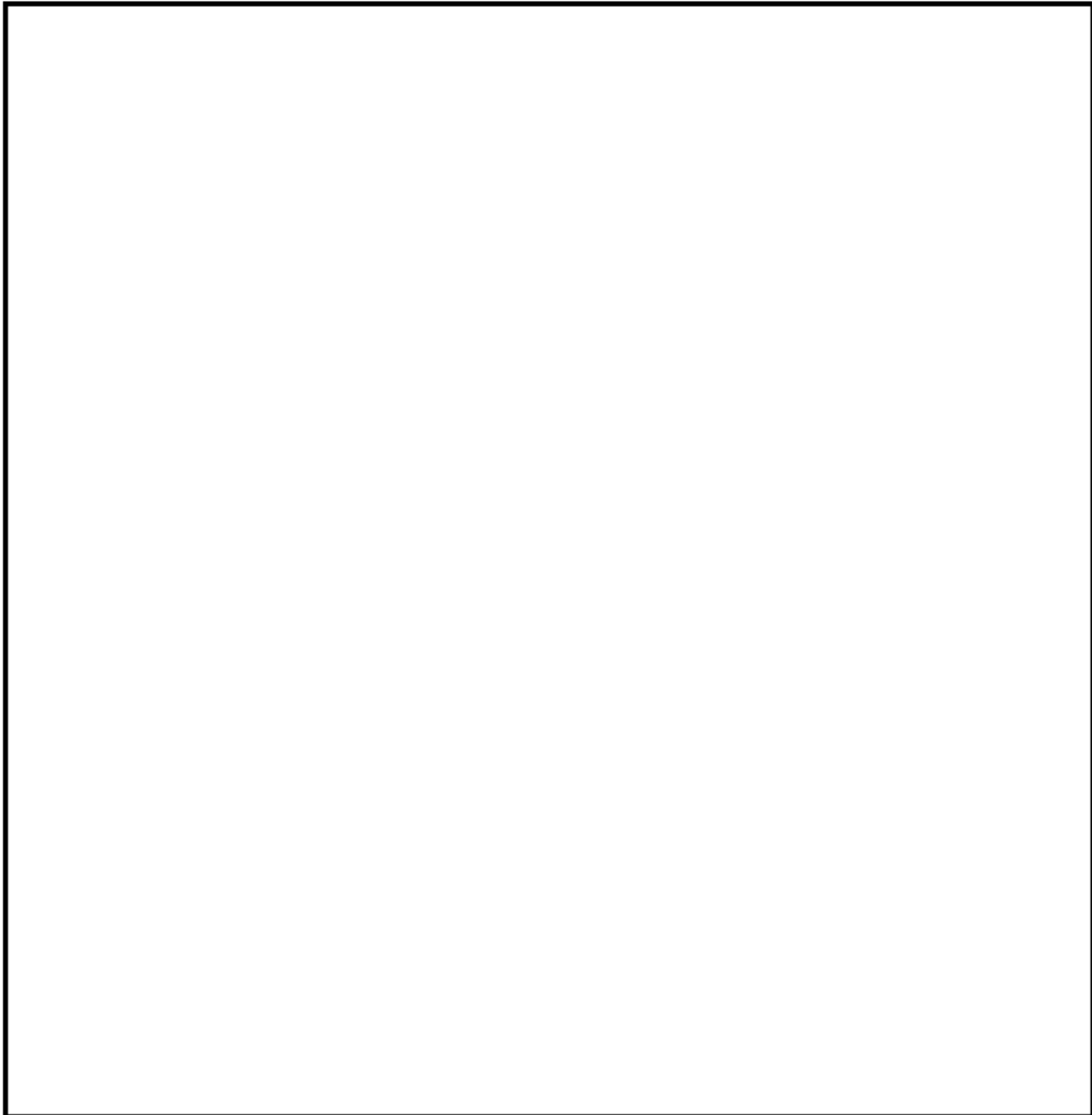
As noted above, FISC orders issued under Section 215 do not include reciprocal notice procedures. No recipient of a Section 215 order has objected to the nondisclosure requirement to date.



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11.94 (C) Business Record Under FOIA

A.(1) Legal Authority

(1) 50 USC §§ 1861e5

B.(1) Definition of Method

(1) A FOIA order for business records is an order for a third party to produce documents, records, and other tangible information relevant to a particular national security investigation.

FOIA Business Record orders may not be used to obtain information during a passive

foreign intelligence case if the material sought relates to a United States person. There is no

FOIA-derived impediment to the use of documents obtained pursuant to such orders.

C. (U//FOUO) Approval Requirements

(U//FOUO) All requests for NSA business record orders must be approved by DCI, Office of

Intelligence (OI) through FISAMS. Requests classified up to

secret/differential will be simplified through FISAMS on FIMM. Requests classified Top Secret

and/or SC/TM will be simplified through FISAMS on SCROW. Field Offices not having SC/TM

access will prepare a copy of the request form route it for appropriate signatures and secure the

request form to the FBIHQ substantive Unit handling the request. The substantive unit will

enter the request into FISAM & on SCROW. If Field Office not having SCROW access, please

express all Top Secret (TS) and/or Special Compartmentalized Information (SCI) requests for

business records must be signed by the CIO, ASAC and the SAC.

D. (U) Duration of Approval

(U) Duration is established by the court order.

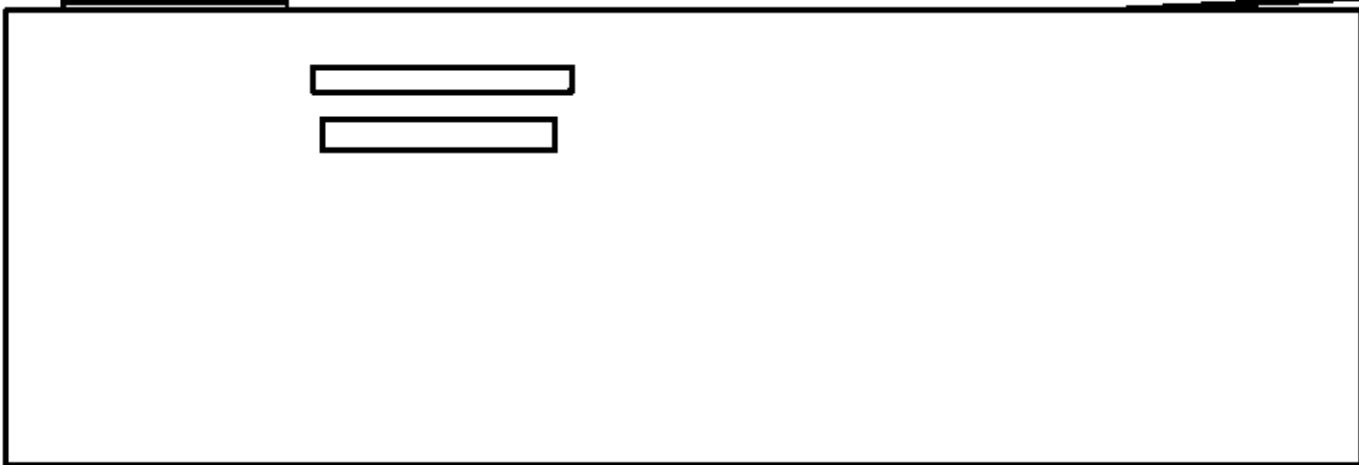
E. (U) Notice and Reporting Requirements

(U) There are no special notice or reporting requirements.

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From: [redacted] (JK) (FBI)
Sent: Wednesday, March 15, 2006 7:11 PM
To: JK FCI; JK JTTF; JK JTTF ADMIN; JK JTTF GV; JK JTTF OC; JK JTTF TL; JK_FIG_SHAREDPCS; JK SQ 10; JK SQ 3; JK SSAs/SSRAs; JK SQ 6
Cc: [redacted] (JK) (FBI); [redacted] (JK) (FBI); [redacted] (JK) (FBI)
Subject: Legal Instruction: "USA PATRIOT Improvement and Reauthorization Act of 2005. New Legislative Changes to FCI/IT Lega. Authorities

UNCLASSIFIED
NON-RECORD

This legal instruction summarizes recent changes to national security legal authorities as a result of the "USA PATRIOT Improvement and Reauthorization Act of 2005," and provides a summary of implementation procedures.

INTRODUCTION

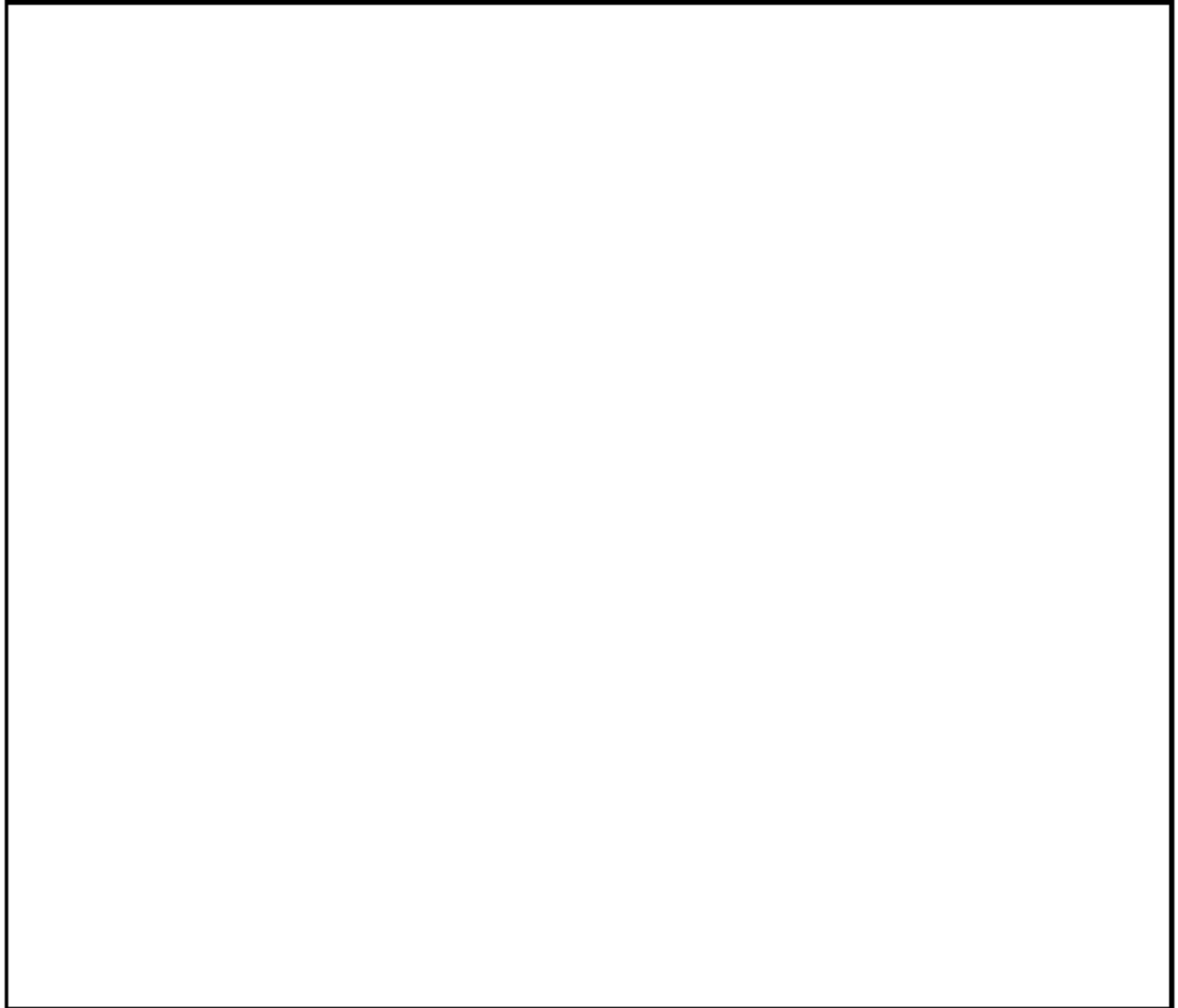
The President signed the USA PATRIOT Improvement and Reauthorization Act of 2005, on March 9, 2006 (also referred to as "USAPA IRA"). The USAPA IRA makes permanent many of the sunset provisions of the USA PATRIOT Act, and it significantly changes many national security legal authorities, including National Security Letters (NSLs) and certain FISA-related provisions, and imposes new reporting requirements. In addition, the new bill makes changes in several substantive criminal laws, some of which may have implications in national security investigations.

The National Security Law Branch of the Office of General Counsel is issuing preliminary guidance on those portions of the USAPA IRA relating to national security operations. The following summarizes authorities contained in sections of the bill, to include a summary of potential changes in FBI operational procedures.

The entire bill is referred to as the USA PATRIOT Act Improvement and Reauthorization Act of 2005, though in reality, the Title I contains the significant changes to the FBI's national security tools. Titles II through VI contain several other Acts and miscellaneous provisions:

Title I - USA PATRIOT Improvement and Reauthorization Act

Title I makes most of the original sunset provisions of the original USA PATRIOT Act permanent, though it creates new sunsets for the authorities in section 206 (FISA roving authority) and section 215 (FISA access to business records) of the USA PATRIOT Act, and section 6004 (Lone Wolf provision) of the Intelligence Reform and Terrorism Prevention Act of 2004. It also extends the duration of several FISA tools. Additionally, it makes significant changes to the National Security Letter statutes. Finally, the USAPA IRA requires new Congressional reporting of the use of national security tools.



TITLE I

Sunset Provisions

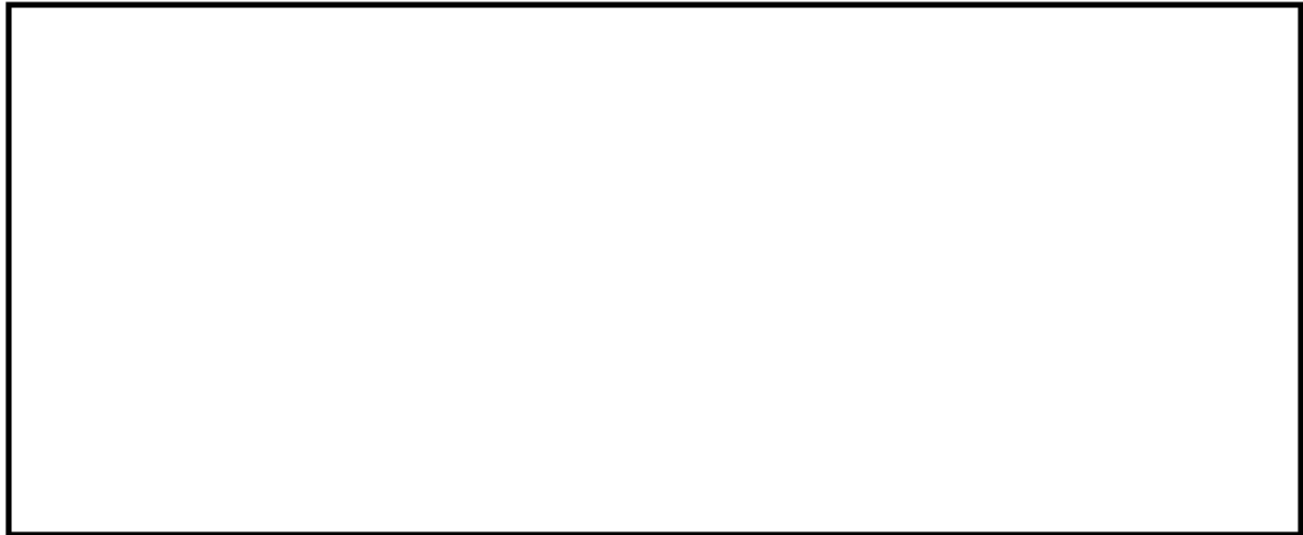
Sec. 102. USA PATRIOT Act Sunset Provisions.

Section 102 repeals section 224 of the USA PATRIOT Act, making most of the original sunset provisions permanent. This section adopts a new 4-year sunset (December 31, 2009) for sections 206 (roving

ACLU Sect. 215-1065

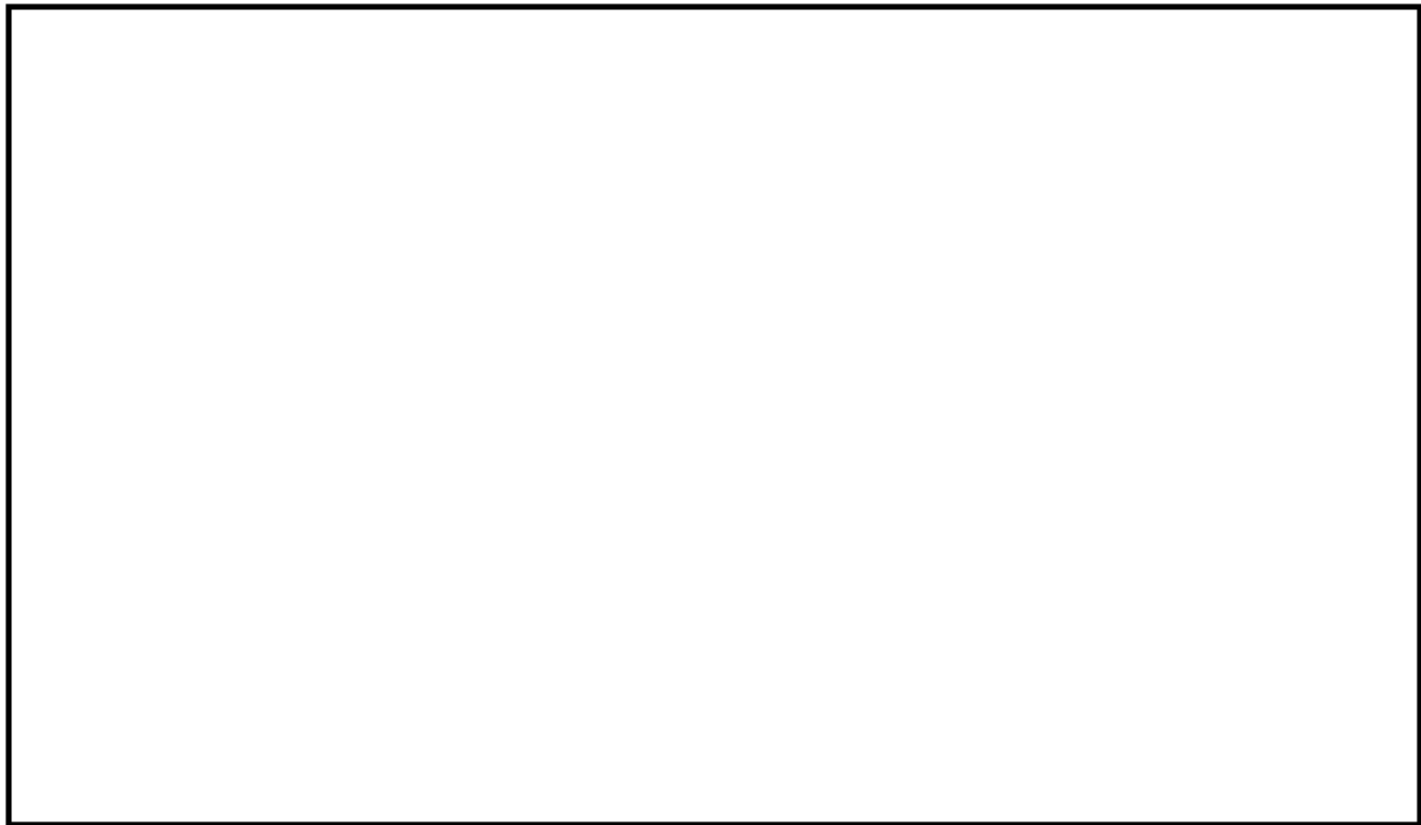
(b) and 215 (business records) of the USA PATRIOT Act. The new permanent provisions of the USA PATRIOT Act are the following:

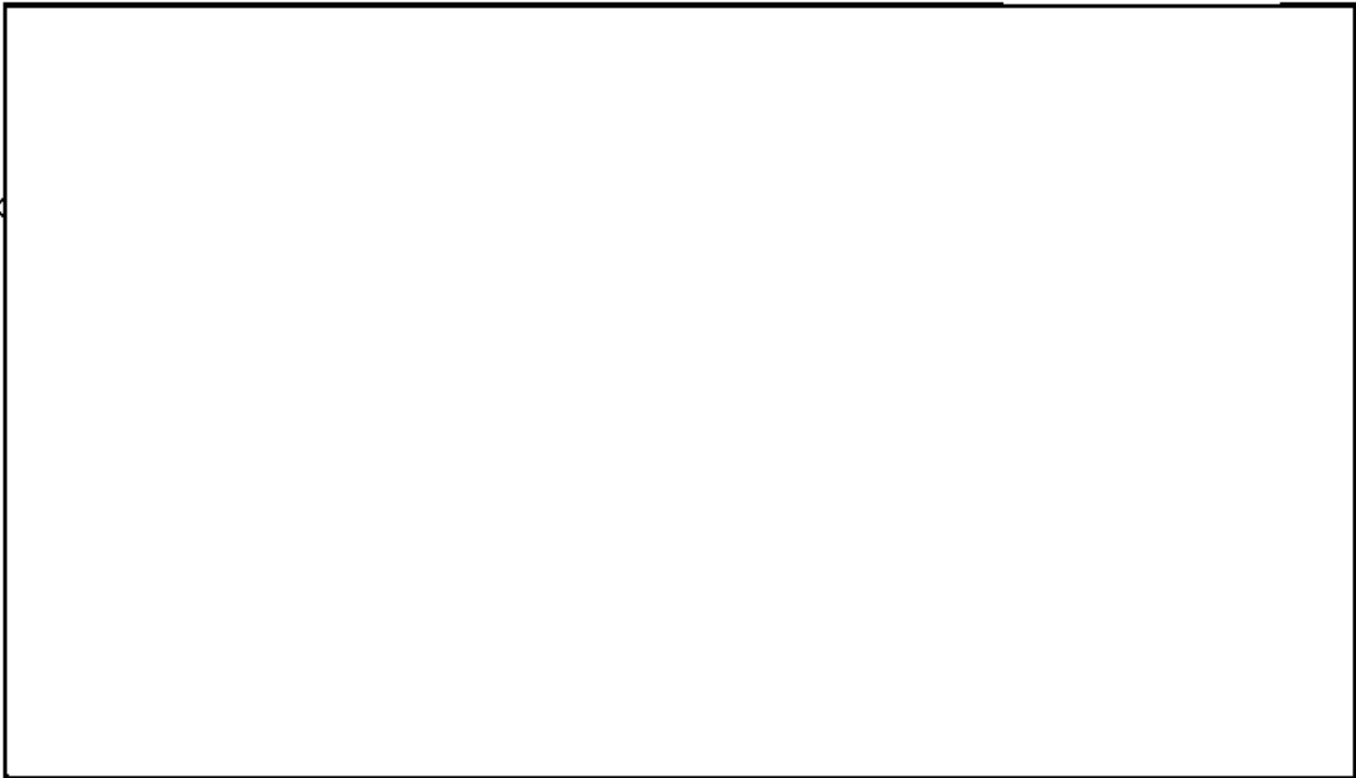
at this time, the scope



Procedural Changes: None at this time.

Provision	New Sunset Date
[Redacted]	December 31, 2009
FISA Business Records Authority	





FISA BUSINESS RECORD CHANGES

Sec. 106. Access to Certain Business Records Under Section 215 of the USA PATRIOT Act.

Section 106 makes the following changes to Sections 501 and 502 of the Foreign Intelligence Surveillance Act (FISA) regarding access to 215 Business Records.

Procedural Changes Related to FISA Business Records: FISA Business Records, which have been the subject of much debate, have been modified to contain more safeguards to protect civil liberties and privacy. These safeguards include special procedures and approvals for certain types of tangible things (i.e., library records), a directive to develop "minimization procedures," the recipient's right to seek judicial review of an order, and a recipient's right to disclose an order for the purpose of obtaining legal advice or for assistance in complying with the order. The following charts summarize significant provisions in the new law.

Scope of FISA Business Records authority.	<ul style="list-style-type: none"> • This authority may be used to obtain "any tangible things (including books, records, papers, documents, and other items)" This authority is broad, similar in scope to a criminal grand jury subpoena. • This authority requires additional procedures for certain special categories of records (see below).
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Special Categories of Tangible Things	Congress designated particular categories of records for special procedures and approvals. The FBI will adjust procedures to account for the <u>special designation</u> .
• Special Categories:	Library circulation records, library patron lists, book sales records, book customer lists, firearms sales records, tax return records, educational records, and medical record containing

<ul style="list-style-type: none"> • Approval Level for special categories: 	<p>information that would identify a person.</p> <p>The Director of the FBI may delegate the authority to either -</p> <ul style="list-style-type: none"> • the Deputy Director of the FBI; or • the Executive Assistant Director (EAD) for National Security (or any successor position). <p>No further delegation is allowed.</p>
<ul style="list-style-type: none"> • Congressional Oversight of special categories: 	<p>Attorney General must provide annual report (April) to the House Judiciary Committee (HJC), the House Permanent Select Committee on Intelligence (HPSCI), the Senate Judiciary Committee (SJC), and the Senate Select Committee on Intelligence (SSCI).</p> <ul style="list-style-type: none"> • Number of FISA business record orders granted, modified, or denied for the special categories of tangible things.

<p>FISA Business Record Standard- Relevance:</p>	<p>The FBI's facts must show that there are "reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation."</p>
<ul style="list-style-type: none"> • Presumptive Relevance Test: 	<p>The tangible things are presumptively relevant if the facts show they pertain to -</p> <ul style="list-style-type: none"> (i) a foreign power or an agent of a foreign power; (ii) the activities of a suspected agent of a foreign power who is the subject of such authorized investigation; or (iii) an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of such authorized investigations...

<p>FISA Business Record Order:</p>	<ul style="list-style-type: none"> • The order must describe the tangible things with sufficient particularity to permit them to be fairly identified. • Date for return - the order will contain a date on which the tangible things must be provided. • Recipient must have a reasonable period of time to produce. • The Order may only require production of tangible things that would be available with a grand jury subpoena or a District Court order (in other words, privileges under the law will apply to Business Record orders).
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<p>FISA Business Record Non-Disclosure Provision:</p>	<p>No person shall disclose the fact that the FBI has sought tangible things.</p>
<ul style="list-style-type: none"> • Exceptions to non-disclosure: 	<p>A recipient may disclose a FISA Business Record Order to -</p> <ul style="list-style-type: none"> (1) persons to whom disclosure is necessary to comply; (2) an attorney to obtain legal advice or assistance with respect to the production; (3) a person as <u>permitted by the FBI Director (or designee).</u>
<ul style="list-style-type: none"> • Extension of nondisclosure to others: 	<ul style="list-style-type: none"> • If the recipient discloses to another person (see exceptions above), the recipient shall notify the person of the nondisclosure requirement.

- The person to whom disclosure is made shall be subject to the nondisclosure requirement.
- The FBI director (or designee) may ask the recipient to identify the other persons to whom disclosure of the Business Record order will be made (**except that the recipient does not have to identify the attorney**).

Judicial Challenge of FISA Business Record authority:	The recipient of a FISA Business Record order may challenge the legality of the order in the Foreign Intelligence Surveillance Court.
• Challenging the order:	<ul style="list-style-type: none"> • Recipient may move to modify or set aside the order. • FISC may grant the motion only if the order does not meet the requirements of FISA or is otherwise unlawful.
• Challenging the non-disclosure provision:	<ul style="list-style-type: none"> • Not less than 1 year after the order, the recipient may move to modify or set aside the nondisclosure order. • FISC may grant such a motion only if there is no reason to believe that disclosure may endanger the national security of the U.S., interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person. • The FISC will treat as conclusive a certification by the Attorney General, Deputy Attorney General, an Assistant Attorney General, or the Director of the FBI that a disclosure may endanger the national security of the U.S., interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person.
• Security:	<ul style="list-style-type: none"> • Filings shall be under seal • Chief Justice of the U.S., in consultation with the AG and the DNI, will establish security measures.

Minimization Procedures for FISA Business Records:	Within 180 days of enactment, the Attorney General shall adopt specific minimization procedures governing the retention and dissemination of FISA Business Record information.
• U.S. Person information:	The minimization procedures should minimize the retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting U.S. persons consistent with the U.S. intelligence community need to obtain, produce and disseminate foreign intelligence information.
• Evidence of a crime:	The procedures should allow for the retention and dissemination of information that is evidence of a crime.

Procedural Changes Related to Congressional Oversight of FISA Business Records: The new law beefs up the Congressional reporting requirements for the FISA Business Record authority. OIPR will have the responsibility for reporting the FISA Business Record statistics to Congress.

Reporting Cycle:	Attorney General will report on an annual basis (April of each year).
Congressional	• House Permanent Select Committee on Intelligence

Committees:	<ul style="list-style-type: none"> • House Judiciary Committee • Senate Select Committee on Intelligence • Senate Judiciary Committee
Reporting Categories:	<ul style="list-style-type: none"> (1) Total number of applications for FISA Business Records. (2) Total number of orders granted, modified, or denied. (3) Total number of orders granted, modified, or denied for the special categories of tangible things. <ul style="list-style-type: none"> • Library circulation records, library patron lists, book sales records, or book customer lists. • Firearms sales records. • Tax return records. • Educational records. • Medical records containing information that would identify a person.
Additional unclassified report:	Annually (April of each year), the Attorney General shall make an unclassified report on the total number of FISA Business Records applications, and the total number of orders granted, modified, or denied.

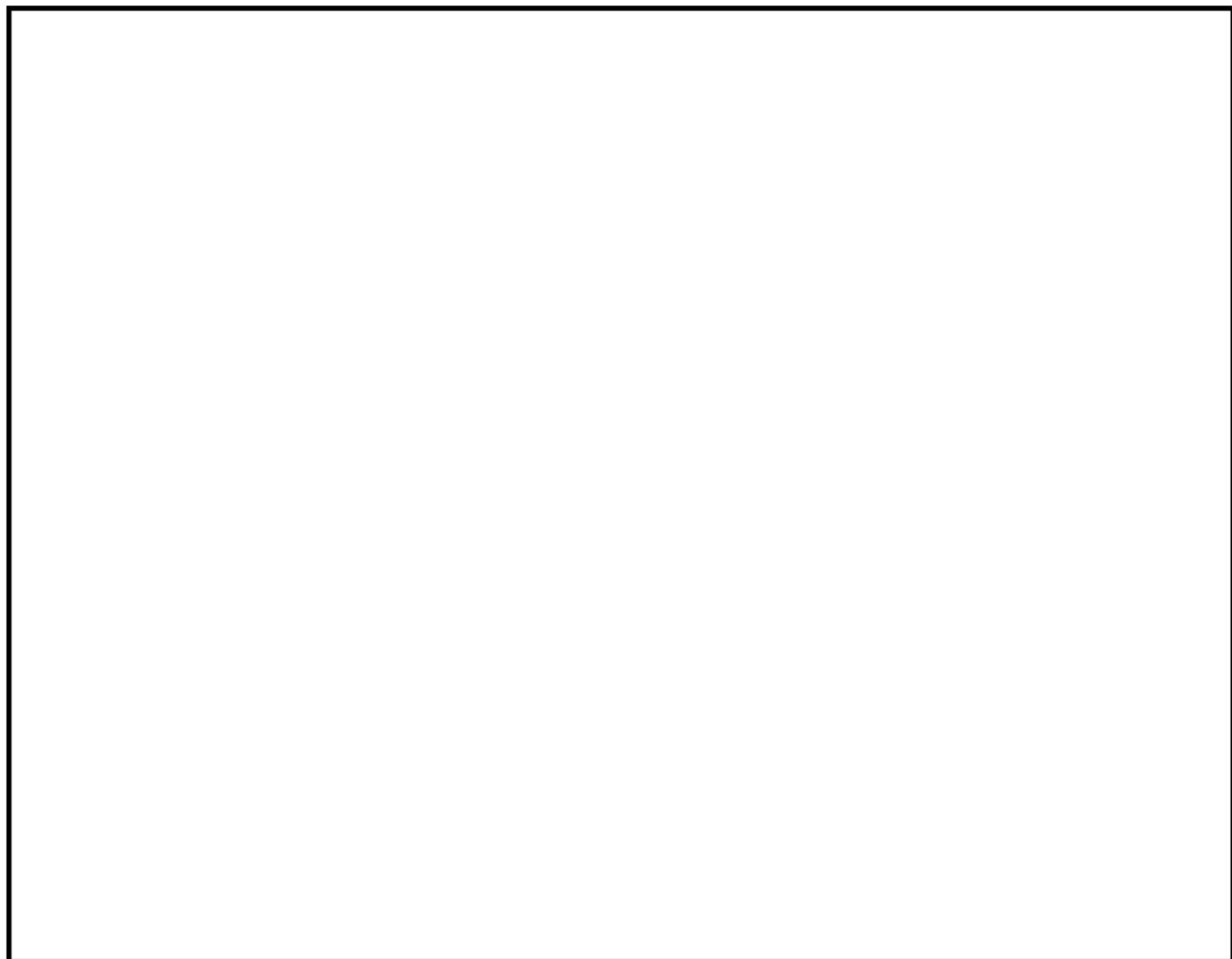
Sec. 106A Audit on Access to Certain Business Records for Foreign Intelligence Purposes.

Section 106A directs the Inspector General of the Department of Justice to perform a comprehensive audit of the effectiveness and use, including improper or illegal use, of the FISA Business Records authority. The audit will take place in two phases, covering the years of 2002 to 2006.

Procedural Changes Related to the Audit of FISA Business Records. The Inspector General's Office of the Department of Justice (DOJ IG) started the audit process in January 2006, in anticipation of the new USA PATRIOT Improvement and Reauthorization Act. It will be incumbent upon the FBI to cooperate with the DOJ IG to complete the two-phased audit. Per established procedures, the FBI's Inspection Division will be the primary point of contact for the DOJ IG.

Scope of Audit:	The IG will perform a comprehensive audit of the effectiveness and use, including any improper or illegal use, of the investigative authority.
Timing of Audit:	For 2002, 2003, and 2004, the audit should be completed within one year of enactment (March 9, 2007). For 2005 and 2006, the audit should be completed by December 31, 2007.
Report results to Congress:	The IG shall submit the audit reports to - <ul style="list-style-type: none"> • House Judiciary Committee. • House Permanent Select Committee on Intelligence. • Senate Judiciary Committee. • Senate Select Committee on Intelligence.
Examine effectiveness of the tool:	Audit will look at the following for effectiveness - <ul style="list-style-type: none"> • Categories of records obtained. • The importance to the FBI and the IC of the information obtained. • The manner in which the information is collected, retained, analyzed, and disseminated by the FBI (this will include an examination of the access to "raw data" provided by the FBI to

	<p>other agencies of the Federal, State, local, or tribal governments, or private sector agencies).</p> <ul style="list-style-type: none"> • The minimization procedures adopted by the AG. • Whether, and how often, the FBI used information to produce analytical intelligence products for the FBI, the IC, or other Federal, State, local, or tribal government agencies. • Whether, and how often, the FBI provided the information to law enforcement authorities for criminal proceedings.
Examine the process:	<p>The audit process will look at the following:</p> <ul style="list-style-type: none"> • How often the FBI requested DOJ to submit an application and the request was not submitted to the court (including the basis for the decision). • Whether the court granted, modified, or denied the application. • The justification for the failure of the AG to issue implementing procedures governing the requests in a timely fashion, including whether the delay harmed national security. • Whether bureaucratic or procedural impediments prevent the FBI from fully using the authority.



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FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE

Date: 4/26/2006

To: Norfolk

From: Norfolk

Chief Division Counsel

Contact: [Redacted]

Approved By: [Redacted]

Drafted By: [Redacted]

Case ID #: 12-NF-C34389-A - 6/6
12-NF-C34389 - 6/6

Title: LEGAL TRAINING
MARCH AND APRIL 2006

Synopsis: Record of legal training.

Details: On 3/28/2006 and 3/31/2006, CDC [Redacted] provided two hours of mandatory legal training about the 3/9/2006 Reauthorization of the PATRIOT Act, which included changes pertaining to criminal law and procedure as well as intelligence law. Copies of the outline provided to attendees and the sign-in sheets are attached.

On 3/6, 3/7, 3/8, 4/9 and 4/26, CDC [Redacted] provided mandatory legal training concerning deadly force law and policy to all Agents and Task Force Officers who attended these firearms sessions. Sign-in sheets are maintained by the Firearms Instructors.

♦♦

12-NF-C34389-A-6/6

SEARCHED	INDEXED
SERIALIZED	FILED
APR 26 2006	
FBI-NORFOLK	

FISA BUSINESS RECORDS

- 50 U.S.C. § 1861
- Hotly debated, though rarely used.
- Authority is broad (versus NSLs), access to:
 *"any tangible things (including books, records,
 papers, documents, and other items.)"*
- But . . . new law requires additional procedures for
 certain special categories of records.

- Records from 3rd parties.
- Much heat, little light.
- Similar to Grand Jury subpoena in breadth.

FISA BUSINESS RECORDS (Cont.)

SPECIAL CATEGORIES:

- Library circulation records
- Library patron lists
- Book sales records
- Firearms sales records
- Tax return records
- Educational records
- Medical records containing information which would identify a person

×

Mention Buckley Amendment/ FERPA and Directory Information.

This list is clearly the work of the political process.

FISA BUSINESS RECORDS (Cont.)

SO WHAT HAPPENS IF YOUR RECORDS FALL WITHIN A SPECIAL CATEGORY?

- New approval levels designate who may apply to the FISA Court –
 - Director of the FBI
 - EAD for National Security (or any successor position)
 - No further delegation
- Special AG report / congressional oversight

iv

So, you'd better have a good reason.

FISA BUSINESS RECORDS (Cont.)

Tangible things are presumptively relevant if the facts show they pertain to:

- a foreign power or agent of foreign power,
- the activities of a suspected agent of a foreign power who is the subject of such investigation, or
- the individual in contact with, or known to, a suspected agent of a foreign power who is the subject of such authorized investigations.

41

Applies to all FISA business records requests.

Think about these standards even when you write ECs supporting NSLs.

FISA BUSINESS RECORDS (Cont.)

EACH ORDER MUST:

- describe the tangible things **with sufficient particularity to permit them to be fairly identified** provide for a return date, which must be reasonable
- only require things that would be available by grand jury subpoena or a district court order

Your job, too!

Only require things that would be available by GJ subpoena or order -- in other words, privileges will apply

FISA BUSINESS RECORDS (Cont.)

NOTE:

- 1 Certain broad non-disclosure provisions apply
- 2 Recipient may challenge non-disclosure provision in FISA Court as well as the order itself.

4

Very hard to challenge non-disclosures. Not likely to happen often.

FISA BUSINESS RECORDS (Cont.)

- AG shall adopt specific minimization procedures by about mid-September governing retention and dissemination of FISA business record information
 - will only govern non-publicly available information concerning unconsent to USPERS consistent with U.S. Intelligence Community need to obtain, produce and disseminate foreign intelligence information
 - procedures must allow for retention and dissemination of information that is evidence of crime.

43

So if information is:

publicly available

or

concerns consenting USPERS

or

concerns non-USPERS

these specific minimizations procedures won't apply.

FISA BUSINESS RECORDS (Cont.)

DOJ IG will audit us for past and future use of this authority, and will report to Congress.

- Congress WANTS us to use it
- But use it well!

“

Everything will be under the microscope

- how, why we did it,
- how often,
- were there bureaucratic impediments that prevent FBI from fully using authority?

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**USA PATRIOT
IMPROVEMENT &
REAUTHORIZATION ACT**
(USAPA IRA)

FBI Norfolk Legal Training
March 2006
CDC

USAPA IRA

Signed March 9, 2006

Deals with sunset provisions of PATRIOT ACT

Significantly changes many national security legal authorities

Makes changes to and creates several new criminal laws, some of which impact national security investigations

There's material impacting every squad

USAPA IRA – Seven Titles

Title USA PATRIOT Improvement and Fraud Detection Act



will not discuss all of them



SENSE OF CONGRESS RELATING TO LAWFUL POLITICAL ACTIVITY

One section of the Act expresses the sense of Congress that federal investigations should not be based solely upon an American citizen's membership in a non-violent political organization of their otherwise lawful political activity.

The key word is 'solely'

•Neither criminal nor national security investigations of U.S. persons may be predicated solely on the exercise of First Amendment rights.

•Wake-up call!

•Audits and oversight are a given, whether your work is classified or not. You are neither writing nor working for a state audience.

•Investigators can easily touch upon the 1st Amendment rights.

Note that it says investigations should not be based on an American citizen's membership in a non-violent political organization of their otherwise lawful political activity.

GOOD NEWS - SUNSET PROVISIONS

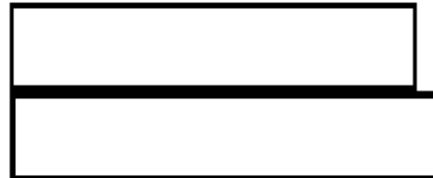
Many of our Sunset Provisions of the 10/26/2001
PATRIOT Act are made permanent



**BUT ...
NEW SUNSET PROVISIONS FOR:**



FISA Business Records Authority - 12/31/2009



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USA PATRIOT Act Renewal



FBI Office of General Counsel National Security Law Branch

Last updated 31 March 2006.

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Unclassified

1

Test

- USA PATRIOT Act is an acronym.
- Who can give me the full title?

Answer

- “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001.”

March 9, 2006

President renewed the USA PATRIOT Act
2001



Unclassified

4

USA PATRIOT Act 2001 Renewal Debate

- Congressional Activity 2005
- Between April 5, 2005 and June 10, 2005 Congress held 18 hearings concerning reauthorizing the USA Patriot Act. Hearings were held by:
 - Senate Select Committee on Intelligence (SSCI)
 - Senate Judiciary Committee (SJC)
 - House Judiciary Committee (HJC)
 - HJC's Subcommittee on Crime, Terrorism and Homeland Security
 - House Permanent Select Committee on Intelligence (HPSCI)

USA PATRIOT Act 2001 Renewal Debate

- Witnesses included:
 - Attorney General (along with 22 other DOJ employees).
 - FBI Director, General Counsel, Assistant Director of the Counterterrorism Division (along with three other FBI employees).
 - NSA and CIA officials.

USA PATRIOT Act 2001 Renewal Debate

- Congress concerned about other FBI activities --
 - Collection of information concerning innocent citizens.
 - Deposit of US Person information into government databases.
 - Data-mining.

USA PATRIOT Act 2001 Renewal Debate

- Trend during the debate—
- Congress wanted more Congressional, Judicial, and Public oversight.
- This oversight trend is reflected in the USA PATRIOT Act 2001 renewal.

USA PATRIOT Act 2001 Renewal

Actually required 2 new Public Laws to accomplish.

Public Law 109-177

Public Law 109-178

1st Amendment

- Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Bill of Rights



1st Amendment

- Section 124 of the USA PATRIOT IRA 2005 – expressed the sense of Congress that “federal investigations should not be based solely upon an American citizen’s membership in a non-violent political organization or their otherwise lawful political activity.”
- Reminder of FBI policy – Neither criminal nor national security investigations of US Persons may be predicated solely on their exercise of First Amendment rights.

Will cover changes in the new laws
as follows:

- Part 1 - Sunset Provisions.
- Part 2 - Changes in FISA tools. [REDACTED]



Part 1

Sunset Provisions of the USA PATRIOT Act 2001

USA PATRIOT Act 2001 Sunset Provisions - Permanent

- USAPA IRA makes most of the original USA PATRIOT Act 2001 (USAPA) sunset provisions permanent:



New Sunset Provisions

- December 31, 2009 [4 years] for –
- USA PATRIOT Act 2001 Section 206 **FISA Roving surveillance.**
- USA PATRIOT Act 2001 Section 215 **FISA Business Records.**
- FISA “lone wolf” provision of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA Section 6001).
 - This addressed the “lone wolf” terrorist by broadening the definition of “agent of a foreign power” to include an individual other than a USP who “engages in international terrorism or activities in preparation thereof.”

Part 2

Foreign Intelligence Surveillance Act (FISA) Investigative Tools

Changes to FISA Tools

January 11, 2013



- **FISA Business Records.**



FISA Business Records

- Changes to FISA Business Records Under Section 215 of the USA PATRIOT Act 2001.

FISA Business Records

- New "presumptive relevance" test.
- Special categories of tangible things.
- Recipient challenge/Judicial review.
- Minimization procedures w/i 180 days.

FISA Business Records

This authority may be used to obtain **"any tangible things (including books, records, papers, documents, and other items."**

- Broad – similar in scope to a Federal grand jury subpoena.
- The scope of this authority has not been changed.

FISA Business Records

Application shall include a statement of facts showing that there are **reasonable grounds** to believe that the tangible things sought are **relevant** to an authorized investigation (**other than a threat assessment**)...

- to obtain foreign intelligence information not concerning US person, or

- to protect against international terrorism or clandestine intelligence activities...

[This makes explicit the existing standard practice.]

FISA Business Records

The tangible things are **presumptively relevant** if the facts show they pertain to –

- (i) a foreign power or an agent of a foreign power;
- (ii) the activities of a suspected agent of a foreign power who is the subject of such authorized investigation; or
- (iii) an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of such authorized investigation.

[These cases probably cover most situations.]

FISA Business Records

- Describe the tangible things with **sufficient particularity** to permit them to be fairly identified.
- Contain a **date of return**.
- Date must give recipient **reasonable period of time** to produce.
- May only require the production of tangible things that would be available with a GJ subpoena or a District Court order [this maintains privileges (ex.: attorney/client)].

FISA Business Records

Special Categories:	<ul style="list-style-type: none">▪Library circulation records and Library patron lists.▪Book sales records and Book customer lists.▪Firearm sales records.▪Tax return information.▪Educational records.▪Medical records.
Special Approval Level:	The Director, the Deputy Director, or the Executive Assistant Director for National Security must make the application for special categories of tangible things that contain information that would identify a person...

FISA Business Records

Congressional Reporting:	AG must report annually on Special Categories to HPSCI, HJC, SSCI, and SJC.
--------------------------	-----------------------------------------------------------------------------

Note:	Approval authority for all FISA Business Record requests (except special categories): <ol style="list-style-type: none"><li data-bbox="519 1323 812 1386">1. Deputy Director;<li data-bbox="519 1407 1120 1470">2. EAD and associate EAD for the NSD;<li data-bbox="519 1491 1380 1680">3. the Assistant Director and all Deputy Assistant Directors of Counterterrorism, Counterintelligence, and Cyber Divisions;<li data-bbox="519 1701 1347 1848">4. the General Counsel, and the DGC for the National Security Law Branch.
-------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

FISA Business Records

No person shall disclose the fact that the FBI has sought tangible things [same as before].

Recipient may disclose order to –

- (1) Persons to whom disclosure is necessary to comply [same as before];
- (2) An attorney to obtain legal advice or assistance with respect to the production [new provision made explicit what had been implicit];
- (3) A person a permitted by the Director (or designee).

FISA Business Records

- Recipient shall notify the person of the nondisclosure.
- Person shall be subject to the nondisclosure.
- Director (or designee) may ask the recipient to identify the other persons to whom disclosure made **(except that the recipient does not have to identify the attorney)**.

FISA Business Records

- Recipient may move to modify or set aside the order [FISC jurisdiction].
- FISC may grant the motion only if the order does not meet FISA requirements or is otherwise unlawful.
- Security: All filings will be under seal, in addition to FISC established security measures.

FISA Business Records

Timing:	Not less than 1 year after order – recipient may move to modify or set aside the nondisclosure order.
FISA Court (FISC)	FISC may grant only if, based on the government's application and recipient's petition, no reason to believe that disclosure – may endanger the national security of the U.S., interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person.

FISA Business Records

Conclusive Certification

- After recipient's petition challenging nondisclosure, the government may choose to submit a certification by the AG, the DAG, an AAG, or the Director that a disclosure may endanger the national security or interfere with diplomatic relations.
- The FISC must treat the certification as conclusive.

FISA Business Records

- W/in 180 days of enactment (approx 9/9/2006).
- AG shall adopt minimization procedures to govern the retention and dissemination of information.
- Minimize the retention/Prohibit the dissemination:
 - Nonpublicly available info re unconsenting USPs.
 - Consistent with the US IC need to obtain, produce and disseminate foreign intelligence information.
- Evidence of a Crime: Procedures should allow for the retention and dissemination of this information.

FISA Business Records

▪AG to report annually (April) to HPSCI, HJC, SSCI & SJC.

▪Report on

- (1) total # of FISA BR applications,
- (2) total # of orders granted, modified, or denied, and
- (3) total # orders granted, modified, or denied for special categories.

▪AG to make an **unclassified annual report** (April) on the total # of FISA BR applications and total # of orders granted, modified, or denied (gives the public a view of activities).

FISA Business Records

<p>Scope & Timing</p>	<p>Comprehensive audit of effectiveness (including any improper or illegal use) covering 2002 to 2006.</p> <ul style="list-style-type: none">• Report to HSPCI, HJC, SSCI and SJC.
<p>Effectiveness of FISA BRs Process (including):</p>	<ul style="list-style-type: none">• How often FBI requested DOJ OIPR to submit an application and the request was not submitted (and why?).• Justification for the failure of AG to issue implementing procedures in a timely fashion, and whether the delay harmed national security.• Whether bureaucratic or procedural impediments prevent the FBI from fully using the tool.

FISA Business Records

Effectiveness of
FISA BRs
(including):

- Categories of info obtained and the importance of the info to the FBI and the IC.
- How info is collected, retained, analyzed, and disseminated by the FBI (including access of "raw data" to other agencies of the Federal, state, local, or tribal governments, or private sector entities).
- Minimization procedures adopted by AG.
- Whether/how often FBI used info to produce analytical intelligence products for the FBI, the IC, or other agencies of the federal, state, local or tribal governments.
- Whether/how often FBI provided info to law enforcement for criminal proceedings.

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PATENT ACT

□ The USA Patent Improvement and Reauthorization Act of 2005 went into effect on March 09, 2006.

□ Makes 14 of the 16 USA Patent Act provisions permanent.

PATRIOT ACT

UNITED STATES DEPARTMENT OF JUSTICE FEDERAL BUREAU OF INVESTIGATION

■

2 Creates a new 4 year sunset extension
for two USA Patriot Act provisions
through 12/31/2009.

[REDACTED]

10-10-09

7 FISA Business Records court orders

REPORT ACT

REPORT ACT

REPORT ACT

REPORT ACT

REPORT ACT

REPORT ACT

REPORT ACT

BUSINESS RECORDS

AMERICAN OVERSIGHT FOUNDATION

4

JFOIA Business Record authority has been modified to provide more safeguards to protect certain categories of personal information.

DISSEMINATION RECORDS

Special categories:

- Library circulation records
- Library patron lists
- Book sales records
- Book customer lists
- Medical sales records
- Tax return records
- Insurance records
- Medical records with identity information

BUSINESS MATTERS

These areas of categories of business records will require approval from:

- Security Director of the FBI or
- SAC for National Security

HEARINGS

COMMISSION ON THE ORGANIZATION AND ADMINISTRATION OF THE FEDERAL BUREAU OF INVESTIGATION

- The scope of FISA Business Records authority is very broad and includes:
 - Any tangible thing, including books, records, tapes, documents, and other items.

BUSINESS RECORDS

ACLU v. FBI, 2015-1098

- The legal standards for a FISA business records court order remain the same:
- "Reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation."

FOUNTAIN HEADINGS

FOUNTAIN HEADINGS

IR/CFR

*Tangible things are presumptive relevant if they contain:

- * A foreign power or agent of a foreign power.

- * The activities of a suspected agent of a foreign power and the subject of such authorized investigation or

- * A confidential source with or known to a suspected agent of a foreign power which has a history of unauthorized communications

BUSINESS RECORDS

FOIA Exemption 7(b) - Business Records

JFSA, Business Records, Court Order

- Describe the tangible things with sufficient particularity.
- Provide a date for return to which the items must be provided.
- Allow a reasonable period of time for compliance.
- The order may only require production of tangible things that would be available with a subpoena or court order (statutory privileges apply).

AMERICAN OVERSIGHT

AMERICAN OVERSIGHT

Non-Disclosure Provision

- No person shall disclose the fact that the FBI has sought or plans to engage under this authority, with these exceptions:
 - If you are necessary to compliance;
 - An attorney in legal advice.

NON-DISCLOSURE

Non-Disclosure

➤ If the business discloses the court order to others for purposes of compliance, the business must also inform those individuals of the non-disclosure requirement.

➤ The FBI may ask the business to identify those individuals to whom disclosure has been made (unless the identity of an attorney is sought for legal advice).

WISCONSIN DECISION

Quota or Challenge of the court order

➤ The recipient of a FISA business record court order may challenge the legality of the order in the FISA Court.

➤ Relief may be granted only if the court order does not meet legal requirements.

BUSINESS REWARDS

◻ Judicial challenge of non-disclosure

▶ 1 year after service of the court order, the recipient may challenge the non-disclosure provision

▶ if the non-disclosure provision is still necessary for national security, the FBI or AC can certify the need to continue the non-disclosure provision.

OPENING REMARKS

Minimization

- Within 180 days of enactment of the USA Patriot Reauthorization Act, the AG shall adopt minimization procedures governing retention and destruction of FISA Business Record information relating to unconsenting US Persons.

RUNNING RUNNING

THE FEDERAL BUREAU OF INVESTIGATION'S USE OF THE PATRIOT ACT

2

QADP

- ▶ Beginning in January 2006, the OIG DOJ began a comprehensive audit of the effectiveness and use of NSA Business Record authority (covering 2002 - 2005)

0112

What does USA PATRIOT Act stand
for?

U - Uniting and

S - Strengthening

A - America by

P - Providing

A - Appropriate

T - Tools

R - Required to

I - Intercept and

O - Obstruct

T - Terrorism



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Department of Justice

STATEMENT OF

**KENNETH L. WAINSTEIN
ASSISTANT ATTORNEY GENERAL
NATIONAL SECURITY DIVISION
DEPARTMENT OF JUSTICE**

BEFORE THE

**PERMANENT SELECT COMMITTEE ON INTELLIGENCE
UNITED STATES HOUSE OF REPRESENTATIVE**

CONCERNING

**THE JUSTICE DEPARTMENT INSPECTOR GENERAL'S FINDINGS ON
THE FBI'S USE OF NATIONAL SECURITY LETTERS**

PRESENTED

MARCH 28, 2007

**Statement of
Kenneth L. Wainstein
Assistant Attorney General**

**Before the
Permanent Select Committee on Intelligence
United States House of Representatives**

**Concerning the
Justice Department Inspector General's Findings on
the FBI's Use of National Security Letters**

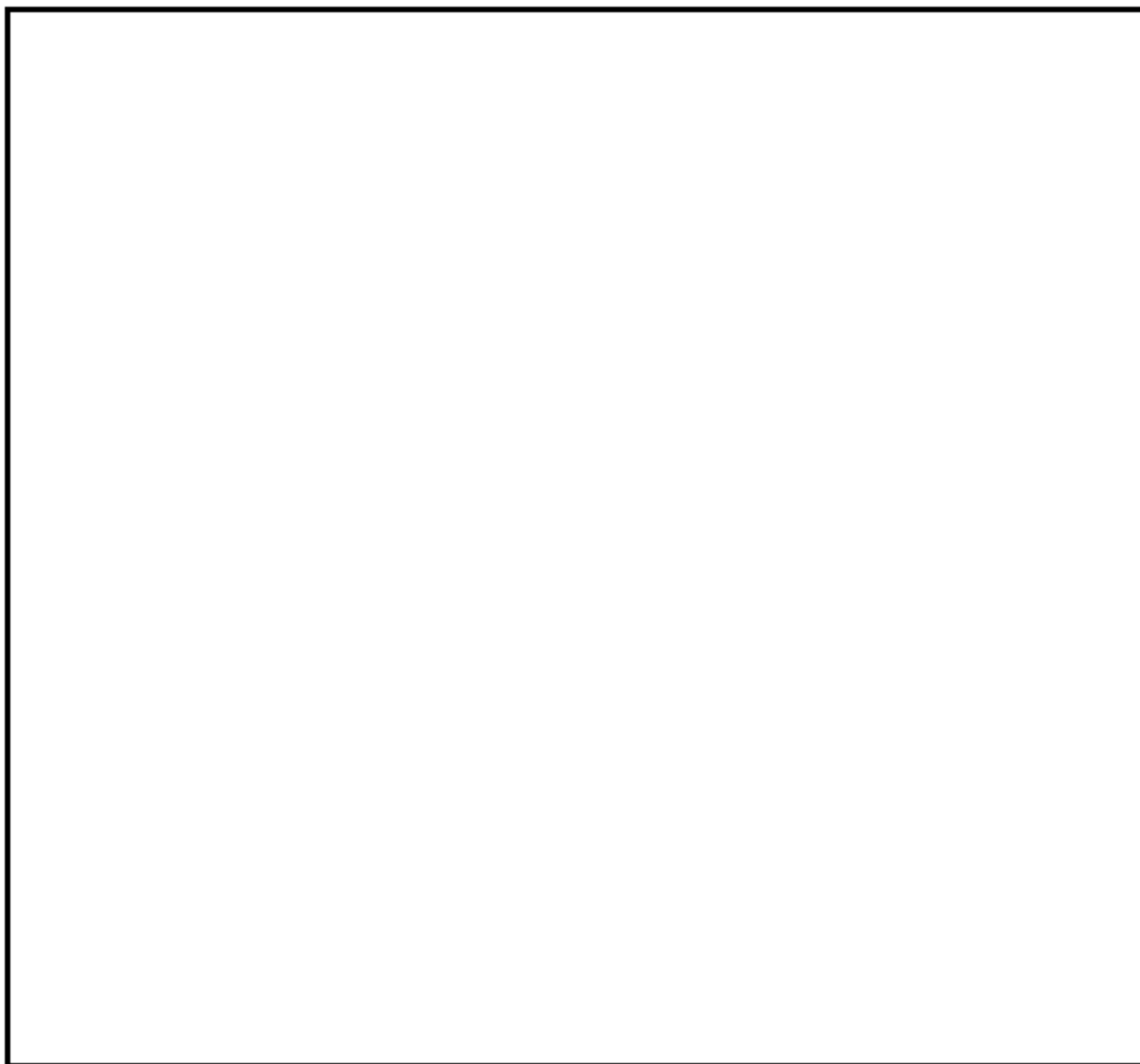
March 28, 2007

Thank you, Chairman Reyes, and Ranking Member Hoekstra, and good morning to all the distinguished members of this committee. I look forward to speaking to you today regarding the recent reports of the Department of Justice's Inspector General regarding the FBI's use of national security letters and the authority granted in Section 215 of the USA PATRIOT Act.

Let me briefly mention at the outset the Inspector General's findings with respect to Section 215 of the USA PATRIOT Act, which authorizes specified FBI officials to file applications with the Foreign Intelligence Surveillance Court to compel production of business records and other tangible things in connection with national security investigations. The Inspector General's report indicates that this authority has been used responsibly. Indeed, the Inspector General did not make any specific recommendations for improvements or other modifications to Justice Department procedures and practices for use of this authority. While the Inspector General did determine that there were some initial delays in using section 215 authority, he noted that they did not result in any harm to national security. The Inspector General also explained that many of the legal, bureaucratic, and process impediments that initially got in the way have now been addressed by the Department.

While the Inspector General also identified two instances of what he determined were “improper” uses of a section 215 order, both involved inadvertent mistakes by an agent or a third party that resulted in small amounts of overcollection. This overcollected information was sequestered and destroyed, and each matter was reported to the Intelligence Oversight Board and the Court, in accordance with FBI procedures. That captures the primary findings of the Inspector General’s 215 report, and I look forward to answering any questions that you may have on that report.

Thank you, Mr. Cooper.



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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 28, 2010

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy:

Enclosed please find responses to questions for the record stemming from the appearance of Robert Mueller, Director of the Federal Bureau of Investigation, before the Committee on January 20, 2010, at a hearing entitled "Securing America's Safety: Improving the Effectiveness of Anti-Terrorism Tools and Inter-Agency Communication." Please note that the attached document includes a response to question 13(a) and therefore represents a complete response to the unclassified questions. We hope that this information is of assistance to the Committee.

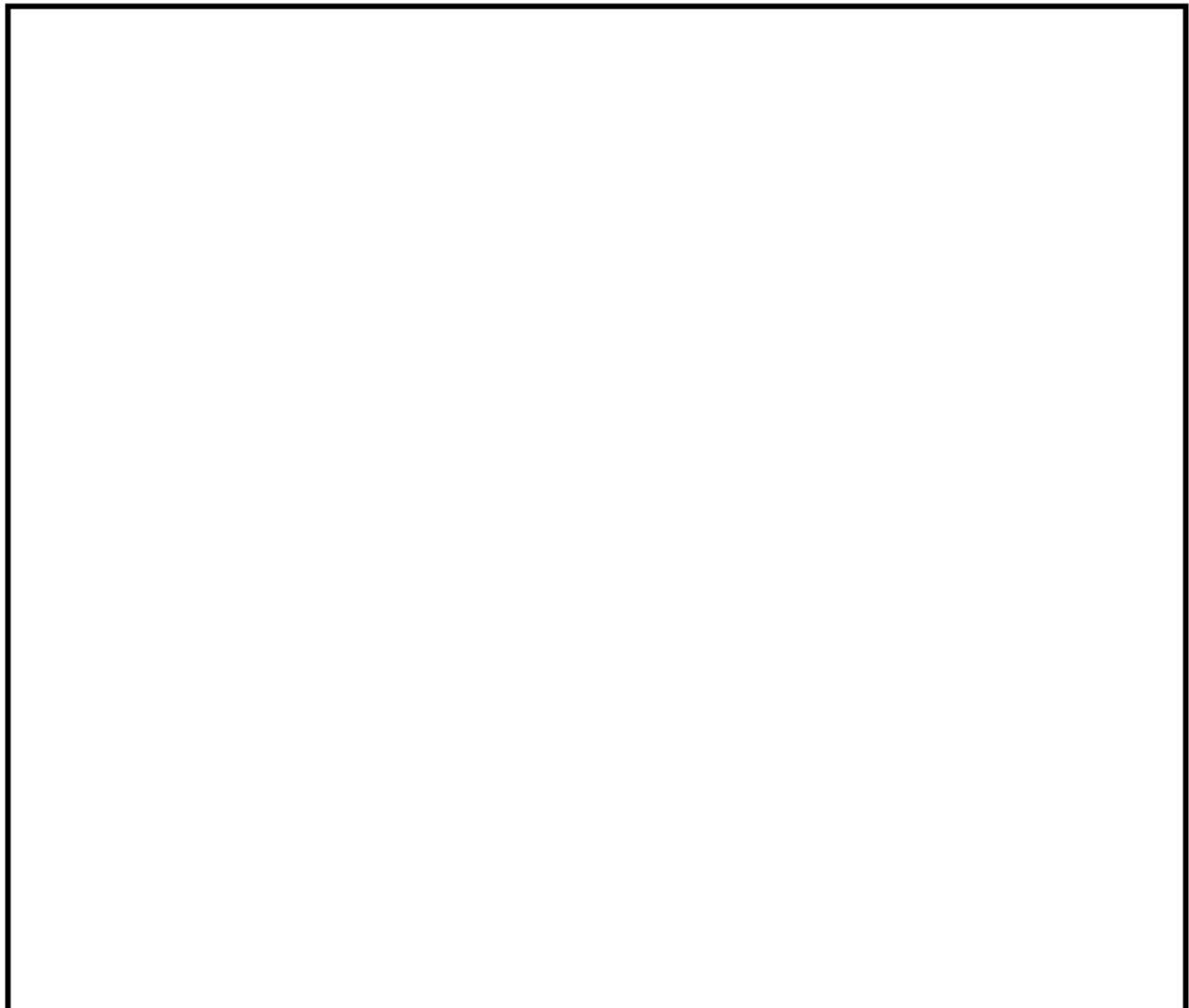
Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that there is no objection to submission of this letter from the perspective of the Administration's program.

Sincerely,

Ronald Weich
Assistant Attorney General

Enclosure

cc: The Honorable Jeff Sessions
Ranking Member



9. The FBI's internal review on Fort Hood called for "strengthened training addressing legal restrictions which govern the retention and dissemination of information." Press reports indicate that the Joint Terrorism Task Force that examined Major Hasan's case prior to the attack at Fort Hood shared information on Hasan with DOD personnel. Is that accurate? Did the FBI find that there were any legal barriers to sharing information about Major Hasan that was in its possession with the Department of Defense?

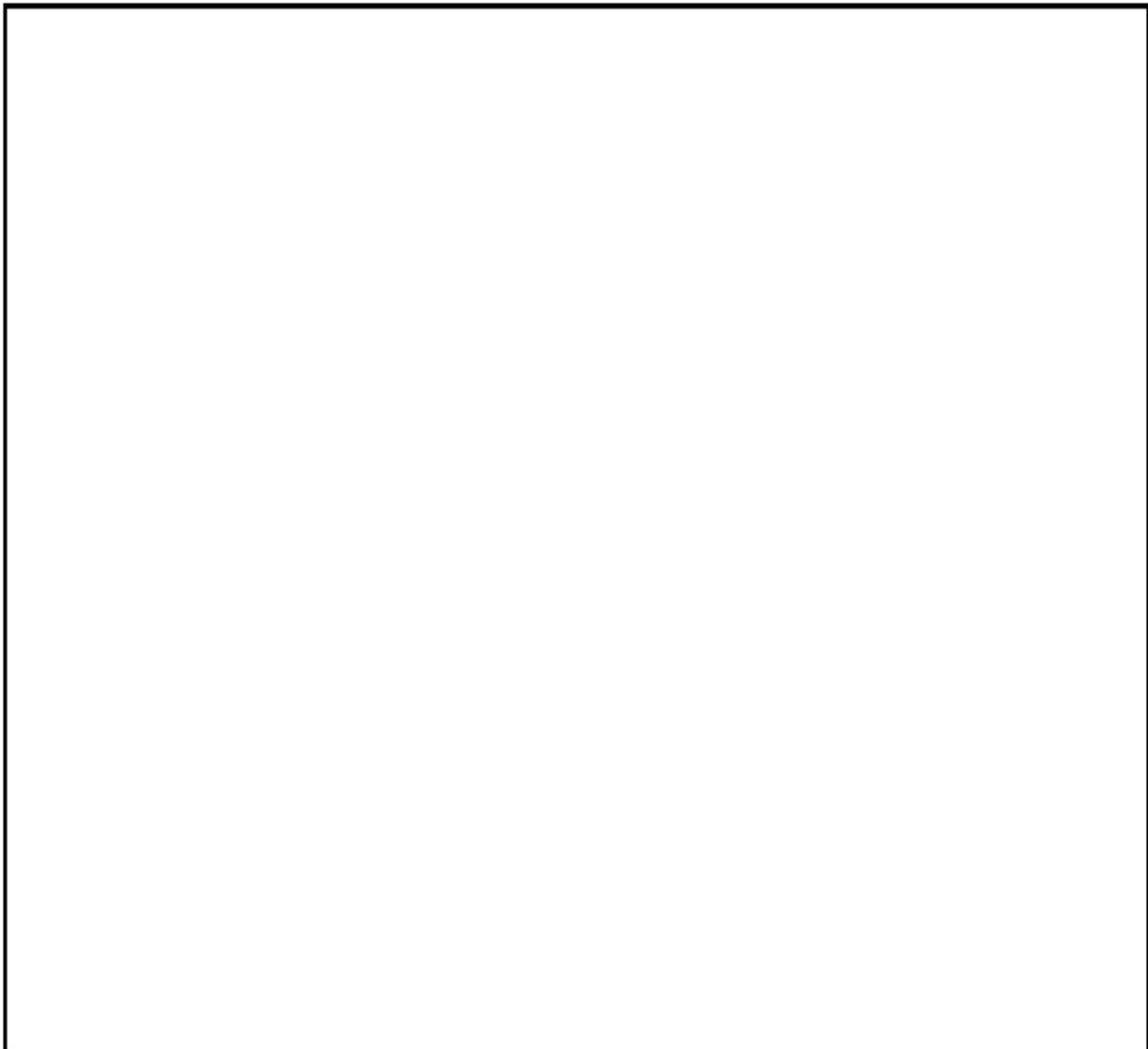
Response:

There are legal restrictions on the FBI's ability to share sensitive information, including those imposed by the Foreign Intelligence Surveillance Act (FISA), Attorney General's Guidelines, and Executive Order 12333, and those that apply to the dissemination of classified information. Generally, information about U.S. persons from sensitive sources cannot be disclosed unless certain legal thresholds

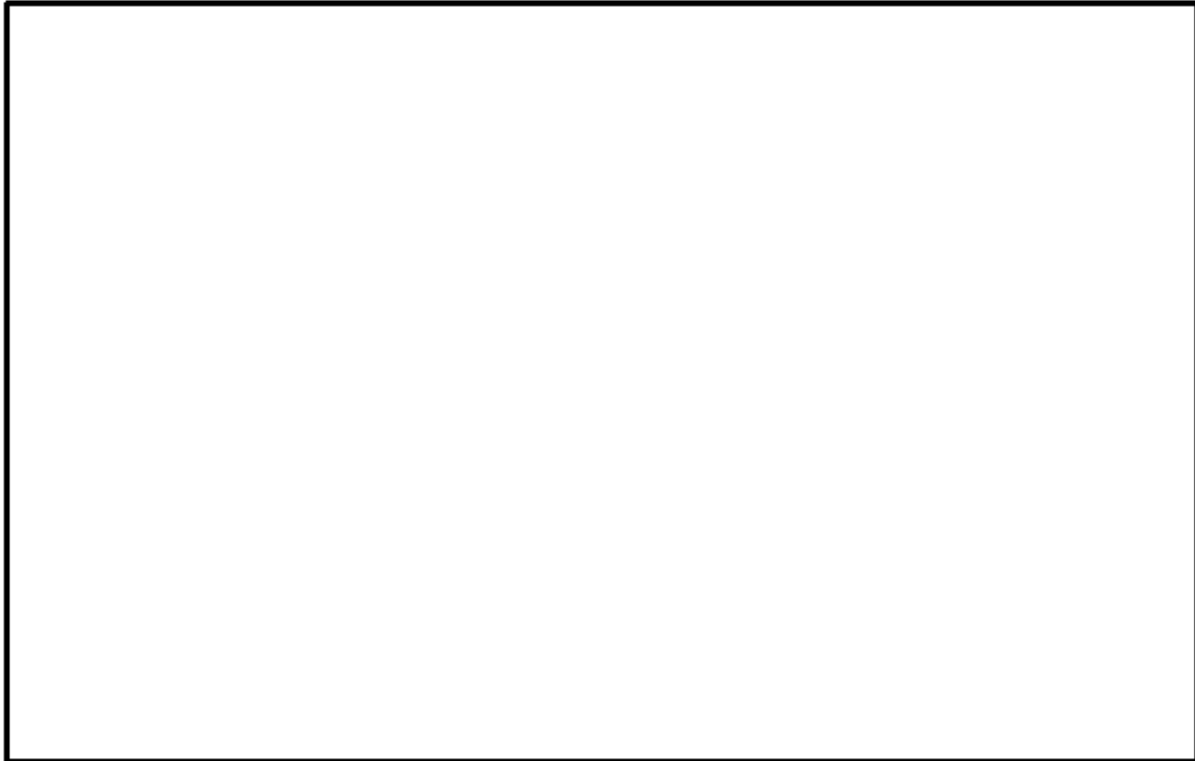
are met. Nonetheless, under the Memorandum of Understanding governing DoD participation on FBI-led JTTFs, DoD detailees to the JTTFs may share information outside of the JTTFs with permission from an FBI supervisor.

DoD agents assigned to a JTTF took part in evaluating certain information regarding Major Hasan that came to the FBI's attention prior to the shootings. Because they believed the information was explainable by Major Hasan's academic research and because there was no derogatory information in the personnel files they reviewed, they determined, in consultation with an FBI JTTF supervisor, that Major Hasan was not involved in terrorist activity or planning. Based on that judgment, a decision was made not to contact Major Hasan's superiors in the Army.

ACLU 10-11-13-001



ACLU Sect. 215-476



Questions Posed by Senator Hatch

13. There are three expiring provisions of the PATRIOT Act. In previous testimony before this committee, you have heralded these provisions as critical investigative tools that the FBI needs to detect and thwart terror plots. For example, the three separate terror plots in Illinois, Texas and New York detected by the FBI last September. In December, Congress only temporarily reauthorized these provisions without any modifications. I have some concerns that any modifications to these investigative tools would “water them down” and unnecessarily increase the investigative burden on the FBI before these tools may be used.

a. Can you tell me if you would support a full reauthorization of these provisions without any modifications?

Response:

The FBI continues to support the reauthorization of the USA PATRIOT Act’s expiring provisions, which concern roving wiretaps, Section 215 business record orders, and the “lone wolf” provision. The Attorney General and Director of National Intelligence have previously advised the Congress that S. 1692, the USA PATRIOT Act Sunset Extension Act, as reported by the Senate Judiciary Committee, strikes the right balance by both reauthorizing these essential national

ACLU Sect. 215-477

security tools and enhancing statutory protections for civil liberties and privacy in the exercise of these and related authorities. Since the bill was reported, a number of specific changes have been negotiated with the sponsors of the bill for inclusion in the final version of this legislation. Among these are several provisions derived from the bills reported by the House Judiciary Committee and introduced by House Permanent Select Committee on Intelligence Chairman Silvestre Reyes in November.

The FBI has been authorized to use the roving wiretap authority many times and we have found that it increases efficiency in critical investigations. This authority affords us an important intelligence gathering tool in a small, but significant, subset of electronic surveillance orders issued under FISA. Roving wiretap authority is particularly critical for effective surveillance of investigative subjects who have received training in countersurveillance methods.

Section 215 orders for business records play an important role in national security investigations as well. This authority allows us to obtain records in national security investigations that cannot be obtained through the use of National Security Letters. In practice, this tool is typically no more intrusive than a grand jury subpoena in a criminal case. Unlike most criminal cases, though, the operational secrecy requirements of most intelligence investigations require the secrecy afforded by this FISA authority. There will continue to be instances in which FBI agents must obtain information that does not fall within the scope of National Security Letter authorities and is needed in an operating environment that precludes the use of less secure criminal investigative authorities.

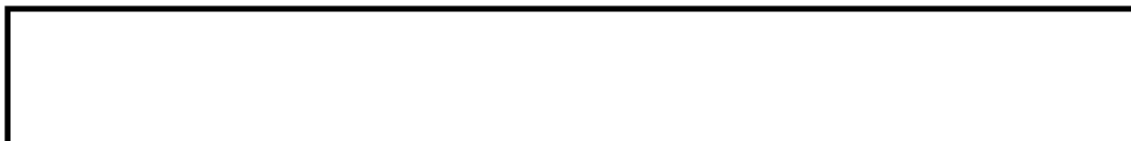
Finally, although the "lone wolf" provision has never been used, it is an important investigative option that must remain available. This provision gives the FBI the flexibility to obtain FISA warrants and orders in the rare circumstances in which a non-U.S. person engages in terrorist activities, but his or her nexus to a known terrorist group is unknown.

b. Can you confirm if any of these expiring provisions were used by the FBI in the investigation of these plots?

Response:

As discussed previously, the FBI continues to support the renewal of the three expiring provisions.

Additional information responsive to this inquiry is classified and is, therefore, provided separately.

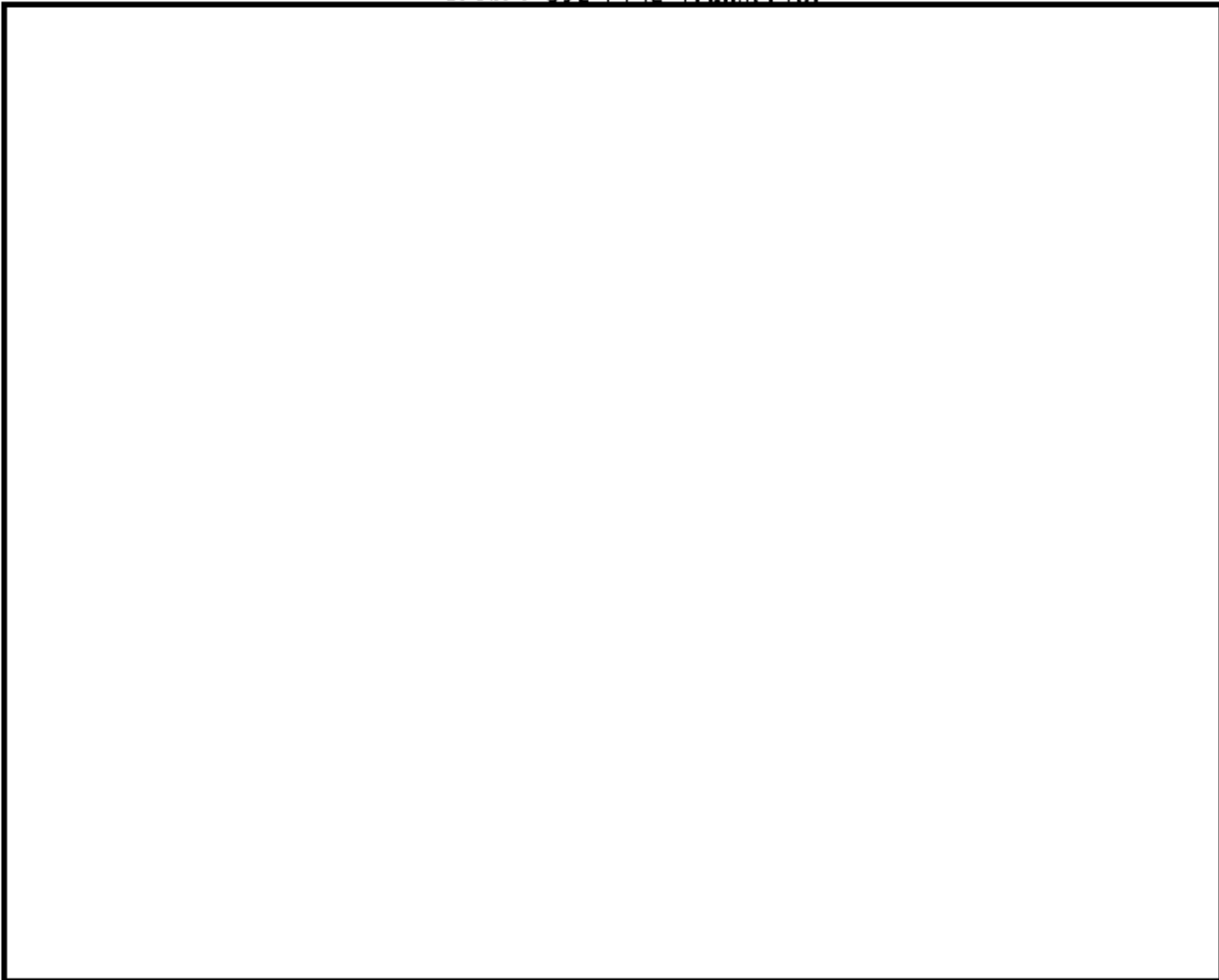


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070321 SJC Fine Transcript



HATCH:

With regard to Section 215, did you find any utilization of the 215 authorities to go to libraries?

FINE:

No, we found that they did not seek a 215 order for library records. There were a few where there was a request for it within the FBI, but in the process prior to application to the FISA Court, they were withdrawn.

HATCH:

In fact, regarding the Section 215 portion of the report, it appears that even though 215 orders were not utilized often -- and that's a fair characterization, isn't it?

FINE:

They were not utilized often. In fact, in the three-year period that we reviewed, they were utilized, pure 215 orders, approximately 21 times.

HATCH:

But they were valued by FBI agents as a tool to try and interdict and work against terrorism.

070321 SJC Fine Transcript

FINE:

The FBI agents did tell us they thought it was a specialized tool that could get important information in certain cases that others could not.

HATCH:

You mentioned that FBI personnel stated during interviews that the kind of intelligence gathered from Section 215 orders is essential to national security investigations and that the importance of the information is sometimes not known until much later in the investigation. That's a fair characterization.

FINE:

That's what some of them told us, yes.

HATCH:

Given that you did not find widespread misuse of this 215 authority, do you feel like the FBI was careful in its application and that agents exhibited proper restraint in its use, if they did not fully understand the process and requirements of obtaining these orders?

FINE:

Well, in the 215 process, we did find that there were controls over it, that there were levels of review that prevented the misuse of the 215 authority.

In some sense, it was -- there were delays in the process and there was a significant amount of time for them to get a 215 order, which is why some of them thought it was not terribly effective.

On the other hand, the multiple levels of review and the internal controls prevented the misuse of these authorities.

HATCH:

And, frankly, the 215 authorities have been utilized by law enforcement -- anti-crime law enforcement -- for many years before the Patriot Act.

FINE:

The Patriot Act expanded the use of -- the predicate for 215s, but it was in existence, that kind of authority, yes.

HATCH:

And we've always been able to go to libraries and on a quest to find evidence against crime. Is that correct?

FINE:

In certain cases.

HATCH:

Certainly, it seems to me, in terrorism cases or major criminal cases.

FINE:

Criminal cases, they had that authority to do to libraries.

WHITEHOUSE:

Yes.

Final point, if you don't mind a moment, Senator Feingold, a final question: There's been some testimony given on the House side that the FISA 215 orders are too cumbersome. And if you tried -- the 215 order would technically allow you to get all of the information that is now obtained through the national security letters, but that the process of using that vehicle would be so cumbersome that it would essentially grind a lot of what we need to do to a halt.

In between allowing the FBI, completely unsupervised, to exercise oversight over themselves, with, you know, demonstrated failure to date in that respect, and a full-blown FISA 215, are you prepared to recommend whether there is any intermediate step that this committee and this Congress might consider to see that the FISA Court or somebody at least, outside of the immediate administrative structure of the bureau, at least has some kind of sign-off on whether the approval process is being done right?

WHITEHOUSE:

Should that be located elsewhere? And is the FISA Court an appropriate place?

FINE:

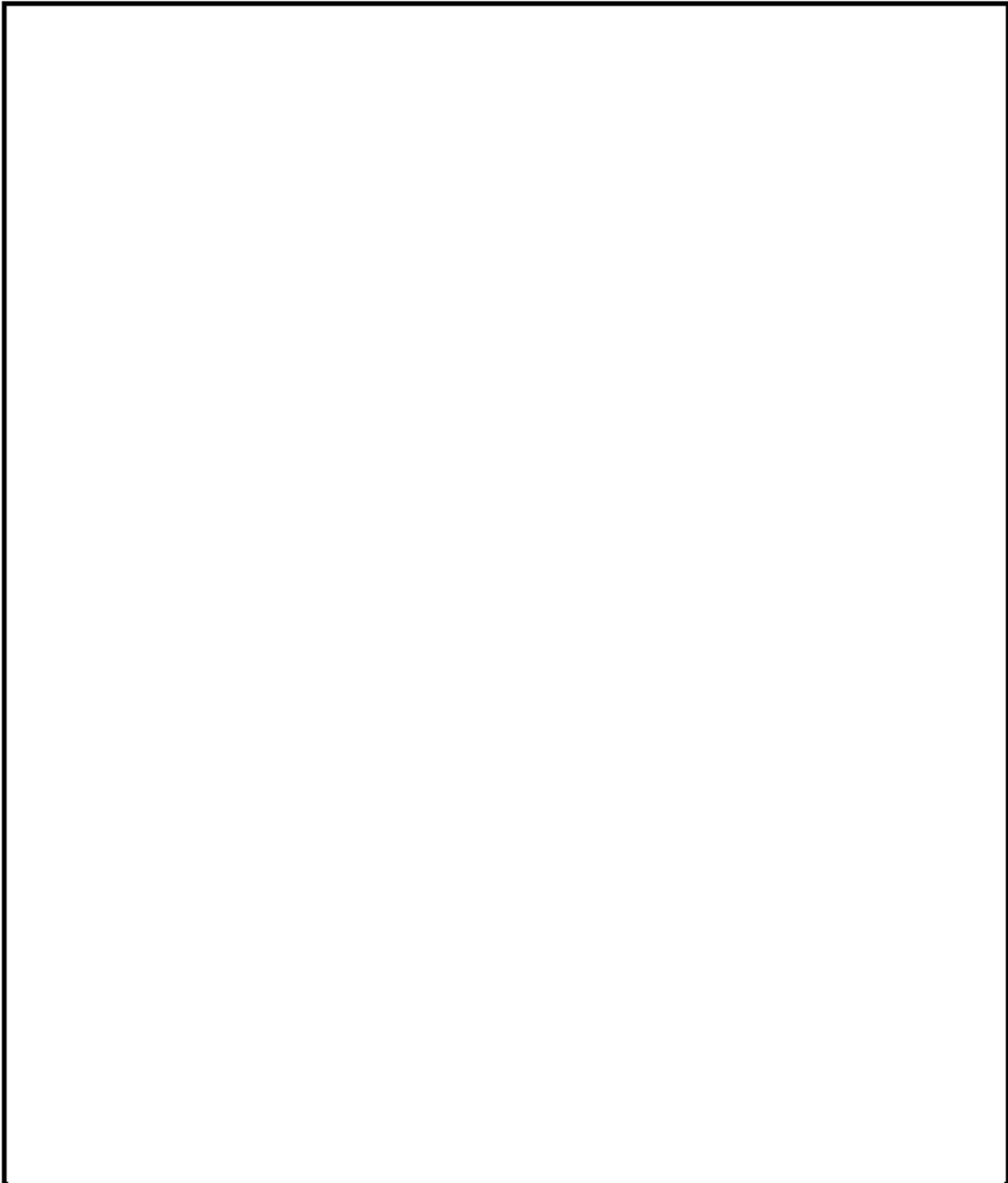
I'm not prepared to recommend a specific legislative piece. I'd have to sort of address it on a case-by-case basis.

I think that is obviously a consideration to be reviewed. And whether there should be review of these by an entity outside the FBI, whether it's in the Department of Justice or whether it's a local prosecutor, that's obviously an issue that both this committee and the Congress need to review, along with

the input of the department and the FBI about what that would mean.

WHITEHOUSE:

OK. Well, I appreciate your testimony very much today.
And Senator Feingold has the floor.



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PATRIOT ACT

March 25, 2009 Senate Judiciary Committee

CARDIN:

Thank you, Mr. Chairman. And let me thank Director Mueller for your service and thank you for being here today.

I want to talk about the Patriot Act. There are three major provisions that will sunset during 2009 that will need to be taken up by Congress. This committee will have a significant role in regards to the reauthorization and perhaps modifications of the roving wiretaps, the business records, and the lone wolf provisions.

I would hope you could share with us the importance of these provisions, whether you believe that there will be efforts made to extend these sunsets and whether you will be recommending modifications in these laws and what process you are intending to go through to work with Congress as we take up these issues, which, in the past, have been somewhat controversial.

MUELLER:

My hope, quite obviously, is that they'll be less controversial as they come up this time, because we have seen their use and have some track record with it.

Starting with the business records provision, 215, we have utilized that 223 times between 2004 and 2007. We don't yet have the records or the total for 2008. But it has been exceptionally helpful and useful in our national security investigations.

With regard to the roving wiretap provision that is also sunseting, we've used that 147 times, and that also has eliminated a substantial amount of paperwork and, I would say, confusion in terms of the ability for us to maintain surveillance, electronic surveillance on an individual where we can utilize that roving wiretap provision.

As to the lone wolf provision, while we have not -- there has not been a lone wolf, so to speak, indicted, that provision is tremendously helpful where we have a difficulty in showing a tie between a particular individual who -- about whom we have information that might be supporting terrorism and be a terrorist, but we have difficulty in identifying the foreign power for which he is an agent, whether it be a terrorist group or otherwise, what we call the Mussawi problem, where the issue was the inability for us to tie Mussawi to a particular terrorist group.

So that also is a provision that has been, I believe, beneficial and should be reenacted.

I have not yet had an opportunity, with the new administration, to have a discussion about the position. I know we'll be working with the Department of Justice on these three provisions, but my hope is that the department will support the reenactment of all three and that we can sit and work with Congress to explain, if necessary, more fully how important they are to our work.

CARDIN:

Well, I very much appreciate your response. Having the total numbers of uses is useful, very helpful.

In regards to the business records, there's been some press that has been less than favorable on some of the applications.

But this may not be the right forum to get into more detail, but I do think it's important that the Judiciary Committee, in its oversight function, and the Intelligence Committee, in its oversight function, examine more specifics, for two years.

One, I think most of us believe these tools are extremely important and we want to make sure that you have the tools that you need. We want to make sure that there is the appropriate oversight.

We normally get more attention as we get closer to the deadlines on extending sunsets that other times during the year, we want to make sure we take advantage of this opportunity to get a better understanding so we are on the same page as to what tools are needed.

And the third point is there may need to be modifications, not necessarily restrictions. There may need to be a fine-tuning of these provisions to make sure that they're more effective and used as intended by Congress.

So I would just encourage you to work with the chairman of our committee, the chairman of the Intelligence Committee, so that we can feel more comfortable working with the administration.

I know it's early in the new administration, but this issue is going to come up quicker than we think and the one thing I don't want to see happen is that we have a deadline without an opportunity to be fully comfortable with a bill that would extend the provisions in the Patriot Act.

SESSIONS:

Thank you, Mr. Chairman.

And I think the Patriot Act was carefully constructed. We had some very vigorous and -- hearings.

And I believe all the provisions in it are consistent, do you not agree, Mr. Mueller, with traditional law enforcement methods, many of which have been used in other circumstances and even in terrorism, and that care was taken not to violate any of the great constitutional protections that we cherish in this country?

MUELLER:

I do. I'm, not surprisingly, a strong supporter of the Patriot Act, particularly the areas where it broke down the walls between ourselves and the intelligence community.

Senator Specter alludes to the changes since September 11th. One of the substantial change since September 11th has been, quite obviously, our sharing of information with the intelligence community and vice versa. And that was attributable to the Patriot Act.

The three provisions that are to sunset are important provisions that we hope will again be reenacted when it comes up for vote.

May 20, 2009 House Judiciary Committee

SMITH:

Thank you.

Recently, you've said that you support reauthorization of the three expiring provisions of the Patriot Act.

Do you foresee any need to make any changes in those three expiring provisions?

MUELLER:

No, I previously, when questioned, testified that the three provisions, the first one, the business records provision, has been exceptionally useful for us over the period of time that it's been on the record books and we've used it over 230 times.

The second provision that is sunseting relates to roving wiretaps. We've used that over 140 times. It has been exceptionally useful and cut down on not only paper, but also enabled us to better facilitate our investigations.

And, lastly, the Lone Wolf provision, while we have not used it with regard to an indictment, it continues to be available for that individual whom we lack evidence to put with a particular terrorist group, but does present a threat as an international terrorist.

Each of those three provisions are important to us. And while I don't believe the Department of Justice has yet weighed in with its letter, this is what I've testified to in the past and is my current opinion.

SMITH:

And you don't foresee the need to make any changes in any of those provisions.

MUELLER:

Not at this juncture.

September 16, 2009 Senate Judiciary Committee

FEINSTEIN:

And we have to find a way to stop that. So, I'd like to talk with you. But I'd like to turn now to a FISA matter, the three sun-setting provisions of the Patriot Act, the lone wolf, the business letters and the roving wiretaps. This -- is an issue where two committees have jurisdiction, both the Judiciary Committee and the Intelligence Committee.

I spoke with Senator Leahy yesterday and indicated that we'd like to work together, if possible, so we don't get into battles of sequential referrals and that kind of thing. It was my thinking simply to extend those three provisions until the Patriot Act is up for reauthorization, which is three years hence. I believe Senator Leahy will submit a bill that does some other things as well.

I have just received a copy of a letter, or a letter directed to me and the vice chairman of intelligence, dated September 14, by the Justice Department, saying that they are in full support of reauthorization of all three provisions; and that they, if there were some ideas for some changes, they would be happy to discuss them. The letter is signed by Ron Weich. And it's a rather forceful case for continuation.

I would like to ask you if you would discuss your use of those three provisions and their relevance today in the continuing concerns about terror infiltrating our country.

MUELLER:

Well, let me start by saying I hope you reinforce each other to -- to, again, pass these three -- these three provisions.

LEAHY:

We'll work it out.

FEINSTEIN:

Right.

MUELLER:

The -- first of all, the business records, 200 -- 215, between 2004 and 2009, we've used that more than 250 times. I make the point that that provision is used with the approval of the FISA court. And the business records that are sought there relate almost -- not all the time -- but almost solely to terrorist investigations in which the records that are received are absolutely essential to identifying other persons who may be involved in terrorist activities.

FEINSTEIN:

Involving a foreign terrorist.

MUELLER:

Involving a -- a -- a -- someone who is a -- yes, a foreign terrorist.

FEINSTEIN:

So, you're prepared to say that there is no domestic exclusivity, but that this relates to a foreign terrorist.

MUELLER:

Well, it relates to an agent of a foreign power.

FEINSTEIN:

Exactly.

MUELLER:

Agent of -- as it says in the...

FEINSTEIN:

Yes, exactly.

MUELLER:

... in the FISA statute.

FEINSTEIN:

So, each one would.

MUELLER:

Yes. My understanding is that 215 relates to any investigation relating to...
[CROSS-TALK]

FEINSTEIN:

It does and (inaudible) it's being used that way.

MUELLER:
Yes.

FEINSTEIN:
OK.

MUELLER:
Let me just check and make sure that's so. Yes.

LEAHY:
The...

FEINSTEIN:
Can we...

LEAHY:
Do you want to add to the question?

FEINSTEIN:
Oh, I -- if he could just finish quickly...

LEAHY:
Sure.

FEINSTEIN:
... on the -- the lone wolf provision...

MUELLER:
OK.

FEINSTEIN:
... and the roving wiretap.

MUELLER:
Roving wiretaps we used approximately 140 times over the -- the -- those same years. And it's tremendously important. With the new technology, it is nothing to buy four or five cell phones at the same time and use them serially to avoid -- to avoid coverage. And the roving wiretaps are used in those circumstances, where we make a case that is going to happen. And we've got approval for it. It's essential, given the technology and the growth of technology that we've had.

As to the lone wolf, that has been -- that has not been used yet. But my belief is it needs to be there, where we have an individual, such as Moussaoui, whom we need to go up and get a FISA warrant, either for a search or a -- an interception and cannot identify

specifically, with specificity, a particular foreign power that is particularized terrorist organization, that he belongs to.

But we -- the need to, as they say in this lone wolf -- lone wolf context -- go to a FISA court and say, OK, this is a lone wolf. We can't put the -- the tie to this particular terrorist group. But here are the reasons why we need to go up on this individual. So, my belief is each of these three provisions are important to our work.

FEINSTEIN:

Thank you, Mr. Chairman, for allowing him to answer.

September 30, 2009 Senate Homeland Security

MR. MUELLER: I'll leap into the fray and say yes. The Patriot Act is going to be debated. I know those provisions have been very essential to us, particularly the first two which relate to the business records provision and, secondly, the roving wiretaps. And a third, while it has not been used, lone wolf will be and is important if we get the similar situation that we had with Musawi in 2001. So I would urge the reenactment of those provisions.

I also would make a point in terms of national security letters. Our success and our information is in large part attributable to the information we can gather, not of substantive conversations but of the tag data or the telephone toll data that we obtain by reason of national security letters. So it's really retaining these capabilities that is important.



U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

January 25, 2008

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed responses to questions posed to FBI Director Robert S. Mueller III, following Director Mueller's appearance before the Committee on March 27, 2007. The subject of the hearing was "Oversight of the Federal Bureau of Investigation."

The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to the submission of this letter. Please do not hesitate to contact this office if we may be of further assistance with this, or any other matter.

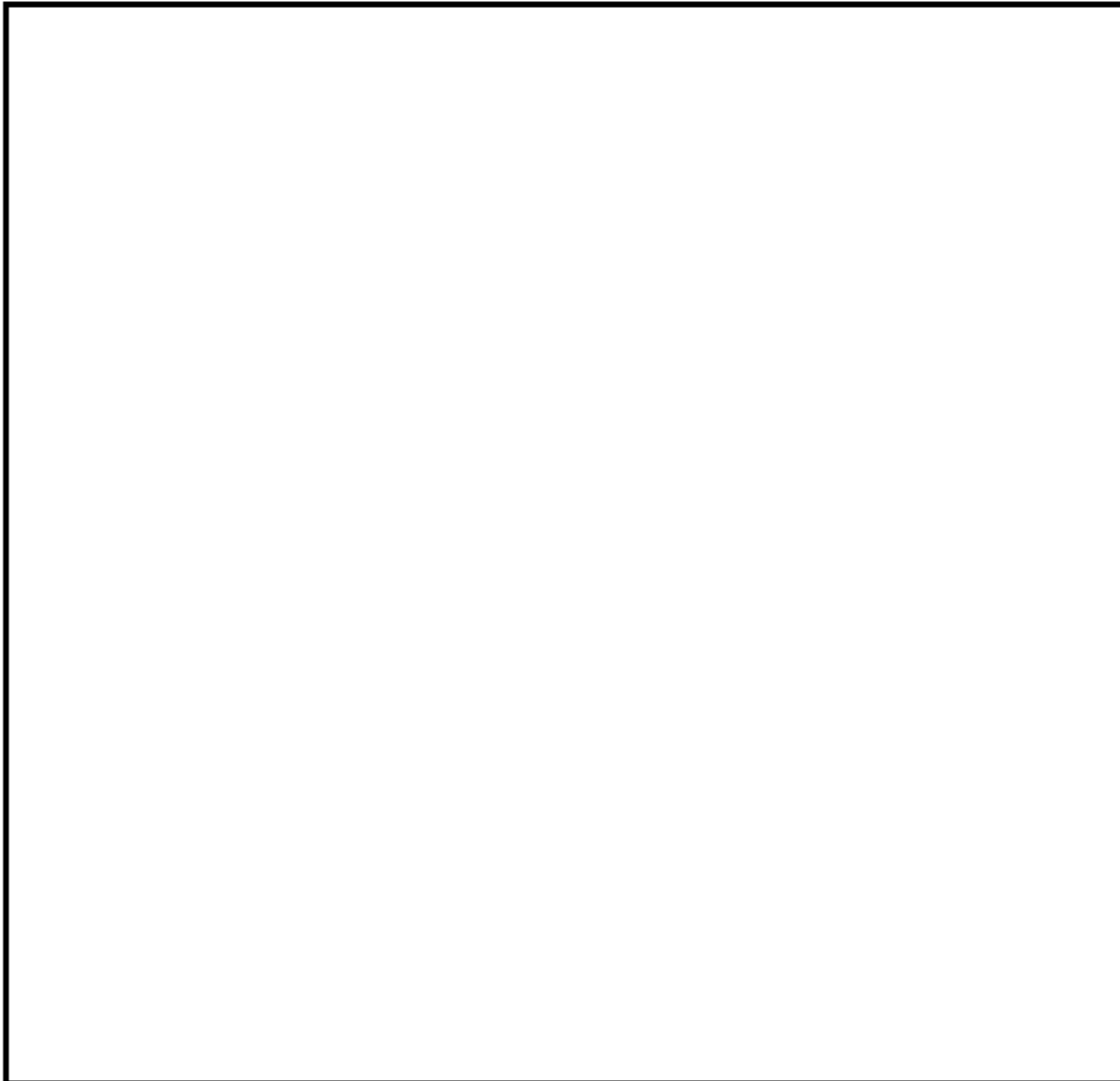
Sincerely,

Brian A. Benzekowski
Principal Deputy Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member

ACLU Sect.
215-722



12. During the hearing, you cited the Inspector General's Report on Section 215 of the PATRIOT Act, which found that the FBI rarely used this authority to obtain library records. However, I am concerned that the FBI is using other provisions in the PATRIOT Act to obtain this information, thereby circumventing the safeguards and reporting requirements of Section 215. For example in 2005, the FBI issued NSLs to four Connecticut libraries asking them to surrender "all subscriber information, billing information and access logs of any person" related to a specific library computer during a specific time period, pursuant to Section 505 of the PATRIOT Act. These NSLs also

prohibited the librarians from disclosing the fact that they had received the NSLs or their contents -- the so-called "gag order" under the PATRIOT Act.

a. Please describe the circumstances surrounding the FBI's decision to issue these National Security Letters.

Response:

We believe the report that NSLs were served on four Connecticut libraries is erroneous. The FBI served one NSL on the Executive Director of Library Connections, Inc., an Internet service provider that furnishes computer services to several libraries. No library was served. Three directors of Library Connections, Inc., have apparently described themselves as individual NSL recipients, but the case agent who served the NSL on one official had no contact with the others.

This one NSL was issued in order to follow up on an alleged local connection to international terrorism. The FBI sought subscriber information, toll billing records, and logs relative to those who had access to the communications services during relevant times. The NSL was very narrowly tailored to seek information for only a 45-minute period.

b. Please identify all of the PATRIOT Act provisions that the FBI has used to obtain library records from libraries and educational institutions?

Response:

We understand the term "library records" to mean records of libraries that reflect loans of books, movies, and similar materials to library patrons. We are not aware of any use of the USA PATRIOT Act to obtain such "library records" from educational institutions or libraries. As indicated in the previous response, we are aware that one NSL was served on a company that provides computer services, including Internet access, to several libraries. This NSL was authorized by 18 U.S.C. § 2709, which was amended by section 505 of the USA PATRIOT Act.

c. Is the FBI circumventing the requirements of Section 215 by relying on other provisions in the PATRIOT Act to obtain this information?

Response:

The premise of this question appears to be that the sole authority for obtaining information from a library or educational institution is section 215 of the USA PATRIOT Act. In fact, libraries and schools are subject to grand jury subpoenas

and NSIs under certain circumstances. If a library provides Internet service that meets the definition of an electronic communication service, as defined in 18 U.S.C. § 2510(15), then the library is an electronic communication service provider to which the provisions of 18 U.S.C. § 2709 apply. Similarly, while special rules govern the acquisition of a student's records from a university, an NSI can be used to obtain toll billing records if the school is functioning as a telephone company relative to the provision of campus telephone services.

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**Digest of Director's Hearing
Before the Senate Judiciary Committee
March 30, 2011**

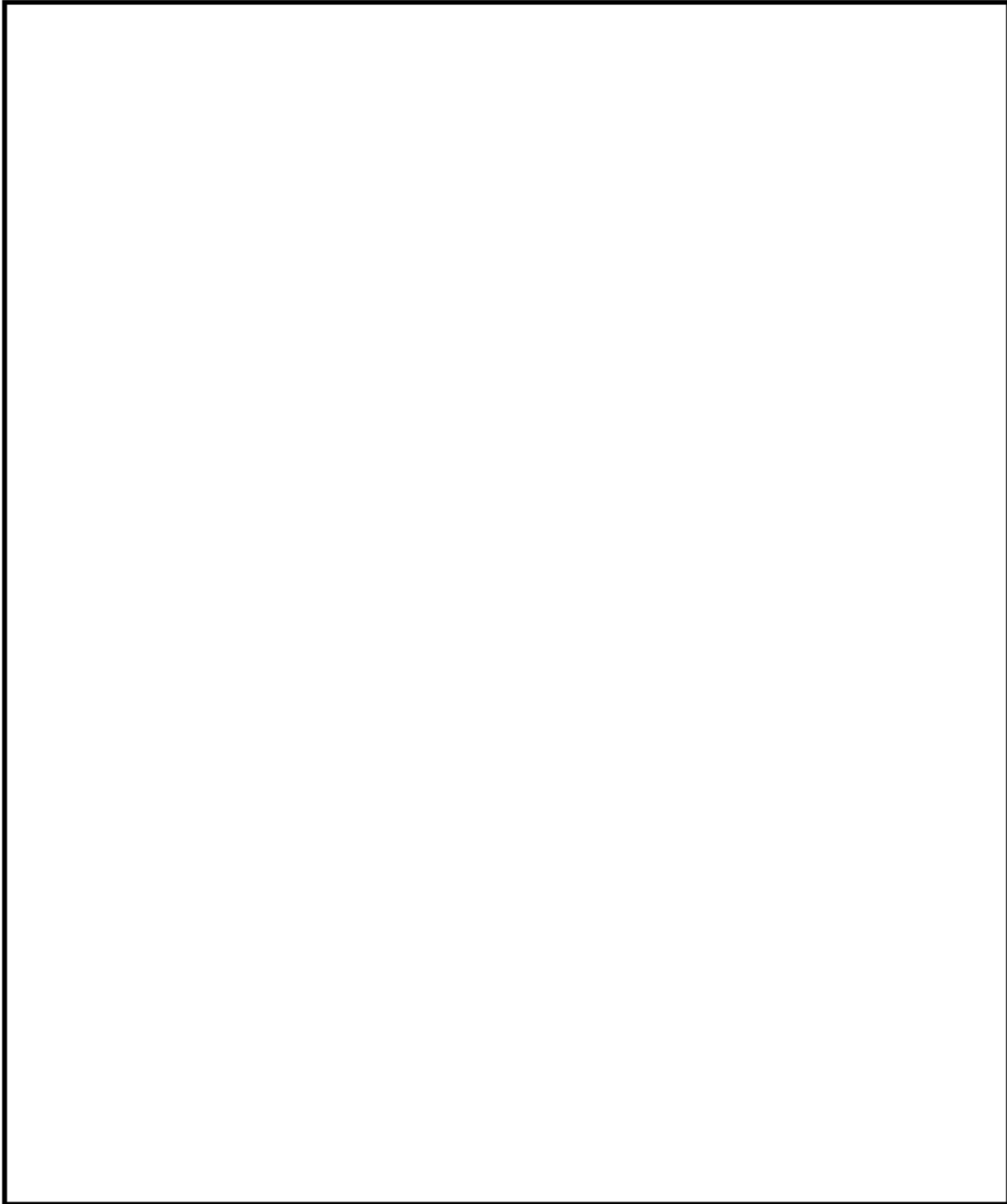
On Wednesday, March 30, 2011, the Senate Judiciary Committee held a hearing on FBI Oversight. Director Mueller was the only witness. Ten Members attended the hearing.

[Redacted]

[Redacted]

PATRIOT Reauthorization: When asked if he thought it was important for all three of the expiring provisions to be reauthorized, the Director responded that all three have been integral in protecting the country from terrorist attack and should be reauthorized. The business record provision, for example, has been used over 380 times. The roving wiretap provision, which we've had on the criminal side for a number of years, has been used 190 times. He added that while the FBI has yet to use the lone wolf provision, we

have come close and will likely be using it in the future. When asked if any of the provisions have been subject to abuse, the Director indicated he was not aware of a single case of abuse. In response to other related questions, the Director stated that National Security Letters (NSLs) should not be subject to sunset, additional legal burdens need not be added to other provisions, and that he could not think of a single abuse that would require decreasing the delayed search notices from 30 days to seven.



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Questions Posed by Senator Feinstein

82. As you offered at the hearing, please provide:

a. A description of how many of the 2,072 FISA warrants that the FBI obtained last year were “emergency” applications, as opposed to non-emergency applications.

Response:

The response to this inquiry is classified and is, therefore, provided separately.

b. The average amount of time the FBI needs to file and get a FISA warrant in each of these categories.

Response:

The response to this inquiry is classified and is, therefore, provided separately.





NSA Surveillance Program

100. Has the FBI received, via information sharing, information from the NSA's domestic wiretapping conducted outside of FISA? If so, is a system in place, either at the FBI or NSA, to identify when information was obtained without a FISA warrant? Does the FBI have any minimization procedures in place for information shared with the FBI by the NSA that has been obtained outside of existing FISA procedures? If so, please describe those procedures and the date when they were enacted.

Response:

It is not appropriate to discuss the operational details of the Terrorist Surveillance Program in this context. The full Senate Select Committee on Intelligence has been fully briefed on the operational details of the TSP described by the President.

101. Has the FBI, like the NSA, conducted non-Title III domestic electronic surveillance (hereinafter "domestic wiretapping") without obtaining or seeking a FISA warrant? If not, why has the FBI chosen not to do what the NSA has done? If so, please describe (in a classified submission, if necessary) the nature of the FBI's activities, the date on which such domestic wiretapping without FISA court approval began, and the reason(s) why the FBI determined that FISA warrants were not legally required for these activities.

Response:

All electronic surveillance conducted by the FBI is in accordance with the Constitution and laws of the United States. The FBI conducts domestic electronic surveillance pursuant to Title III and FISA. In addition, the FBI engages in two types of surveillance without court order: consensual monitoring (based on the consent of one party to the conversation) and under circumstances in which there is no reasonable expectation of privacy. The TSP is not a "domestic" surveillance

program. Rather, that program targets for interception only international communications where NSA determines there is probable cause to believe that at least one party to the communication is a member or agent of al-Qa'ida or an affiliated terrorist organization.

102. In his written testimony, Inspector General Fine noted how the FBI has reported a variety of claims of civil rights and civil liberties violations to the President's Intelligence Oversight Board ("IOB"), including some in FYs 2004 and 2005 relating to "intercepting communications outside the scope of the order from the FISA court," and how "[n]ot all possible violations were attributable solely to FBI conduct." Did the FBI ever submit, to the IOB, concerns about the NSA's (or the FBI's, or any other agency's) activities relating to domestic wiretapping without a FISA warrant? If so, please provide the date and subject matter of such submissions, and please produce all such submissions that the FBI sent to the IOB (in classified form, if necessary).

Response:

The FBI's obligation is to report intelligence activities affecting FBI investigations that violate law, AG Guidelines, or the FBI's internal policies established to protect the rights of United States persons. Because DOJ has opined that the TSP is lawful, there has been no basis for reporting activities related to that Program to the Intelligence Oversight Board.

Questions Posed by Senator Feingold

National Security Letters

103. When you appeared before the Judiciary Committee on May 2, 2006, I asked you about the disparity between the number of National Security Letters (NSLs) that were issued in 2005 versus the number of Section 215 business records orders issued in 2005. You agreed that obtaining a Section 215 order requires judicial approval, and that issuing a NSL does not require judicial approval, but said that you would get back to me about why so many more NSLs were issued in 2005. Please provide a response.

Response:

NSLs are available to obtain the records that form the basic building blocks of most investigations (e.g., telephone records and banking records). They are used frequently and in many national security investigations (similar to the role of grand jury subpoenas in criminal investigations). Orders pursuant to Section 215 of the USA PATRIOT Act, on the other hand, are used only if the records cannot be obtained through other means (e.g., through NSL or voluntary production).

The preference toward NSLs is not borne of any desire to avoid judicial review, but rather from a desire to obtain the information needed to pursue a national security investigation in the most efficient way possible under the law. Because NSLs can be issued at the field office level, they are far more efficient than 215 orders, which require court filings.

NSA Wiretapping Program

104. When did you first learn about the NSA wiretapping program authorized by the President shortly after September 11, which circumvented the FISA court process?

Response:

Director Mueller became aware of NSA's TSP at or near the time the program commenced.

105. Did you raise any objection to the NSA wiretapping program at the time?

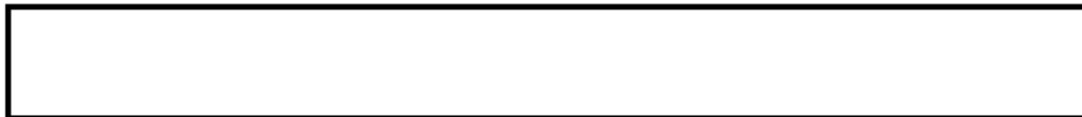
Response:

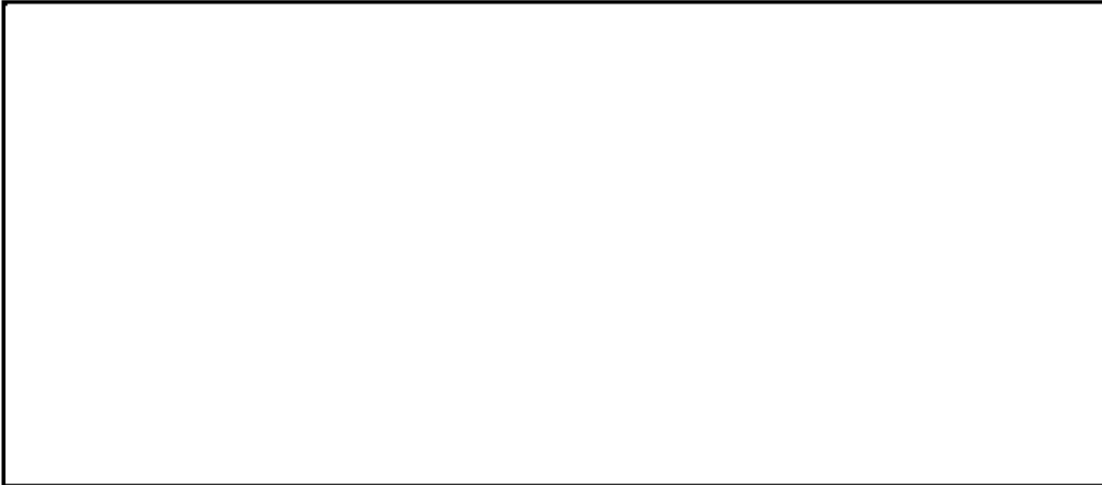
As I explained at the hearing, I do not believe I should go into internal discussions I may have had with others in the Executive Branch.

106. Do you have any concern that judges would not permit the information gathered through the use of these wiretaps to be used in criminal prosecutions?

Response:

The purpose of the TSP is to gather intelligence about what al-Qa'ida and affiliated terrorist organizations are planning, particularly in the United States or against United States interests, not to gather evidence for use in criminal proceedings. The FBI has used FISA and Title III as the exclusive means of eavesdropping on individuals within the United States, whether we are attempting to develop evidence for use in criminal proceedings or to gather foreign intelligence.





USA PATRIOT Act

109. In March, Chairman Specter introduced legislation (S. 2369) that contained four additional changes to the Patriot Act, beyond what was in the reauthorization package.

a. In Chairman Specter's bill, the provision relating to Section 215 would require the government to convince a FISA judge: (1) that the business records pertain to a terrorist or spy; (2) that the records pertain to an individual in contact with or known to a suspected terrorist or spy; or (3) that the records are relevant to the activities of a suspected terrorist or spy. Do you agree this standard is adequate to provide agents with the flexibility they need? If not, please provide specific examples demonstrating why not.

Response:

The response to this inquiry is classified and is, therefore, provided separately.



c. Another provision of the bill would make sure that recipients of business records orders under Section 215 of the Patriot Act and recipients of National Security Letters can get meaningful judicial review of the accompanying gag orders. Under the reauthorization package, the recipient would have to prove that any certification by the government that disclosure would harm national security or impair diplomatic relations was made in bad faith. This seems to be a virtually impossible standard to meet. How frequently would you estimate that FBI agents make such certifications in bad faith?

Response:

The bad-faith standard to which this question refers, contained in the USA PATRIOT Improvement and Reauthorization Act of 2005 (hereinafter the "Reauthorization Act"), applies in the very limited context of a petition challenging the nondisclosure provision of a national security letter or a FISA business records order in which there has been a certification by the AG, the DAG, an Assistant AG, or the FBI Director that disclosure of the letter or the business records order may endanger the national security of the United States or interfere with diplomatic relations. We do not expect that any such certifications will be executed in bad faith. We should note, however, that under the statutory scheme contained in the Reauthorization Act, if the government invokes any other reason for nondisclosure (i.e., interference with a criminal, counterterrorism, or counterintelligence investigation or danger to the life or physical safety of any person), even if such a certification is made to that effect by one of the officials enumerated above, or if the certification is made by an official other those enumerated above, then the nondisclosure provision can be set aside if the district court finds there is no reason to believe such damage will occur. Accordingly, the bad-faith standard to which the question refers will be applicable only in a very narrow subset of all cases in which nondisclosure provisions in NSLs or business records orders are challenged. We note that there have only been two such challenges in the history of the NSL statutes (there has been no challenge to a FISA business records order), and none since the USA PATRIOT Act was reauthorized. In one of the two challenges, after the enactment of the Reauthorization Act, the government did not certify that its disclosure would cause harm and the NSL was, in fact, disclosed.





116. Among the more disturbing aspects of everything the Inspector General has presented today in his written testimony are his reports of FBI intelligence violations, specifically: FBI agents intercepting communications outside the scope of FISA orders; FBI agents continuing investigative activities after the authority for the investigation expired; and third parties providing information that was not part of a national security letter request. In light of these findings, please explain the following.

a. Were any of these activities that the OIG defines as violations authorized by you, personally, or any deputy of yours?

Response:

No. As indicated in response to Question 60, above, the errors identified by the OIG were either inadvertent or third-party errors. None were the product of directives to exceed FISA or other investigative authority.

b. Were any of these activities authorized by the President?

Response:

No.

c. Does the use of surveillance outside the scope of FISA orders by the FBI have any connection to the NSA domestic surveillance program the President has described? Is it part of a separate program?

Response:

No, in response to each question. As previously stated, the compliance issues noted by the IG were inadvertent, and not wilful, violations.





U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 30, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find responses to questions posed to FBI Director Robert S. Mueller III, following Director Mueller's appearance before the Committee on May 2, 2006. The subject of the Committee's hearing was "Oversight of the Federal Bureau of Investigation." The FBI submitted these responses for clearance on July 10, 2006. We hope this information is helpful to the Committee.

The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to the submission of these responses. If we may be of additional assistance in connection with this or any other matter, we trust that you will not hesitate to call upon us.

Sincerely,

James H. Clinger
Acting Assistant Attorney General

Enclosure

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

FEDERAL BUREAU OF INVESTIGATION
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U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, DC 20530

January 31, 2007

~~SECRET~~

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find classified responses to questions posed to FBI Director Robert S. Mueller III, following Director Mueller's appearance before the Committee on May 2, 2006. The subject of the Committee's hearing was "Oversight of the Federal Bureau of Investigation." The FBI submitted these responses for clearance on July 10, 2006. These classified responses supplement the unclassified responses, which were provided to the Committee on November 30, 2006.

The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to the submission of these responses. If we may be of additional assistance in connection with this or any other matter, we trust that you will not hesitate to call upon us.

Sincerely,

Handwritten signature of Richard A. Herling in black ink.

Richard A. Herling
Acting Assistant Attorney General

Enclosure

cc: The Honorable Arlen Specter
Ranking Minority Member

THIS PAGE IS UNCLASSIFIED WHEN SEPARATED FROM CLASSIFIED PAGES
ACLU Sect. 215-620

Question Posed by Senator Feinstein

82. As you offered at the hearing, please provide:

a. A description of how many of the 2,072 FISA warrants that the FBI obtained last year were "emergency" applications, as opposed to non-emergency applications.

Response:

(U)

~~(U)~~ DOJ's Office of Intelligence and Policy Review advises that, of the 2,072 FISA warrants obtained in 2005, there were [] emergency authorizations by the Attorney General.

b. The average amount of time the FBI needs to file and get a FISA warrant in each of these categories.

Response:

(U)

~~(U)~~ As the Congress is aware, the FISA process begins when an agent who is conducting an investigation determines that the investigation will be advanced through electronic surveillance or physical search of the target. The process to obtain an order from the FISA Court begins when the requesting agent submits a FISA request to DOJ. The request form requires the agent to provide information concerning the target and to explain the basis for his or her belief that there is probable cause to believe the target is a foreign power or an agent of a foreign power. The actual length of time it takes to get a FISA warrant from the time the request is made varies widely []

[]

~~(U)~~ In order to respond to this question, we took a sample of FISA initiations and calculated the length of time it took to obtain the order. []

[]

(S)

~~SECRET/NF/OC~~

(S) [REDACTED]



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(S)

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Question Posed by Senator Feingold

109. (U) In March, Chairman Specter introduced legislation (S. 2369) that contained four additional changes to the Patriot Act, beyond what was in the reauthorization package.

a. (U) In Chairman Specter's bill, the provision relating to Section 215 would require the government to convince a FISA judge: (1) that the business records pertain to a terrorist or spy; (2) that the records pertain to an individual in contact with or known to a suspected terrorist or spy; or (3) that the records are relevant to the activities of a suspected terrorist or spy. Do you agree this standard is adequate to provide agents with the flexibility they need? If not, please provide specific examples demonstrating why not.

Response:

This standard would not provide adequate flexibility in some of the FBI's investigations. It would not, for example, cover some cases in which it may be appropriate for the FBI to open a national security investigation, such as when

(S) [REDACTED]

[REDACTED]

[REDACTED]

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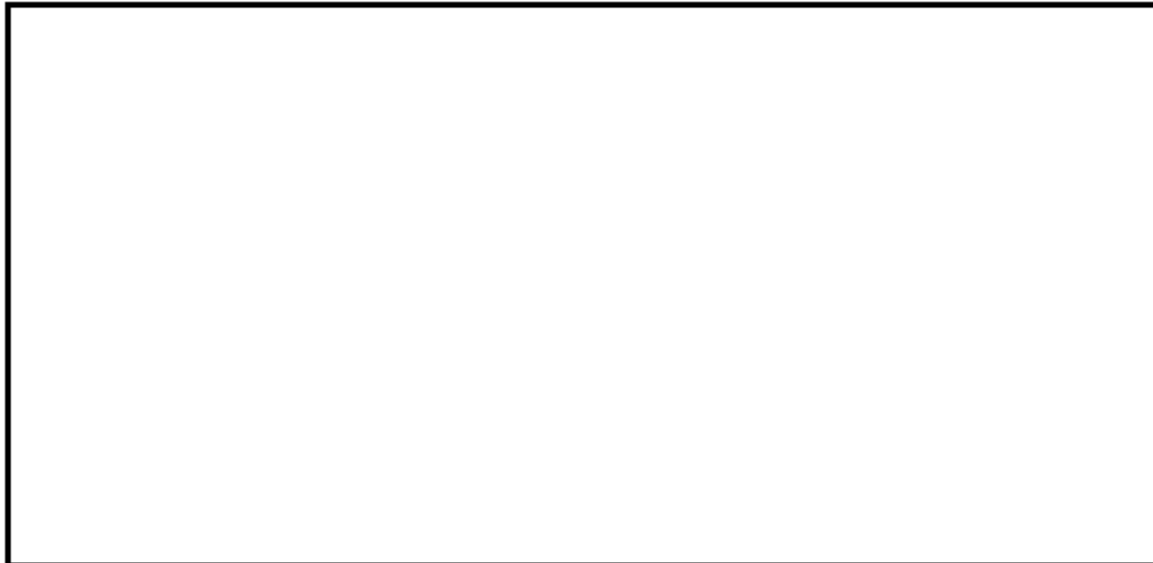
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PATRIOT Act Reauthorization

34. As you are aware, three provisions of the USA PATRIOT Act are set to expire at the end of this year. Without action, law enforcement would not be able to use these three important tools after December 31, 2009: section 206 of the USA PATRIOT Act, which governs “roving” wiretaps; section 215 of the USA PATRIOT Act, which allows federal agents to ask a court for an order to obtain business records in national security terrorism cases; and section 6001 of the Intelligence Reform and Terrorism Prevention Act (“IRTPA”), which allows intelligence investigations of lone terrorists not connected to a foreign nation or organization (also known as the “lone wolf” provision).

a. Last week, Assistant Attorney General Ronald Weich sent a views letter to Chairman Leahy recommending renewal of all three of these tools. The letter noted that the Office of the Director of National Intelligence concurred with the recommendations for renewal. In that letter, the Department of Justice specifically stated that the roving wiretaps provision “has functioned as intended and has addressed an investigative requirement that will continue to be critical to national security operations.” Do you agree?

Response:

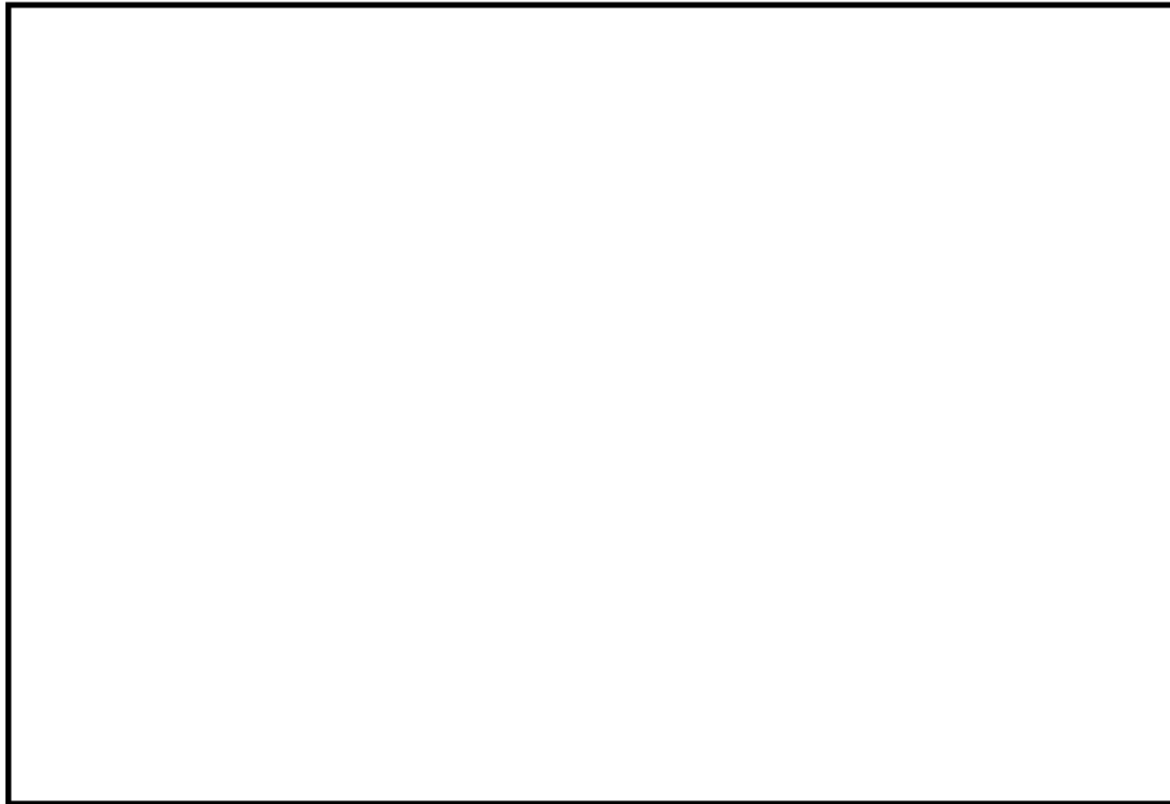
The response to this inquiry is classified and is, therefore, provided separately.

b. In that same letter, the Department of Justice also recommended the renewal of section 215, the business records provision. It stated, “the availability of a generic, court-supervised FISA business records authority is the best option for advancing national security investigations in a manner

consistent with civil liberties. The absence of such an authority could force the FBI to sacrifice key intelligence opportunities.” Do you agree?

Response:

Yes. This authority has been exceptionally useful in our national security investigations. It allows us to obtain records in national security investigations that we may be unable to obtain using National Security Letters (NSLs); the records that can be obtained using this tool are those that are typically obtained in a criminal case by using a grand jury subpoena. The operational security requirements of most intelligence investigations require the secrecy afforded by this FISA authority. We anticipate that there will always be national security investigations in which the FBI needs to obtain records that are not available through the use of NSLs and in which criminal investigative tools are either unavailable or insufficiently secure. The authority to obtain records under the supervision of the FISA Court in such cases is entirely appropriate. Moreover, the FISA Court's track record since this provision was added to FISA clearly establishes that the court is sensitive to the need to protect the privacy rights of unconsenting U.S. persons who may have some connection to the documents received pursuant to such an order.



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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 8, 2010

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find responses to questions for the record posed to Federal Bureau of Investigation Director Robert Mueller following his appearance before the Committee at an oversight hearing on September 16, 2009.

We hope this information is helpful. Please do not hesitate to contact this office if we may be of further assistance on other matters. The Office of Management and Budget has advised us that from the perspective of the Administration's program, they have no objection to submission of this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Weich".

Ronald Weich
Assistant Attorney General

Enclosure

cc: The Honorable Jeff Sessions
Ranking Minority Member



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 13, 2010

The Honorable Patrick Leahy
Chairman
Committee on Judiciary
United States Senate
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed please find responses to questions for the record arising from the appearance of FBI Cyber Division Deputy Director Steven Chabinsky, before the Committee on November 17, 2009, at a hearing entitled "Cybersecurity: Preventing Terrorist Attacks and Protecting Privacy in Cyberspace."

We apologize for our delay in responding to your letter and hope that this information is helpful to the Committee. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Ronald Weich".

Ronald Weich
Assistant Attorney General

Enclosures

cc: The Honorable Jeff Session
Ranking Minority Member

Terror Fighting Tools in Investigating Cyber Communications

3. Deputy Assistant Director Chabinsky, setting aside the widespread cyber attack for a moment, I am also concerned about how technology is making it easier for terrorists to communicate. Smart phones have become hand held computers that make phone calls and transmit email. Laptops with wireless internet can operate in city parks, fast food restaurants and coffee shops. Some in Congress want to raise the requirements and increase burdens of proof for the FBI before they can gather information on suspected terrorists. I am not one of those people especially when I have seen the numbers on how often they have been used and how successful they have been.

a. Would the FBI use 215 business records searches to gain information on a particular ISP or if a Wi-Fi hot spot that had been repeatedly used? I ask this because the Senate will be debating the reauthorization of the PATRIOT Act. These are critical tools that Director Mueller has publicly endorsed as essential in detecting terrorist plots.

b. If possible, can you elaborate on how the Cyber Division uses terror fighting tools when terrorists retreat to cyber communication?

Response to subparts a and b:

Consistent with the Attorney General's Guidelines for Domestic FBI Operations and the FBI's associated Domestic Investigations and Operations Guide, in deciding what investigative techniques to use in a given case, the FBI considers which techniques will afford an effective and efficient means of accomplishing the investigative objectives in the least intrusive manner based on all of the circumstances involved. The FBI would apply for an order under the Foreign Intelligence Surveillance Act (FISA) Business Records provision in the referenced circumstances if that would be the most timely, most effective, and least intrusive means of investigating a suspected terrorist.

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U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 14, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find responses to questions posed to FBI Director Robert S. Mueller III, following Director Mueller's appearance before the Committee on December 6, 2006. The subject of the Committee's hearing was "Oversight of the Federal Bureau of Investigation." We hope this information is helpful to the Committee.

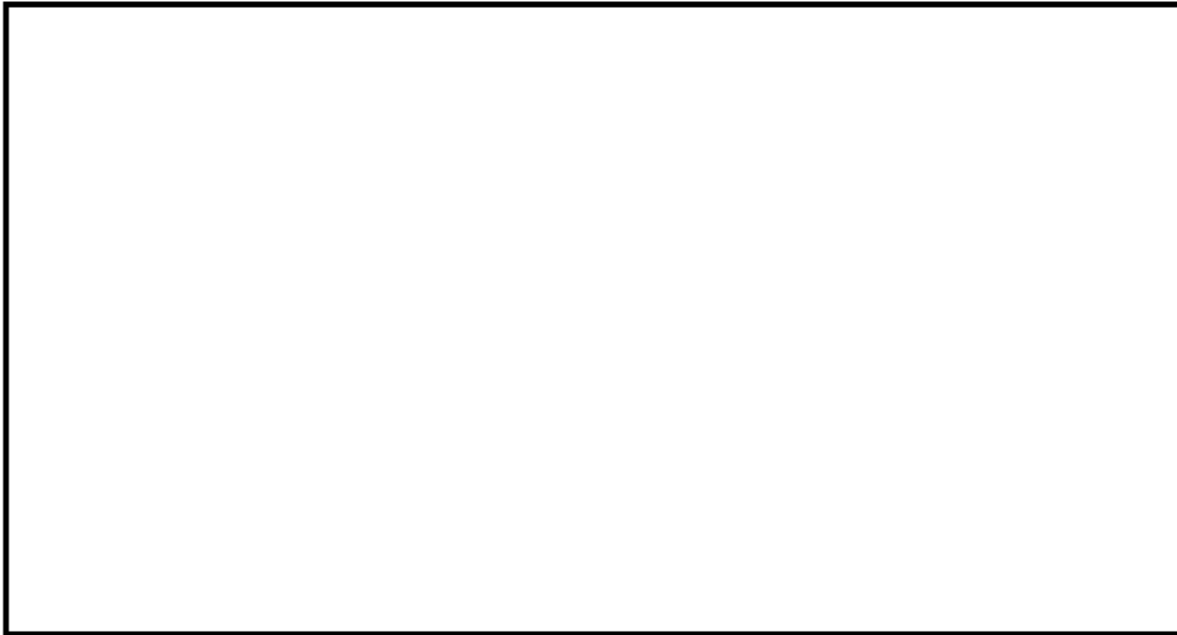
The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to the submission of these responses. If we may be of additional assistance in connection with this or any other matter, we trust that you will not hesitate to call upon us.

Sincerely,

Richard A. Hertling
Principal Deputy Assistant Attorney General

Enclosure

cc: The Honorable Arlen Specter
Ranking Minority Member



IMPACT OF CHANGES IN SUPPLEMENTAL PATRIOT BILL

4. During the debate over reauthorization of the PATRIOT Act, I introduced a bill (S.2369) along with Senator Leahy to correct some of the provisions contained in the conference report negotiated with the House of Representatives. One provision of concern was the provision governing challenges to the so-called "gag" or non-disclosure requirement that accompanies National Security Letters and orders issued pursuant to Section 215 of the Patriot Act. Under the conference report, the recipient of an NSL or a Section 215 order can challenge the "gag," but there is a conclusive presumption requiring courts to uphold the "gag" if the government makes a good-faith certification that disclosure may endanger the national security of the United States or interfere with diplomatic relations. Our bill eliminates this "conclusive presumption" to give courts more discretion in reviewing the "gag" requirement.

a. Why shouldn't we trust Article III judges to make sound decisions about disclosure or nondisclosure?

These responses are current as of 2/8/07

Response:

The provisions adopted in the USA Patriot Act Improvement and Reauthorization Act of 2005 (the Act) to modify the so-called "gag" provisions of the National Security Letter (NSL) statutes and Section 215 of the PATRIOT Act were not the result of any distrust of Article III judges. To the contrary, they are carefully crafted provisions that conform to constitutional allocations of power. When the Executive Branch certifies that there should be non-disclosure of an NSL or a 215 order because disclosure would interfere with a criminal, counterterrorism, or counterintelligence investigation or endanger the life or physical safety of any person, that certification is fully reviewable by an Article III judge because the judiciary is fully competent to evaluate those possible harms. On the other hand, when the Executive Branch certifies (via a high level executive official) that disclosure of an NSL or 215 order might endanger national security or interfere with diplomatic relations, the Executive is making an assessment in an area that is at the core of the Executive Branch's Constitutional authority. In those instances (i.e., national security and foreign relations), the Executive Branch is better able to assess the risk caused by disclosure.

orders? b. **Would this change negatively impact the FBI's use of NSLs or Section 215**

Response:

As indicated above, we believe the Executive Branch is best able to assess the harm to national security or to diplomatic relations that could be caused by disclosing the existence of an NSL or a 215 order, and that the statute should not be further amended.

[Redacted]

[Redacted]

These responses are current as of 2/8/07

the violation, a report may be issued to the appropriate entity within DOJ or to the FBI's OPR, resulting in formal review and potential disciplinary action.

96. In light of the FBI's failure to comply with the existing Guidelines and the ineffectual sanctions to deter violations of the Guidelines, please state the FBI's position on H.R. 4132, the Law Enforcement Cooperation Bill introduced by Congressmen Lundgren and Delahunt. The bill would require mandatory prompt Notification to federal, state and local prosecutors having jurisdiction, whenever the FBI obtains knowledge a confidential informant or any other individual has committed a violent crime. If the FBI has concerns about this proposed legislation, please provide the Committee with a detailed explanation of those concerns.

Response:

The FBI's concerns regarding H.R. 4132 are articulated in the 8/25/06 letter provided as Enclosure D.

III. NEW REPORTING REQUIREMENTS UNDER THE REAUTHORIZATION OF THE PATRIOT ACT

The USA Patriot Improvement and Reauthorization Act enacted last March contains new reporting requirements relating to National Security Letters as well as an audit of the use of these letters.

97. Under the Act, a report on the number of National Security Letters is due to the Senate Judiciary Committee by April 2007. Please provide the Committee with an update and detailed information on the FBI's progress to comply with implementation of these new reporting requirements.

Response:

Pursuant to the USA PATRIOT Improvement and Reauthorization Act of 2005, the AG submitted the first annual report on 4/28/06. The FBI is currently compiling the information required for the calendar year 2006 report. We expect that report to include a caveat regarding the reported number of different U.S. persons on whom we have collected data through NSLs because, toward the end of the year, we discovered that we had not adequately explained the change in the reporting requirement to our field personnel. That lack of clarity, together with the fact that the U.S. person status of the subject of an NSL (as opposed to the

These responses are current as of 2/8/07

U.S. person status of the target of the investigation) is not always clear, leads us to believe that the statistics we have this year on the number of different U.S. persons whose data is gathered through NSLs will not be as precise as we would like. Further, we have learned from the review conducted by the DOJ OIG that there are other errors in our compilation of these numbers. We continue to work to ensure the accuracy and reliability of these statistics.

98. Please provide the Committee with information relating to any changes in FBI policy or procedures following the enactment of the USA Patriot Improvement And Reauthorization Act last March.

Response:

The USA Patriot Improvement and Reauthorization Act ("Patriot IRA") amended several statutes that are regularly used by the FBI in the conduct of its national security investigations. In limited respects, some of these statutory changes required changes to FBI processes; other notable changes largely codified procedures the FBI already followed.

NSLs. The Patriot IRA modified the various authorities pursuant to which the FBI issues NSLs in several respects, it increased the number of committees to which certain semi-annual reports are made, and it altered the content slightly of those reports.

Those changes required three changes to FBI process and procedure. First, the FBI is now required to report the number of different persons (including status as a U.S. Person or Non-U.S. Person) about whom information is sought. As discussed further above, before enactment of the Patriot IRA the FBI reported only the U.S. Person status and the number of different targets about whom information was gathered. This change in external reporting has required changes in internal reporting. Agents are now required to include with every request for an NSL the U.S. Person status of the person to whom the requested NSL relates.

The second change to FBI process and procedure required by the Patriot IRA relates to the internal evaluation that must accompany every request for an NSL. Prior law automatically imposed an obligation of confidentiality on the recipient of an NSL. The Patriot IRA requires a case-by-case evaluation of the need *vel non* for the recipient to be obligated not to disclose the existence of the NSL. In response, FBI process now requires its employee initiating the NSL request to

These responses are current as of 2/8/07

explain in the request whether, and if so why, the recipient should be obligated not to disclose the NSL. That justification is reviewed along with the request for the NSL and must be approved by the official who executes the NSL.

Finally, the Patriot IRA mandated that the recipient of an NSL be affirmatively notified of: the process by which he or she can challenge the NSL or the nondisclosure provision and his or her right to disclose the NSL to persons necessary to comply with the NSL request, including an attorney to obtain legal advice or legal assistance regarding the NSL. The FBI made conforming changes to the standard forms of all NSLs.

Roving Foreign Intelligence Surveillance Act (FISA) Surveillance. The Patriot IRA modified FISA regarding the amount of detail the FBI must provide in connection with a FISA roving surveillance order. The application must now include a description of the "specific" target when the target is identified by description rather than by name. The Court, in turn, must find the possibility of the target thwarting surveillance based upon specific facts. The FBI has always provided a description of the target of surveillance, to the extent known. (The FBI's describing the target with as much specificity as possible has always been necessary to accomplish collection on the correct person or persons authorized by the Court.) Thus, this change, in effect, codified existing practice and did not require changes to FBI procedures.

The Patriot IRA also added a statutory return requirement, pursuant to which the FBI is generally required to notify the Court within ten days of instituting surveillance of a new facility under the roving authority. In the notice, the FBI must inform the Court of the nature and location of the new facility, the facts and circumstances upon which the applicant relies, any new minimization procedures, and the total number of electronic surveillances that have been or are being conducted under the roving authority. As a practical matter, that change simply codified the practice that was generally followed with roving surveillance. Even before the Patriot IRA, the FISA Court typically mandated notice to the Court when the surveilled facility changed. The new statute has imposed some more reporting requirements, and FBI has adjusted its process to generate the required information in a timely fashion.

Business Records under FISA. The Patriot IRA made significant changes to Section 215 of the Patriot Act (FISA Business Records Order). Among other things, the law now requires that a FISA Business Records Order describe the tangible things that must be produced with sufficient particularity to permit them

These responses are current as of 2/8/07

to be fairly identified. The Order must also contain a date on which the tangible things must be provided, and that date must afford the recipient a reasonable period of time in which to produce them. The Patriot IRA also imposes high-level supervisory approval of FISA Business Records Orders when they are seeking certain special categories of things such as library circulation records, library patron lists, book sales records, book customer lists, firearm sales records, tax return records, educational records, and medical records containing information that would identify a person.

The new statutory obligation to specifically describe the documents sought and to provide a date on which they must be produced did not require changes to FBI policy and procedures. Rather, it simply codified existing policy and procedure.

The obligation to obtain high-level supervisory approval for sensitive FISA Business Records Requests has resulted in an alteration in practice. Previously, virtually all FISA Business Records Requests were signed by either the FBI General Counsel or the FBI Deputy General Counsel for the National Security Law Branch. As a result of the Patriot IRA, that process has been altered to the limited extent that, in those very limited situations in which sensitive records are sought, the General Counsel obtains the signature of either the FBI Director or Deputy Director.

FISA Duration Changes. The Patriot IRA extended the duration of initiations and renewals of electronic surveillance, physical searches, and pen register/trap-and-trace surveillance for agents of foreign powers who are not U.S. persons. Initiations and renewals for U.S. persons remained the same.

The duration of FISA surveillance and physical search for non-U.S. persons was increased from the standard of 90-day initiations and 90-day renewals. Electronic surveillance and physical search coverage increased to a 120-day initiation and one-year renewal, and the pen register/trap-and-trace increased to a one-year initiation.

While there was little, if any, effect on FBI policies or procedures, both DOJ and the FBI have benefited from the substantial savings in resources that resulted from the new durations.



(b) (5) - ACP, DPP

These responses are current as of 2/8/07



140. In April 2005, a Department of Justice Inspector General review of eight FBI field offices, conducted over three days, found that three of these offices failed to review their high-priority FISA interceptions within 24 hours.

a. Please state the FBI's current rule regarding how quickly FISA interceptions must be reviewed.

Response:

FBI policy is that FISA intercepts in the highest priority counterterrorism and counterintelligence cases (those in which the subject potentially presents a direct threat of violent terrorist activity) will be reviewed within 24 hours. Additional information in response to this inquiry is classified and is, therefore, provided separately.

b. Please describe what is entailed by such a review.

Response:

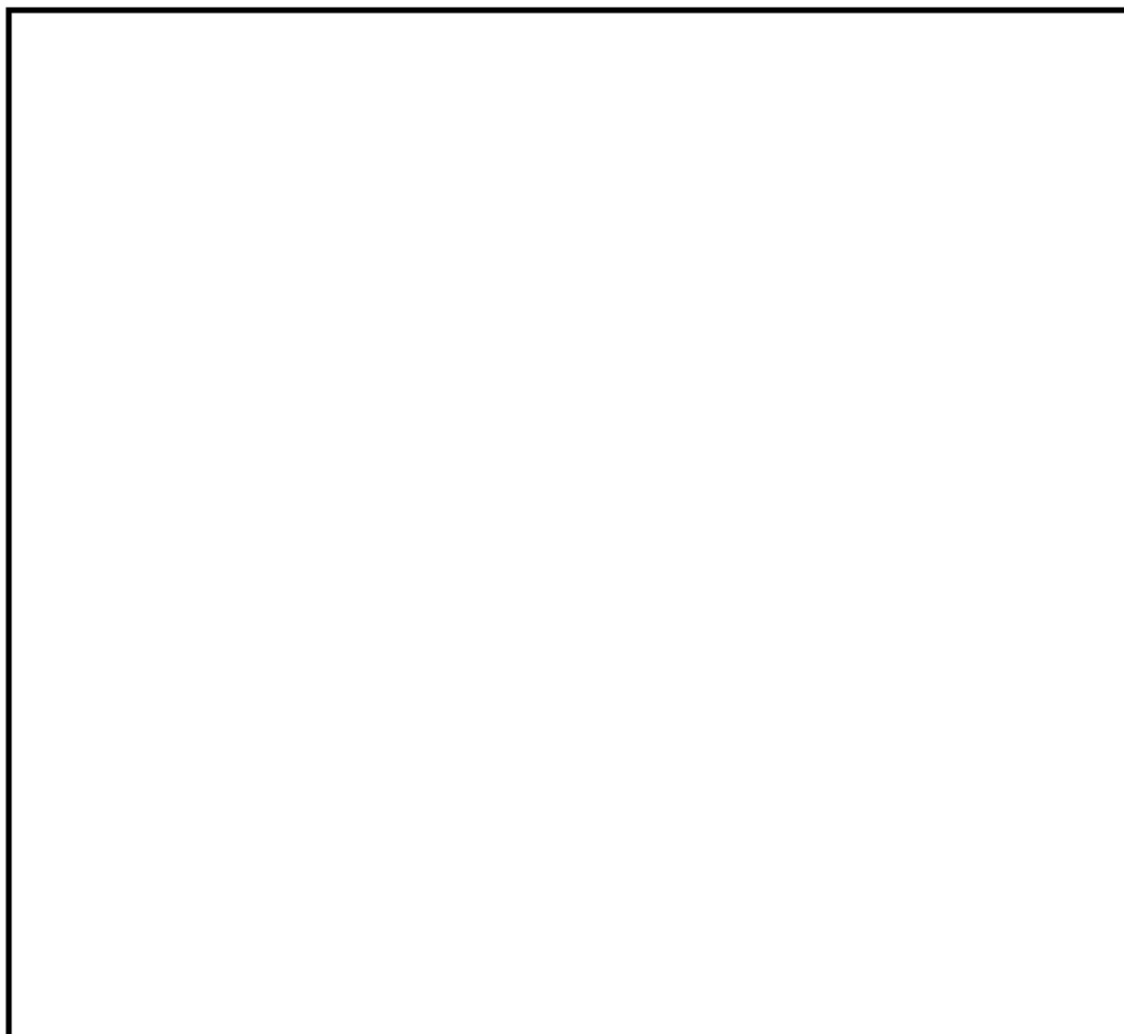
A review is completed when the linguist or analyst determines whether a session contains a threat to safety and/or security or contains actionable intelligence. If the reviewer determines there is a threat or actionable intelligence contained in the session, this information is immediately reported to parties that can act on the information.

These responses are current as of 2/8/07

c. Please explain what specific steps, if any, you are taking to clarify the rule on reviewing FISA interceptions and to ensure that field offices are abiding by this rule.

Response:

The FBI disseminated policy in 2004 and in 2006 reiterating the rule that a session is not considered reviewed until the threat information/actionable intelligence or lack thereof has been determined. This policy is reinforced through repeated FISA training.



These responses are current as of 2/8/67

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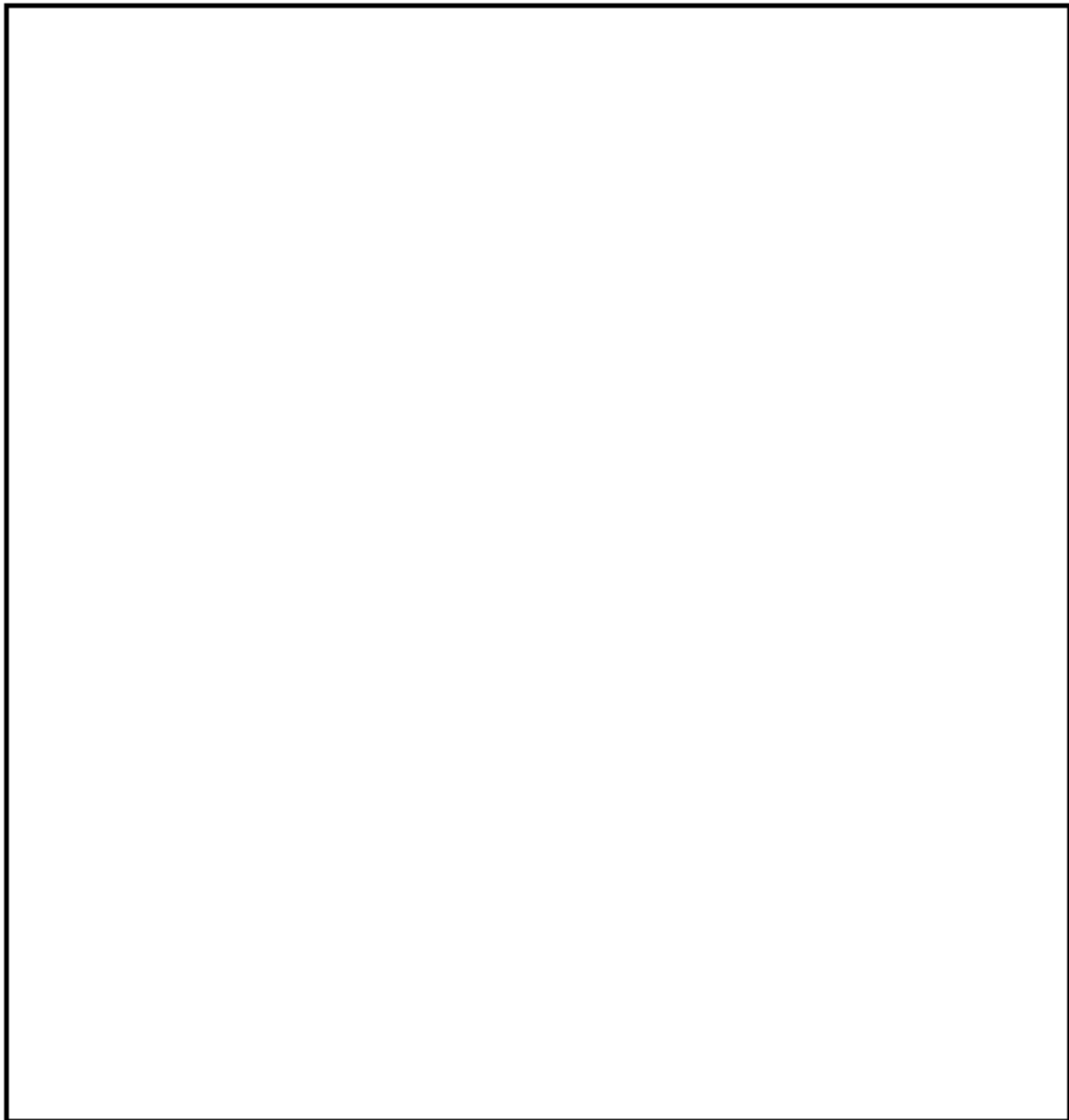
HEARING OF THE SENATE JUDICIARY COMMITTEE

- SUBJECT: OVERSIGHT OF THE FBI
- WITNESS: FBI DIRECTOR ROBERT MUELLER
- CHAIR: SENATOR PATRICK LEAHY (D-VT)

226 DIRKSEN SENATE OFFICE BUILDING, WASHINGTON, D.C.
10:03 A.M. EDT, WEDNESDAY, SEPTEMBER 16, 2009

10:03 AM EDT

SEN. LEAHY: Good morning. I always hate to rush the photographers. If I do this wrong, I hear about it at family gatherings. And the photographers understand what I'm talking about.



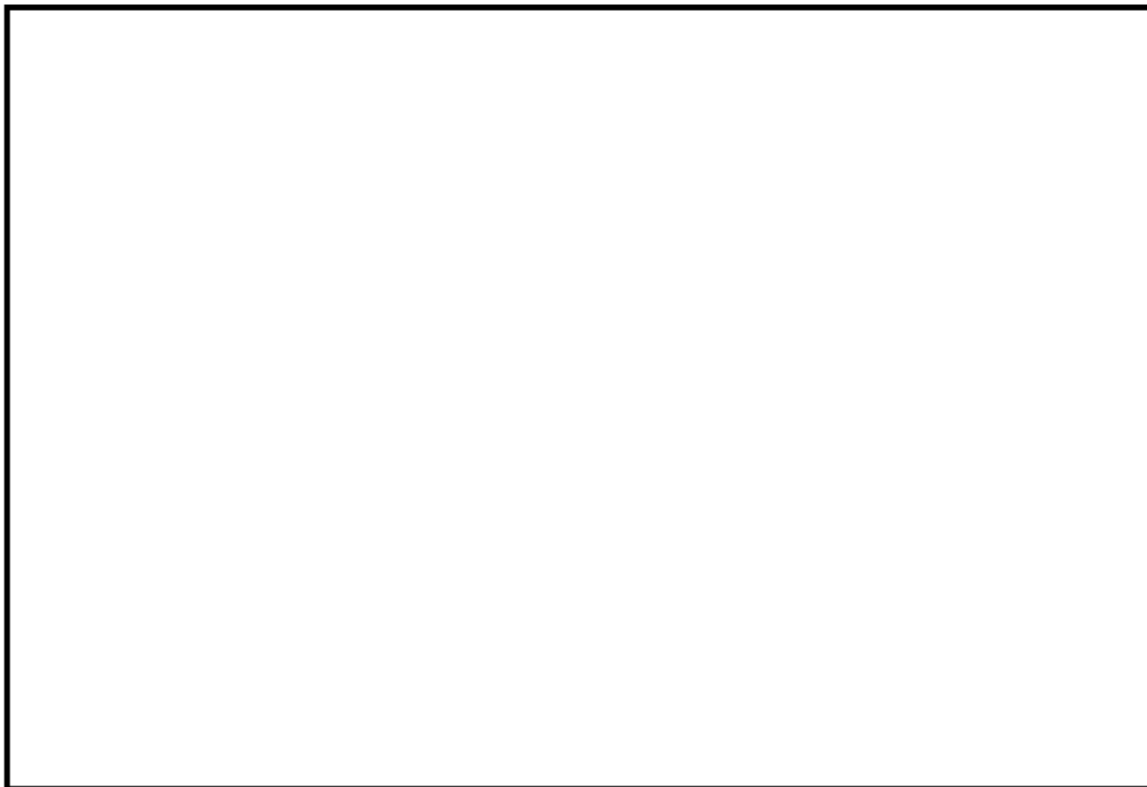


I've also closely tracked the use of Section 215 of the original Patriot Act, which authorized an order for business records. I've long believed that greater oversight of this section is required, including broader access to judicial review of the non-disclosure orders that are so often issued with Section 215 demands for records.



.....

SEN. LEAHY: When Congress included in the 2006 Patriot Act reauthorization, we had a requirement that the Justice Department's Office of Inspector General conduct audits and reviews of the use of national security **letters** authority in Section 215, Orders for Business Records.



PANEL I OF A HEARING OF THE SENATE JUDICIARY COMMITTEE

■ **SUBJECT:** REAUTHORIZING THE PATRIOT ACT

■ **WITNESSES:** DAVID KRIS, ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION, DEPARTMENT OF JUSTICE; GLENN FINE, INSPECTOR GENERAL, DEPARTMENT OF JUSTICE

■ **CHAIRMAN:** SENATOR PATRICK LEAHY (D-VT)

226 DIRKSEN SENATE OFFICE BUILDING, WASHINGTON, D.C.

10:00 A.M. EDT, WEDNESDAY, SEPTEMBER 23, 2009

.....

SEN. LEAHY: It's here.

Glenn Fine is well known, of course, to this committee. He served at the Department of Justice inspector general since 2000. He's been a member of the Office of Inspector General since 1995.

His office conducted comprehensive audits of Section 215 of the Patriot Act, for the use of national security **letters**. These audits, which are combined in a number of other reports issued by his office, represent really the largest portion of the public reporting on the use of surveillance authorities.

ACLU Sect. 215-695

Mr. Fine, glad to have you here. Go ahead, please.

MR. FINE: Mr. Chairman, Ranking Member Sessions, members of the committee, thank you for inviting me to testify about the Office of the Inspector General's work related to the Patriot Act.

Our most significant reviews have focused on the FBI's use of national security **letters** and Section 215 orders. Pursuant to the Patriot Reauthorization Act, in March 2007 and March 2008, we issued reports examining the FBI's use of these two authorities, and I will focus my testimony on our findings from those reviews.



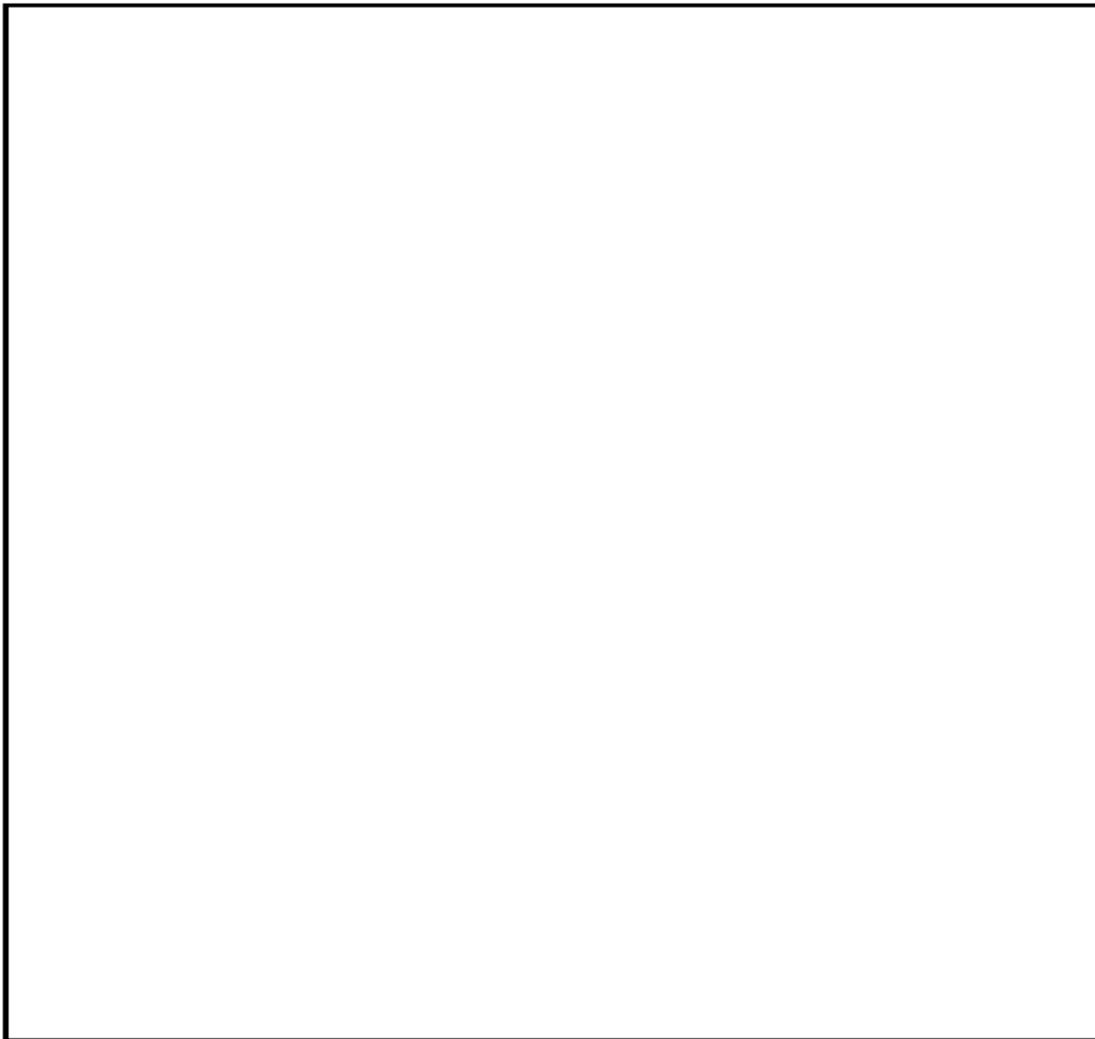
With regard to the use of Section 215 orders, the OIG examined and issued two reports on the FBI's use of these orders to obtain business records. While used much less frequently than NSLs, the FBI believes that the Section 215 authority is essential to national security investigations because it is the only compulsory process for certain kinds of records.

Our reviews did not identify any illegal use of Section 215 orders. However, our second report does discuss a case in which the FISA Court twice refused to authorize a Section 215 order based on concerns that the investigation was premised on protected First Amendment activity. The FBI subsequently issued NSLs to obtain information about the same subject based on the same factual predicate, even though the NSL statute contains the same First Amendment caveat as the Section 215 statute.

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12. During the hearing, you cited the Inspector General's Report on Section 215 of the PATRIOT Act, which found that the FBI rarely used this authority to obtain library records. However, I am concerned that the FBI is using other provisions in the PATRIOT Act to obtain this information, thereby circumventing the safeguards and reporting requirements of Section 215. For example in 2005, the FBI issued NSLs to four Connecticut libraries asking them to surrender "all subscriber information, billing information and access logs of any person" related to a specific library computer during a specific time period, pursuant to Section 505 of the PATRIOT Act. These NSLs also prohibited the librarians from disclosing the fact that they had received the NSLs or their contents -- the so-called "gag order" under the PATRIOT Act.

a)



b) Please identify all of the PATRIOT Act provisions that the FBI has used to obtain library records from libraries and educational institutions?

c) Is the FBI circumventing the requirements of Section 215 by relying on other provisions in the PATRIOT Act to obtain this information?

10/11/2001 11:30 AM

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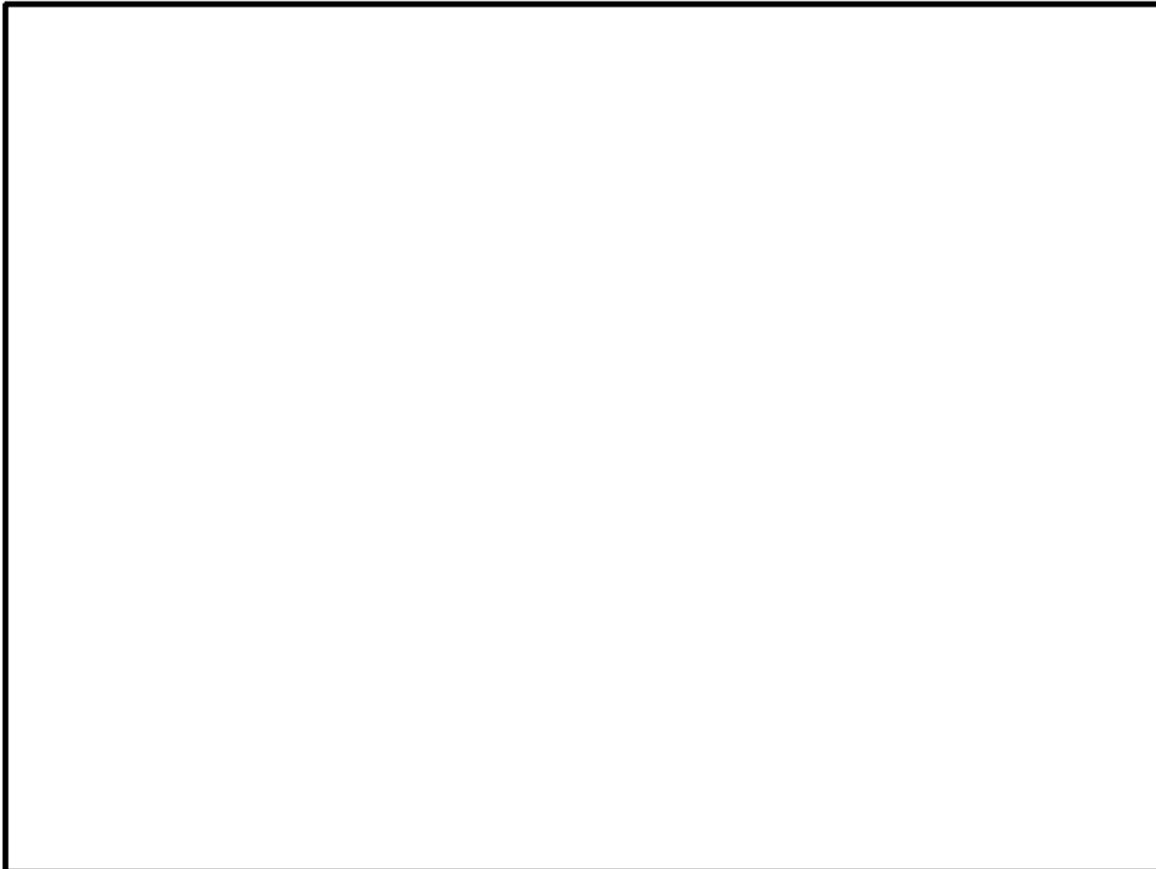
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SUMMARY OF PATRIOT ACT REAUTHORIZATION

Sunsets

- Retains 4-year sunsets for two PATRIOT provisions:
 - Section 206, multi-point or "roving" wiretaps; and
 - Section 215, FISA court orders for business records
- Makes remaining PATRIOT provisions permanent.



Section 215 (FISA Business Records)

- Requires applications to include "a statement of facts" showing "reasonable grounds to believe" the things sought are "relevant" to an authorized investigation.
- Creates a legal presumption in favor of a finding of relevance for records that pertain to: (a) a foreign power or an agent of a foreign power; (b) the activities of a suspected agent of a foreign power who is the subject of an authorized investigation; or (c) an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of an authorized investigation.
- Includes explicit right for recipients to consult legal counsel and to seek judicial review.

- Permits challenges to non-disclosure requirement, but no sooner than 1 year after issuance of order. (Added by Sununu bill, S.2271.)
- Makes clear that section 215 orders are not available for threat assessments.
- Requires FBI Director, Deputy Director or Executive Assistant Director to approve requests for certain records (e.g., library, medical, educational, and tax records).
- Limits scope of requests to materials that could be obtained via grand jury subpoena or a similar court order for the production of records.
- Requires recipients, upon request, to inform the FBI of the names of others to whom the order has been or will be disclosed.
 - Disclosures to legal counsel exempt from this requirement. (Added by S. 2271)
- Requires the use of minimization procedures to limit “the retention, and prohibit the dissemination” of information concerning US persons.
- Requires audits by the DOJ Inspector General on the use of Section 215;
- Includes enhanced reporting to Congress regarding the use of Section 215 and new public reporting on the use of Section 215.

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USA PATRIOT ACT



CHIEF DIVISION COUNSEL – FBI SPRINGFIELD

PATRIOT ACT

10/26/2001

16 sunset provisions (12/31/2005)

Permanent provisions

PATRIOT ACT

- Information sharing;
- Provide traditional criminal investigative tools to national security investigations;
- Bring statutes up to date with emerging technology

PATRIOT ACT

- 215 – FISA Business Records Court Order
 - Broadened scope to include “any tangible thing” from all businesses
 - Previously limited to certain businesses.

USA PATRIOT IMPROVEMENT AND REAUTHORIZATION ACT



ACLU Sect. 215-1153

PATRIOT ACT

- ❑ The USA Patriot Improvement and Reauthorization Act of 2005 went into effect on March 09, 2006.
- ❑ Makes 14 of the 16 USA Patriot Act provisions permanent.

PATRIOT ACT

- ❑ Creates a new 4 year sunset extension for two USA Patriot Act provisions, through 12/31/2009:



- FISA Business Records court orders

PATRIOT ACT

Changes:

➤ FISA Business Records;



BUSINESS RECORDS

- ❑ FISA Business Record authority has been modified to provide more safeguards to protect certain categories of personal information.

BUSINESS RECORDS

□ Special categories:

- Library circulation records;
- Library patron lists;
- Book sales records;
- Book customer lists;
- Firearms sales records;
- Tax return records;
- Educational records;
- Medical records which identify a person

BUSINESS RECORDS

- ❑ These special categories of business records will require approval from FBIHQ executive management

BUSINESS RECORDS

□ Non-Disclosure Provision

- No person shall disclose the fact that the FBI has sought tangible things under this authority, with these exceptions:
 - Persons necessary for compliance;
 - An attorney for legal advice.

BUSINESS RECORDS

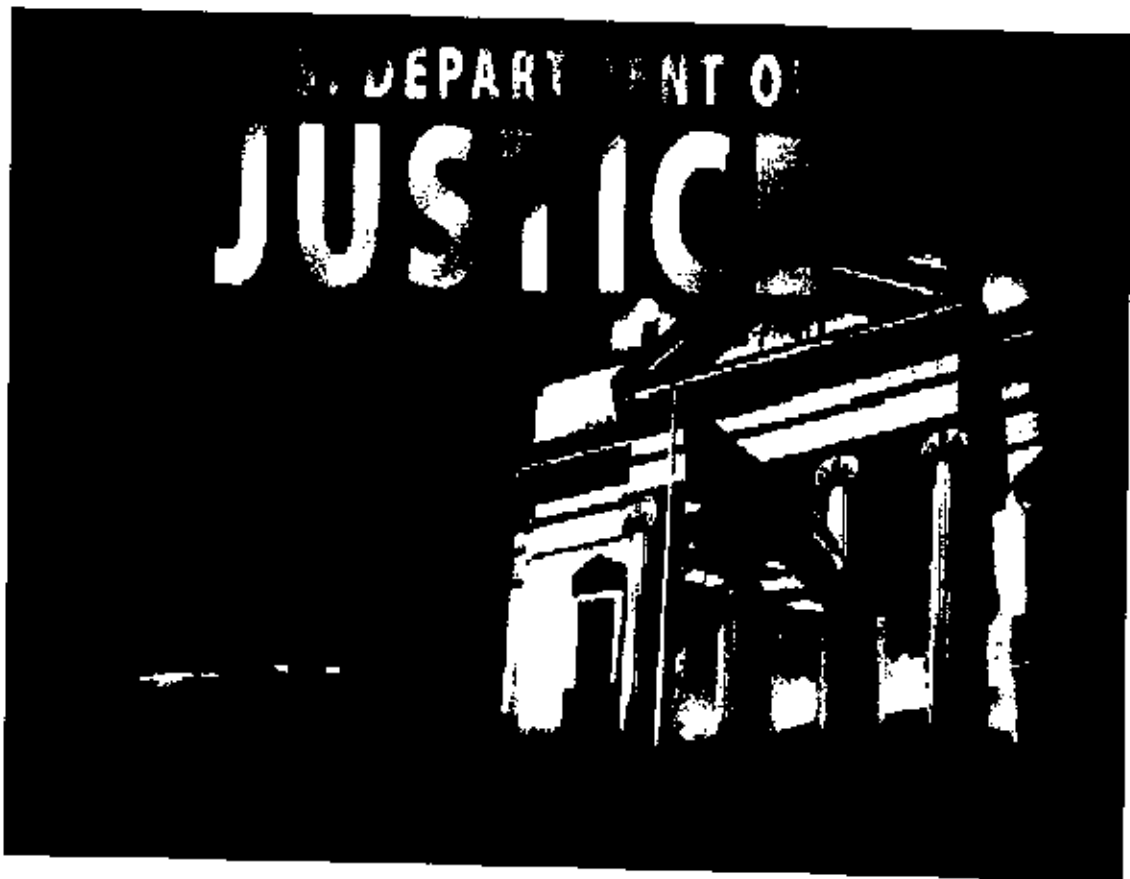
- ❑ Judicial Challenge of the court order
 - The recipient of a FISA Business Record court order may challenge the legality of the order in the FISA Court.

 - Relief may be granted only if the court order does not meet legal requirements.

BUSINESS RECORDS

- Judicial challenge of nondisclosure
 - FISC may set aside the nondisclosure provision only if there is no reason to believe that disclosure may:
 - Endanger National Security;
 - Interfere with a pending investigation;
 - Interfere with diplomatic relations, or
 - Endanger the life or safety of a person.

QUESTIONS



ACLU Sect. 215-1175

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ACLU Sect. 215-1176

- Uniting and**
- Strengthening**
- America by**

- Providing**
- Appropriate**
- Tools**
- Required to**
- Intercept and**
- Obstruct**
- Terrorism**



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**USA PATRIOT IMPROVEMENT and REAUTHORIZATION ACT of 2005
(Public Law 109-177).**

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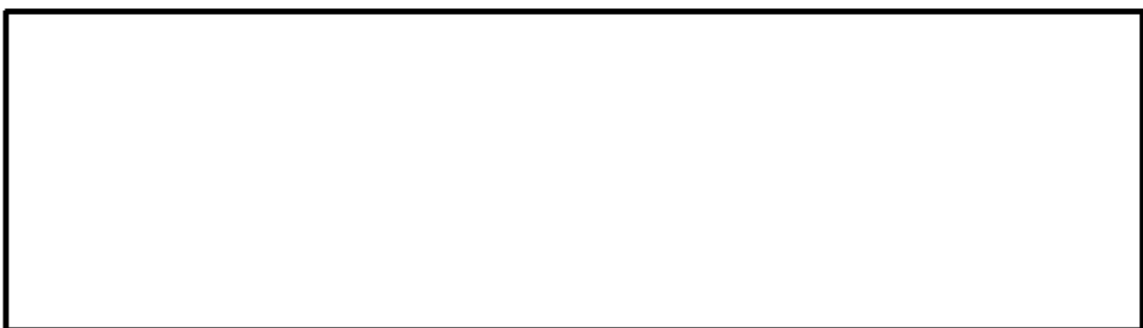
**USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006
(Public Law 109-178).**

Chart Summaries of recent changes to national security legal authorities as a result of the "USA PATRIOT Improvement and Reauthorization Act of 2005" and the "USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006."

- **Title I - USA PATRIOT Improvement and Reauthorization Act**

Title I makes most of the original sunset provisions of the original USA PATRIOT Act permanent, though it creates new sunsets for the authorities in section 206 (FISA roving authority) and section 215 (FISA access to business records) of the USA PATRIOT Act, and section 6001 (Lone Wolf provision) of the Intelligence Reform and Terrorism Prevention Act of 2004. It also extends the duration of several FISA tools. Additionally, it makes significant changes to the National Security Letter statutes. Finally, the USAPA IRA requires new Congressional reporting of the use of national security tools.

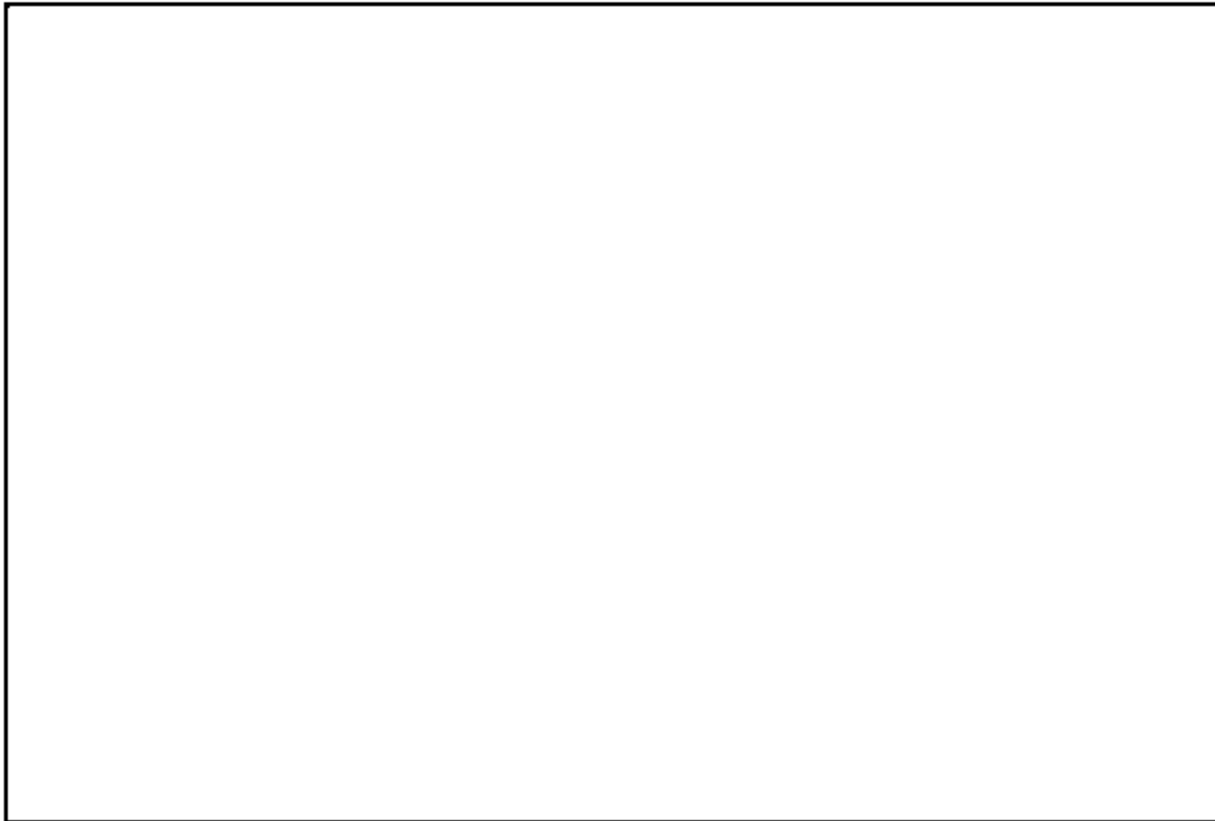
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ACLU Sect. 215-980

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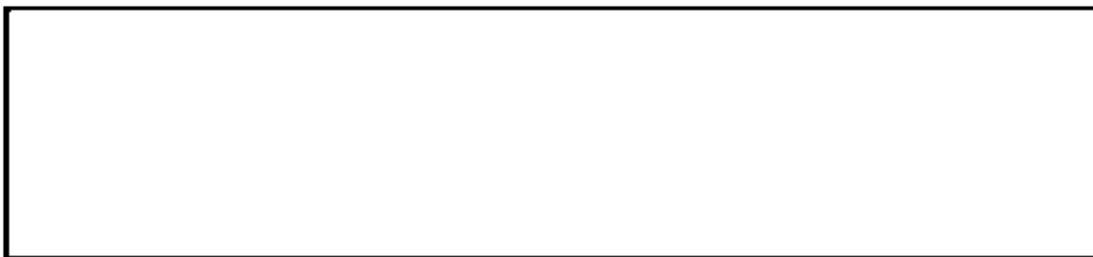


**TITLE I - USA PATRIOT IMPROVEMENT and REAUTHORIZATION
ACT of 2005.**

SUNSET PROVISIONS

Sec. 102. USA PATRIOT Act Sunset Provisions.

Section 102 repeals section 224 of the USA PATRIOT Act, making most of the original sunset provisions permanent. This section adopts a new 4-year sunset (December 31, 2009) for sections 206 (roving authority) and 215 (business records) of the USA PATRIOT Act. The now permanent provisions of the USA PATRIOT Act are the following:



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ACLU Sect. 215-981

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FOIA(b) (7)(C) - Exemption



Provision	New Sunset Date
[Redacted]	[Redacted]
FISA Business Records Authority	December 31, 2009



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ACLU Sect. 215-982

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FISA BUSINESS RECORD CHANGES

Sec. 106. Access to Certain Business Records Under Section 215 of the USA PATRIOT Act.¹

<p>Scope of FISA Business Records authority.</p>	<ul style="list-style-type: none"> • This authority may be used to obtain “any tangible things (including books, records, papers, documents, and other items).” This authority is broad, similar in scope to a criminal grand jury subpoena. • This authority requires additional procedures for certain special categories of records (see below).
<p>Special Categories of Tangible Things</p>	<p>Congress designated particular categories of records for special procedures and approvals. The FBI will adjust procedures to account for the special designation.</p>
<ul style="list-style-type: none"> • Special Categories: 	<p>Library circulation records, library patron lists, book sales records, book customer lists, firearms sales records, tax return records, educational records, and medical record containing information that would identify a person.</p>
<ul style="list-style-type: none"> • Approval Level for special categories: 	<p>The Director of the FBI may delegate the authority to either -</p> <ul style="list-style-type: none"> • the Deputy Director of the FBI; or • the Executive Assistant Director (EAD) for National Security (or any successor position). <p>No further delegation is allowed.</p>

¹ This information also includes the changes made by sections 3 and 4 of the “USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006.”

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ACLU Sect. 215-983

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<ul style="list-style-type: none"> • Congressional Oversight of special categories: 	<p>Attorney General must provide annual report (April) to the House Judiciary Committee (HJC), the House Permanent Select Committee on Intelligence (HPSCI), the Senate Judiciary Committee (SJC), and the Senate Select Committee on Intelligence (SSCI).</p> <ul style="list-style-type: none"> • Number of FISA business record orders granted, modified, or denied for the special categories of tangible things.
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<p>FISA Business Record Standard- Relevance:</p>	<p>The FBI's facts must show that there are "reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation."</p>
---------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------

<ul style="list-style-type: none"> • Presumptive Relevance Test: 	<p>The tangible things are presumptively relevant if the facts show they pertain to -</p> <ul style="list-style-type: none"> “(i) a foreign power or an agent of a foreign power; (ii) the activities of a suspected agent of a foreign power who is the subject of such authorized investigation; or (iii) an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of such authorized investigations.”
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<p>FISA Business Record Order:</p>	<ul style="list-style-type: none"> • The order must describe the tangible things with sufficient particularity to permit them to be fairly identified. • Date for return - the order will contain a date on which the tangible things must be provided. • Recipient must have a reasonable period of time to produce. • The Order may only require production of tangible things that would be available with a grand jury subpoena or a District Court order (in other words, privileges under the law will apply to Business Record orders).
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<p>FISA Business Record Non-Disclosure Provision:</p>	<p>No person shall disclose the fact that the FBI has sought tangible things.</p>
--------------------------------------------------------------	-----------------------------------------------------------------------------------

<ul style="list-style-type: none"> • Exceptions to non-disclosure: 	<p>A recipient may disclose a FISA Business Record Order to -</p> <ul style="list-style-type: none"> (1) persons to whom disclosure is necessary to comply; (2) an attorney to obtain legal advice or assistance with respect to the production; (3) a person as permitted by the FBI Director (or designee).
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<ul style="list-style-type: none"> • Extension of nondisclosure to others: 	<ul style="list-style-type: none"> • If the recipient discloses to another person (see exceptions above), the recipient shall notify the person of the nondisclosure requirement. • The person to whom disclosure is made shall be subject to the nondisclosure requirement. • The FBI director (or designee) may ask the recipient to identify the other persons to whom disclosure of the Business Record order will be made (except that the recipient does not have to identify the attorney).
<p>Judicial Challenge of FISA Business Record authority:</p>	<p>The recipient of a FISA Business Record order may challenge the legality of the order in the Foreign Intelligence Surveillance Court.</p>
<ul style="list-style-type: none"> • Challenging the order: 	<ul style="list-style-type: none"> • Recipient may move to modify or set aside the order. • FISC may grant the motion only if the order does not meet the requirements of FISA or is otherwise unlawful.
<ul style="list-style-type: none"> • Challenging the non-disclosure provision: 	<ul style="list-style-type: none"> • Not less than 1 year after the order, the recipient may move to modify or set aside the nondisclosure order. • FISC may grant such a motion only if there is no reason to believe that disclosure may endanger the national security of the U.S., interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person. • The FISC will treat as conclusive a certification by the Attorney General, Deputy Attorney General, an Assistant Attorney General, or the Director of the FBI that a disclosure may endanger the national security of the U.S., interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person.
<ul style="list-style-type: none"> • Security: 	<ul style="list-style-type: none"> • Filings shall be under seal • Chief Justice of the U.S., in consultation with the AG and the DNI, will establish security measures.
<p>Minimization Procedures for FISA Business Records:</p>	<p>Within 180 days of enactment, the Attorney General shall adopt specific minimization procedures governing the retention and dissemination of FISA Business Record information.</p>

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<p>•U.S. Person information:</p>	<p>The minimization procedures should minimize the retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting U.S. persons consistent with the U.S. intelligence community need to obtain, produce and disseminate foreign intelligence information.</p>
<p>• Evidence of a crime:</p>	<p>The procedures should allow for the retention and dissemination of information that is evidence of a crime.</p>

<p>Reporting Cycle:</p>	<p>Attorney General will report on an annual basis (April of each year).</p>
<p>Congressional Committees:</p>	<ul style="list-style-type: none"> •House Permanent Select Committee on Intelligence •House Judiciary Committee •Senate Select Committee on Intelligence •Senate Judiciary Committee
<p>Reporting Categories:</p>	<p>(1) Total number of applications for FISA Business Records. (2) Total number of orders granted, modified, or denied. (3) Total number of orders granted, modified, or denied for the special categories of tangible things.</p> <ul style="list-style-type: none"> • Library circulation records, library patron lists, book sales records, or book customer lists. • Firearms sales records. • Tax return records. • Educational records. • Medical records containing information that would identify a person.
<p>Additional unclassified report:</p>	<p>Annually (April of each year), the Attorney General shall make an unclassified report on the total number of FISA Business Records applications, and the total number of orders granted, modified, or denied.</p>

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Sec. 106A Audit on Access to Certain Business Records for Foreign Intelligence Purposes.

Scope of Audit:	The IG will perform a comprehensive audit of the effectiveness and use, including any improper or illegal use, of the investigative authority.
Timing of Audit:	For 2002, 2003, and 2004, the audit should be completed within one year of enactment (March 9, 2007).
	For 2005 and 2006, the audit should be completed by December 31, 2007.
Report results to Congress:	The IG shall submit the audit reports to <ul style="list-style-type: none"> • House Judiciary Committee, • House Permanent Select Committee on Intelligence, • Senate Judiciary Committee, • Senate Select Committee on Intelligence.
Examine effectiveness of the tool:	Audit will look at the following for effectiveness - <ul style="list-style-type: none"> • Categories of records obtained. • The importance to the FBI and the IC of the information obtained. • The manner in which the information is collected, retained, analyzed, and disseminated by the FBI (this will include an examination of the access to "raw data" provided by the FBI to other agencies of the Federal, State, local, or tribal governments, or private sector agencies). • The minimization procedures adopted by the AG. • Whether, and how often, the FBI used information to produce analytical intelligence products for the FBI, the IC, or other Federal, State, local, or tribal government agencies. • Whether, and how often, the FBI provided the information to law enforcement authorities for criminal proceedings.

UNCLASSIFIED

<p>Examine the process:</p>	<p>The audit process will look at the following:</p> <ul style="list-style-type: none">• How often the FBI requested DOJ to submit an application and the request was not submitted to the court (including the basis for the decision).• Whether the court granted, modified, or denied the application.• The justification for the failure of the AG to issue implementing procedures governing the requests in a timely fashion, including whether the delay harmed national security.• Whether bureaucratic or procedural impediments prevent the FBI from fully using the authority.
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**REPORTING REQUIREMENTS UNDER
THE USA PATRIOT IMPROVEMENT and REAUTHORIZATION ACT of
2005 (Public Law 109-177).**

&

**THE USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006
(Public Law 109-178).**

FISA BUSINESS RECORD CHANGES

Sec. 106. Access to Certain Business Records Under Section 215 of the USA PATRIOT Act.

Reporting Cycle:	Attorney General will report on an annual basis (April of each year).
Congressional Committees:	<ul style="list-style-type: none">• House Permanent Select Committee on Intelligence• House Judiciary Committee• Senate Select Committee on Intelligence• Senate Judiciary Committee
Reporting Categories:	<p>(1) Total number of applications for FISA Business Records.</p> <p>(2) Total number of orders granted, modified, or denied.</p> <p>(3) Total number of orders granted, modified, or denied for the special categories of tangible things.</p> <ul style="list-style-type: none">• Library circulation records, library patron lists, book sales records, or book customer lists.• Firearms sales records.• Tax return records.• Educational records.• Medical records containing information that would identify a person.
Additional unclassified report:	Annually (April of each year), the Attorney General shall make an unclassified report on the total number of FISA Business Records applications, and the total number of orders granted, modified, or denied.

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ACLU Sect. 215-969

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Sec. 106A Audit on Access to Certain Business Records for Foreign Intelligence Purposes.

Scope of Audit:	The IG will perform a comprehensive audit of the effectiveness and use, including any improper or illegal use, of the investigative authority.
Timing of Audit:	For 2002, 2003, and 2004, the audit should be completed within one year of enactment (March 9, 2007).
	For 2005 and 2006, the audit should be completed by December 31, 2007.
Report results to Congress:	The IG shall submit the audit reports to - <ul style="list-style-type: none"> • House Judiciary Committee. • House Permanent Select Committee on Intelligence. • Senate Judiciary Committee. • Senate Select Committee on Intelligence.
Examine effectiveness of the tool:	Audit will look at the following for effectiveness - <ul style="list-style-type: none"> • Categories of records obtained. • The importance to the FBI and the IC of the information obtained. • The manner in which the information is collected, retained, analyzed, and disseminated by the FBI (this will include an examination of the access to "raw data" provided by the FBI to other agencies of the Federal, State, local, or tribal governments, or private sector agencies). • The minimization procedures adopted by the AG. • Whether, and how often, the FBI used information to produce analytical intelligence products for the FBI, the IC, or other Federal, State, local, or tribal government agencies. • Whether, and how often, the FBI provided the information to law enforcement authorities for criminal proceedings.

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<p>Examine the process:</p>	<p>The audit process will look at the following:</p> <ul style="list-style-type: none">• How often the FBI requested DOJ to submit an application and the request was not submitted to the court (including the basis for the decision).• Whether the court granted, modified, or denied the application.• The justification for the failure of the AG to issue implementing procedures governing the requests in a timely fashion, including whether the delay harmed national security.• Whether bureaucratic or procedural impediments prevent the FBI from fully using the authority.
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PATRIOT ACT SUNSET PROVISIONS (215s/Roving Wiretaps/Lone Wolf)

What use has the FBI made of the expiring Patriot Act authorities?

Response:

Business Records (215s)

- The FBI began using Business Records in 2004. Since that time, through CY 2008, we have used this authority a total of 236 times.

Year	Business Record (pure)	Business Record Combination (i.e. combined with PR/TT request to the FISC)	Totals
2004	7	0	7
2005	14	141	155
2006	12	32	44
2007	17	0	17
2008	13	0	13
TOTALS	63	173	236

Roving Wiretaps

- We have utilized the Roving Wiretap authority a total of 147 times.

Lone Wolf

- Although the lone wolf provision has never been used, it is an important investigative option which must remain available. This provision gives the FBI the flexibility to obtain FISA warrants and orders in the rare circumstance where a non-US person engages in terrorist activities, but his or her nexus to a known terrorist group is unknown. The fact that this provision has not been used does not denigrate the need for the provision. To the contrary, this is an important tool which allows the FBI to obtain foreign intelligence about a non-US person under the authority and direct supervision of a court expressly created to keep the domestic collection of foreign intelligence within constitutional limits.
- It is an important tool which will be used only under the appropriate circumstances and with the appropriate supervision from the Foreign Intelligence Surveillance Court. Because the circumstances under which we would use the lone wolf provision have not arisen since the passage of the Intelligence Reform and Terrorist Prevention Act of 2004 does not mean that they will not arise in the future. The United States Government needs to be prepared to address that situation should it occur.

Information provided by: Rick McNally, A-300, NSM/OCG

Information approved by: UC Valenz Caproni, OIG

Dated: 5/15/2009



U.S. Department of Justice

Federal Bureau of Investigation

Washington, D. C. 20535-0001

October 30, 2006

Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I am writing in response to your letter dated October 11, 2006 in which you raised a number of oversight issues of interest to the Committee. Enclosed please find the following responsive material for your review:

(1)

(2)

(3)

(4)

(5) The Department of Justice Report to the Congress dated April 28, 2006 pursuant to the Foreign Intelligence Surveillance Act and the USA PATRIOT Improvement and Reauthorization Act.

(6)

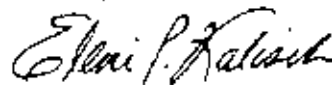
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Honorable Arlen Specter

These materials address most of the issues set forth in your letter. With regard to the remaining issues, to include operational matters, Director Mueller is prepared to discuss those with you during your courtesy visit scheduled for October 31, 2006.

I hope that this information is helpful to you. If you have additional questions or issues that are not adequately addressed by this letter or during your meeting with Director Mueller, please do not hesitate to contact me

Sincerely,



Eleni P. Kalisch
Assistant Director
Office of Congressional Affairs

Enclosures

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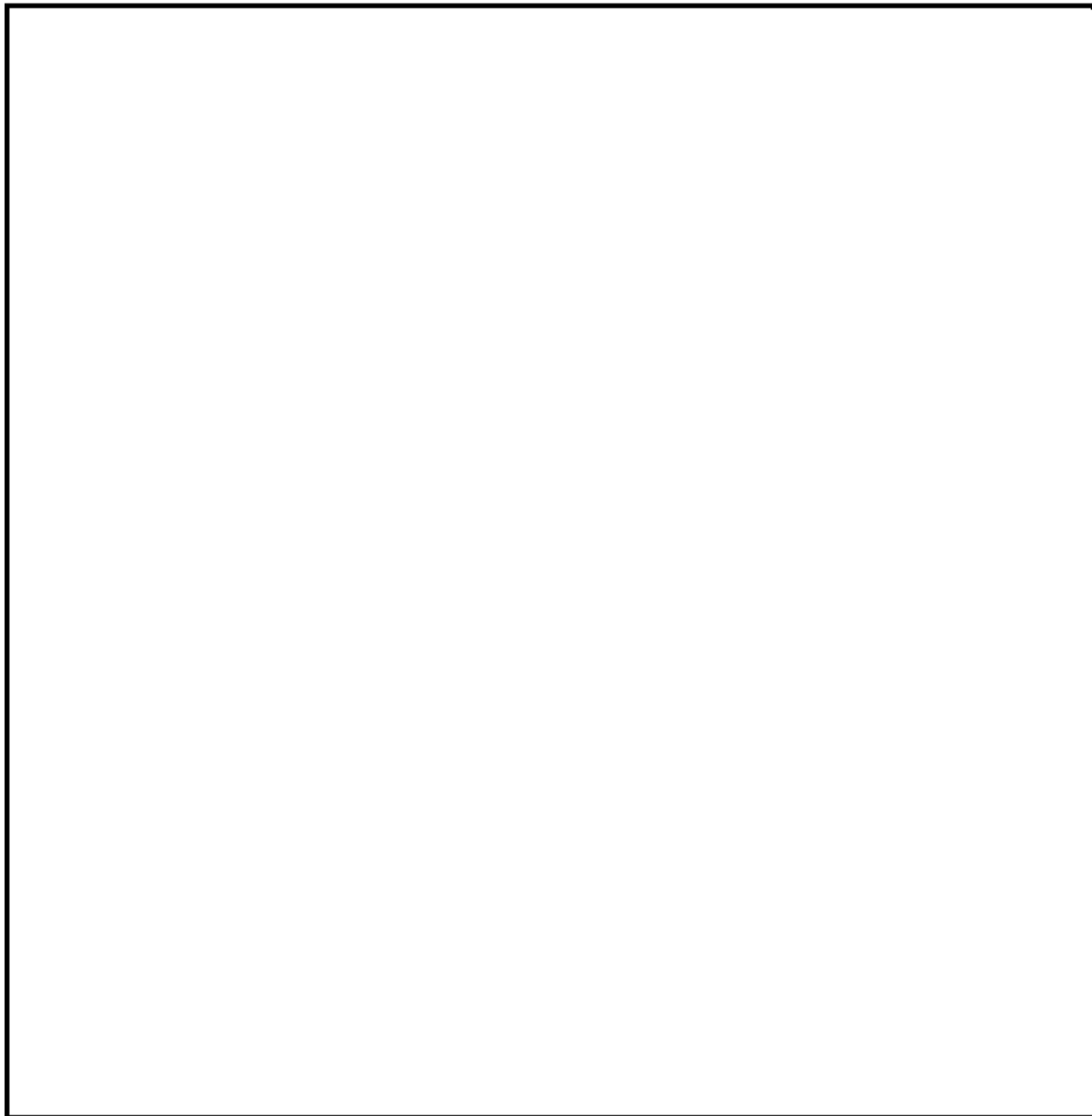
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CQ CONGRESSIONAL TRANSCRIPTS
Congressional Hearings
March 30, 2011 - Final

SENATE JUDICIARY COMMITTEE

Senate Judiciary Committee Holds Hearing on FBI Oversight



[REDACTED]

GRASSLEY:

I would take a moment to publicly thank you, Director Mueller, for your service to America. And I do that just in case this might be the last time as director of the FBI you're before this committee. But I'll bet you, after you're in private life, you'll be asked to testify on various things before Congress in that capacity because of your experience.

While we have had our share of disagreements, Director Mueller, I've always appreciated your candor and your willingness to work with us to get answers even if we don't always agree with what those answers are.

For instance, I know there's a lot of agreement between you and me on the need to extend the Patriot Act provisions that are set to expire in May.

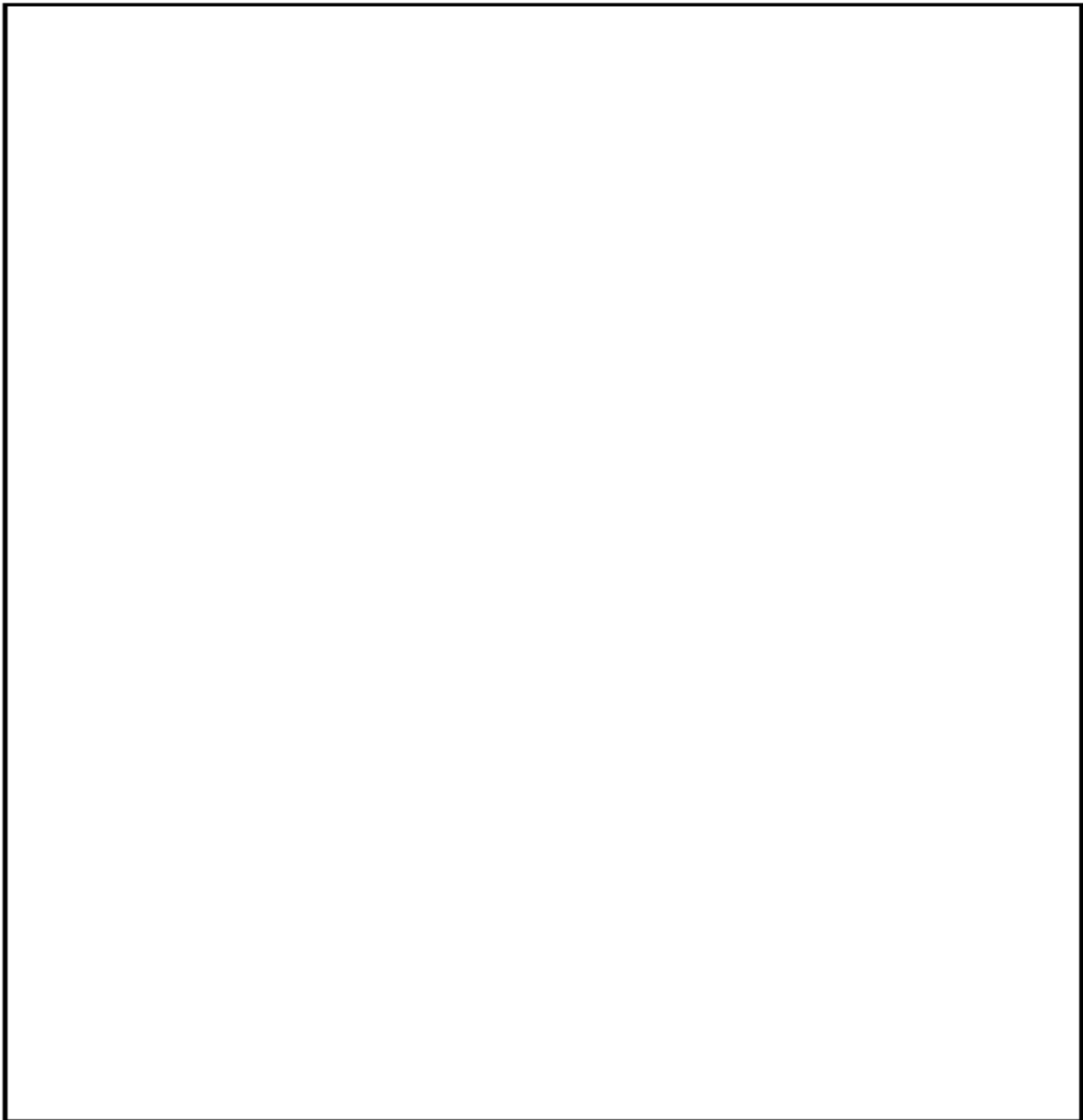
The three expiring provisions of the Patriot Act are very important tools used by law enforcement and the intelligence community to protect us from threats to our national security. They're vital to our ability to investigate, identify and track and deter terrorists.

It was recently revealed that the FBI successfully utilized a Section 215 order as part of the investigation that prevented a terrorist attack planned by a Saudi national in Texas.

In that case it was revealed that the individual in question purchased bomb-making materials, such as three gallons of sulfuric acid, clocks, chemistry sets and a gas mask from online retailers Amazon.com and eBay.

This case is the latest of many examples of successes of the Patriot Act provisions and your successful use of that.

Given the numerous threats we face and the fact that the three expiring provisions have not been found to have been abused, the Senate should work to reauthorize the expiring authority without amendment.



[REDACTED]

MUELLER:

Let me briefly discuss two areas where Congress can help the FBI with its mission.

First, you (ph) do encourage Congress to reauthorize the three FISA tools that are due to expire later this spring. The roving Internet -- intercept authority is necessary for our national security mission, and provides us with tools similar to what we use in criminal cases already, and have used for a number of years.

The business records authority permits us to obtain key documents and data in our national security cases, including in our most serious terrorism matters.

And the lone wolf provision is important to combat the growing threat from lone offenders and home-grown radicalization.

These authorities, all of which are conducted with full court review and approval, are critical to our national security.

[REDACTED]

GRASSLEY:

Director Mueller, I'm going to start out with a question or two that probably you touched on in your testimony, but I think it's important that we get answers to specific questions. It's in regard to the Patriot Act.

And you know the three provisions that are expiring. Do you agree that these three provisions should be made permanent?

MUELLER:

Yes, sir.

GRASSLEY:

Have these three tools been useful to the FBI to prevent terrorists attacks on our country?

MUELLER:

They have. Let me, if I briefly can mention the business records provision has been used over 380 times. You alluded to an instance where it was used recently. It's absolutely essential that we have the ability to gather these records through that provision,

whether it be for identifying intelligence officers from other countries.

These records enable us to get hotel records, travel records and the like. And without that capability, we would -- would be -- it would be difficult to develop the cases and the investigations in that arena, as well as the counterterrorism arena, without this provision.



GRASSLEY:

I think that your answer shows that if these provisions were not reauthorized or if they were substantially weakened by including new requirements, that it would be detrimental to the agents in the field. Would that be a correct assumption?

CQ Transcriptions, March 30, 2011

List of Panel Members and Witnesses **PANEL MEMBERS:**

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WITNESSES:

FBI DIRECTOR ROBERT MUELLER

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COMPARISON OF "PATRIOT" PROVISIONS

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	USA PATRIOT Act	USA PATRIOT Improvement and Reauthorization Act (incl. Sen. Sununu's Bill, S.2271)	Sen. Specter's New PATRIOT Bill (S. 2369)
Status/Sunsets	Became law 10:26:2001. 16 provisions designed to sunset on 12/31/2005 (postponed to 03/10/2006).	Became law 03:09:2006. 1-year sunsets kept for PATRIOT § 206 (FISA "roving" wiretaps) and § 215 (FISA business records).	Introduced 03-06-2006. Adds 4-year sunset for NSLs.
FISA Business Records Orders (Section 215) - Legal Standard	Requires certification "that the records concerned are <u>sought for</u> an authorized investigation" (implicit relevance standard).	Requires "statement of facts" showing "reasonable grounds to believe" records are " <u>relevant</u> " to authorized investigation. Creates a <u>legal presumption</u> of relevance for records that satisfy 3-part test (see next column).	Under <u>3-part test</u> , the records must: (1) pertain to a foreign power or an agent of a foreign power ("AFP"); (2) be relevant to the activities of a suspected AFP who is the subject of an authorized investigation, or (3) pertain to an individual in contact with a suspected AFP.
Judicial Review of Section 215 Orders	No explicit right to judicial review of production order or non-disclosure requirement.	Explicit right to challenge both production request and "gag." But, includes "conclusive presumption" (like NSLs) and requires a 1-year waiting period for challenges to the "gag" order.	Eliminates the "conclusive presumption" and the 1-year waiting period for challenges to the non-disclosure requirement.

CONGRESSIONAL TRANSCRIPTS

Congressional Hearings

March 28, 2007

House Intelligence Committee Holds Hearing on FBI Use of National Security Letters

REYES:

The committee will please come to order.

This morning, the committee will examine the FBI's use of the national security letters and Section 215 orders for business records under the Foreign Intelligence Surveillance Act, two investigative tools that were greatly expanded by Congress under the USA Patriot Act.



RE: YES:

Thank you, Mr. Hoekstra.

And with that, we'll begin with the panelists' opening statement.

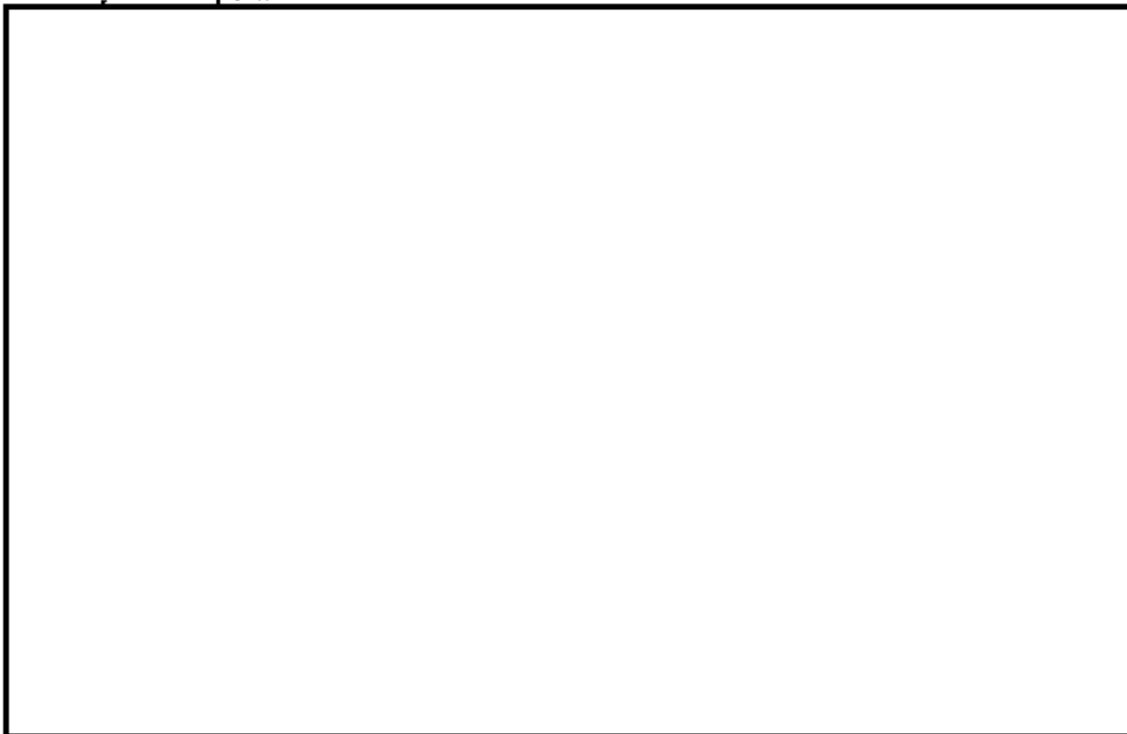
We'll start with you, Mr. Fine.

FINE:

Thank you, Mr. Chairman, Mr. Hoekstra and members of the committee. Thank you for inviting me to testify about reports issued by the Department of Justice Office of the Inspector General regarding the FBI's use of national security letters and Section 215 orders to obtain business records.

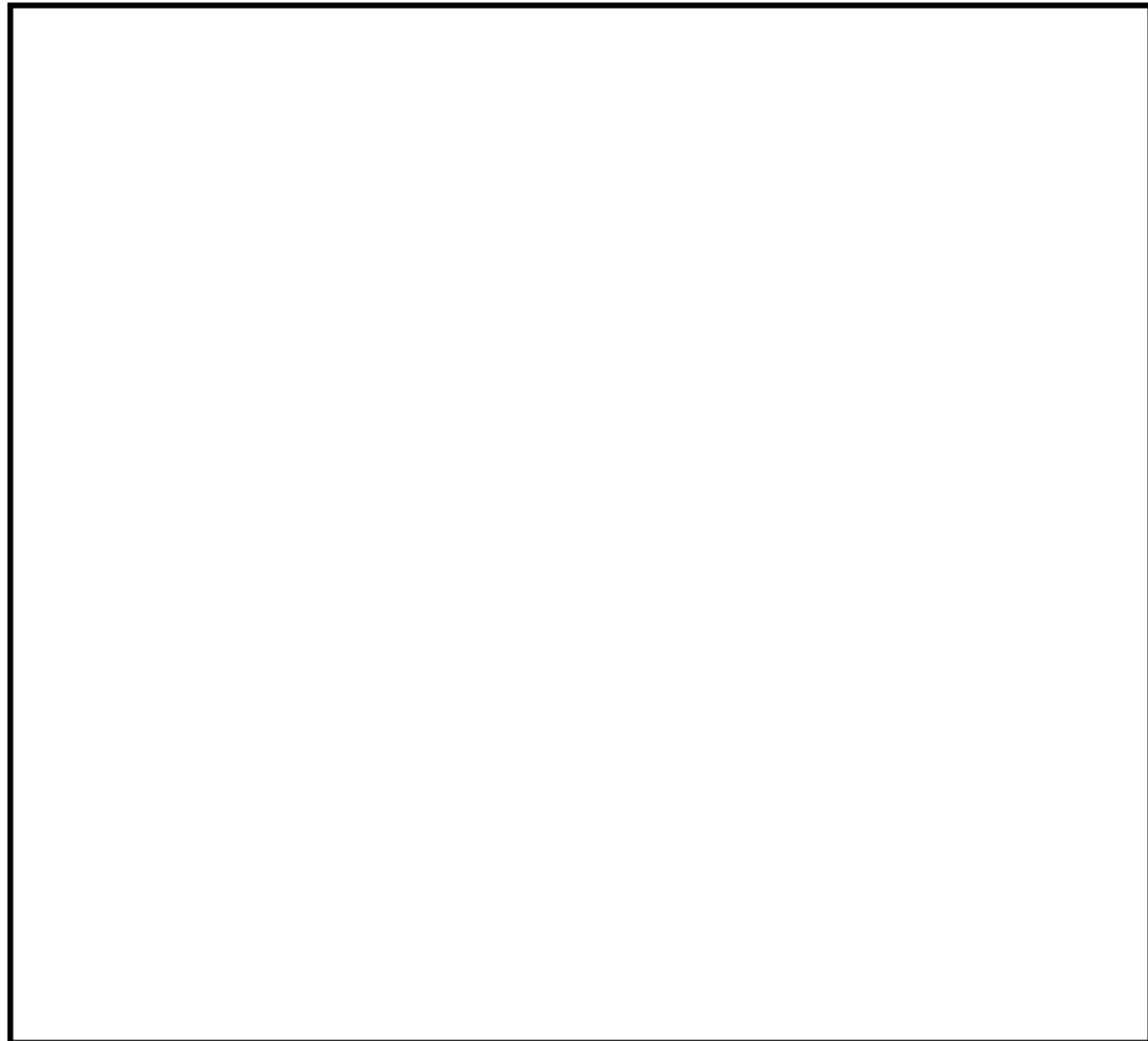
The Patriot Reauthorization Act required the OIG to examine the FBI's use of these authorities. And on March 9th, we issued reports detailing our findings.

Today I will summarize our key findings, focusing my attention on the national security letter report.



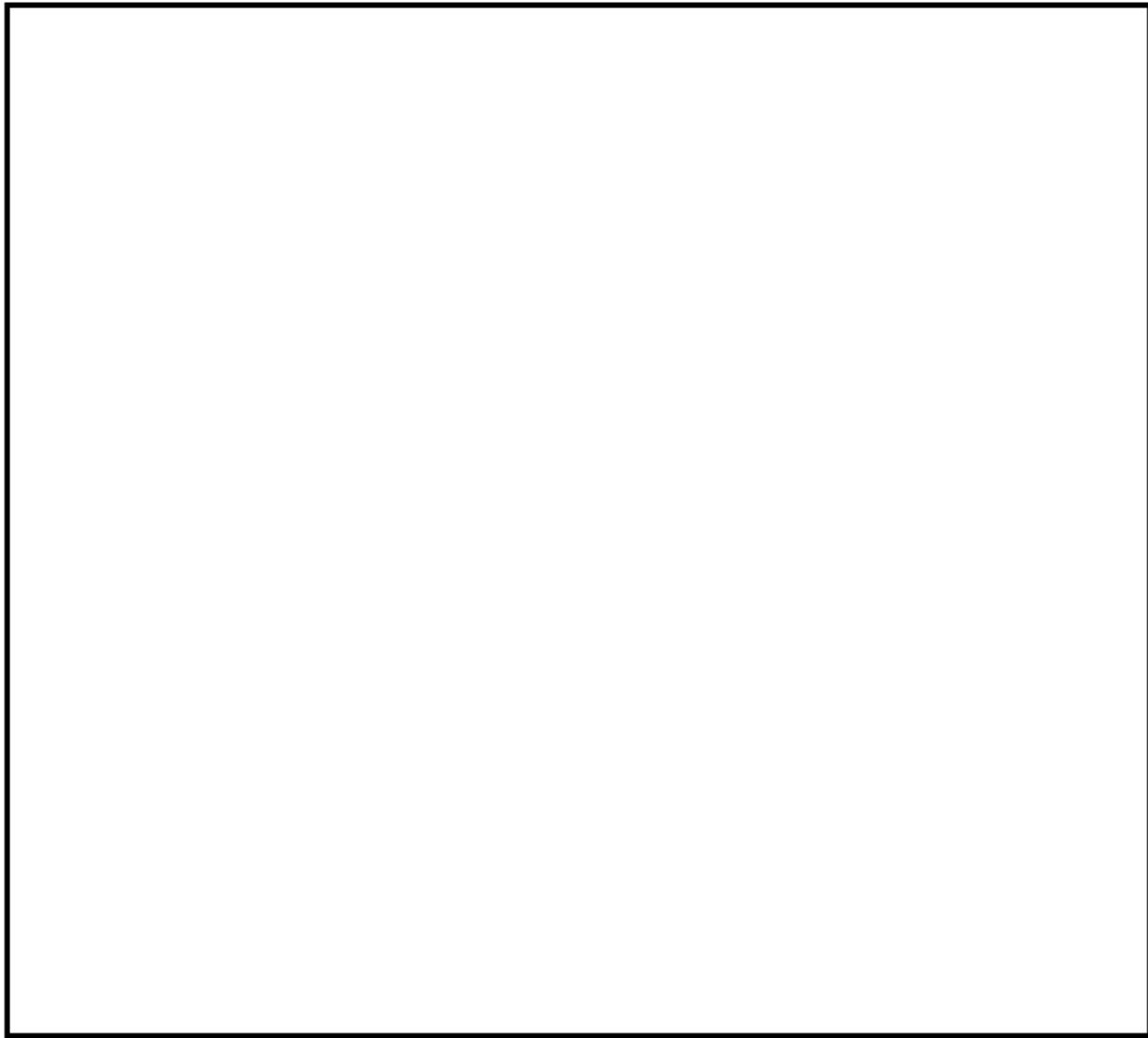


FINE:



I also want to briefly note at the end here our review of Section 215 orders for business records. We did not find that it was used widely. Only 21 pure Section 215 requests were issued from 2002 through 2005. We also did not identify instances involving improper or illegal use of a pure Section 215 order. In addition, we did not find that they were used to obtain library records, which was one of the concerns relating to the statute when it was passed.

The FBI also noted to us -- reported to us, and we reviewed -- that Section 215 orders were a specialized tool that was useful in various contexts.



REYES:

But it wasn't without having warnings from those of us in Congress -- as we debated the Patriot Act, we actually identified some of these, some of these very issues that the inspector general has now documented in his report.

In fact, yesterday the director was at the Senate Judiciary Committee. And he was asked: Had Congress not required an inspector general report, would it have been possible for the FBI to have identified these issues or these problems?

And the director's answer was: He certainly hoped so.

Well, hope -- like everything else -- doesn't cut it in an area where we're talking about the security of this country and making sure that agents are accountable to follow procedures and the law.

The fact that, in at least one case, a problem by one of your attorneys in the FBI was brought to the attention of a member of management, a supervisor, and nothing was done is very troubling to me.

I have, as you know, the privilege of having worked with many fine, outstanding FBI agents, and also managers and agents in charge as a chief in the Border Patrol. So I know how important having these kinds of tools is to an investigation, especially when we're talking about terrorism.

But, you know, the one thing -- and I will tell you, in the last three weeks or so, I've made contact with some of my former colleagues: some have made contact with me -- one of the troubling things is that you might have had training in place, but it was not followed.

In fact, a couple commented to me: You know, when we're under such pressure to perform and to do these investigations, one of the first things that falls by the wayside is training.

But training in a critical area like NSIs or Section 215 -- in fact, I asked that question: How come there weren't more 215s executed? And the candid answer from some of my colleagues was: Because more agents don't understand them; don't understand how to use them.

And so that is very telling on the agency. And so I hope you do refocus on training; you do refocus on accountability and tracking and making sure that you, as the deputy and the director, know exactly what's going on in your respective agency.

I know, as a chief, we always had the mantra to do more with less. And whenever we had to cut back, one of the first areas that management always identified: Well, we'll just forego the training.

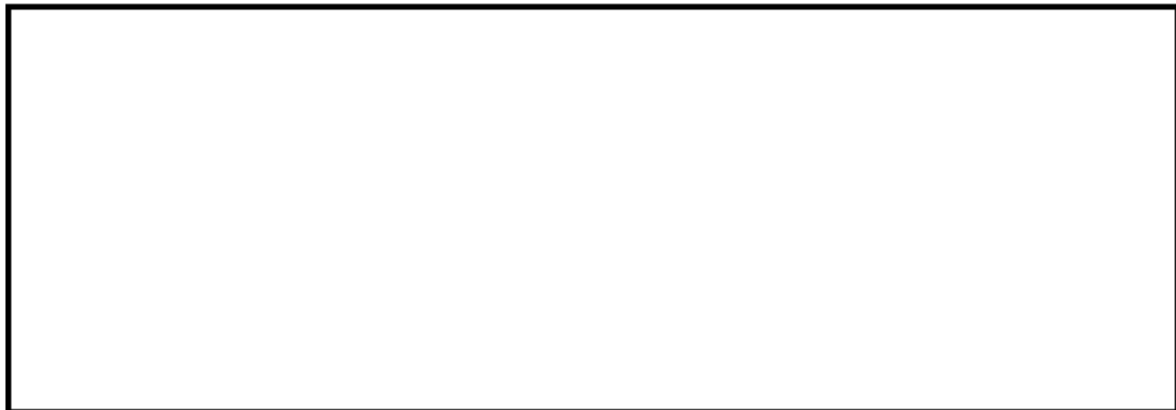
Well, you know what? There are certain areas that we can't forego. We certainly can't forego firearms training for agents out there, because that makes a difference between an agent surviving or not surviving.

And the same principles apply when you're dealing in national security and you're dealing with the rights and liberties of Americans. We want you to have the tools, but we want to make sure that you use them judiciously, and certainly within the Constitution and the law.

So I wanted to make those comments, because I hold the FBI in the highest regard. I mean, you've stumbled, you've tripped, but I'm certainly going to be mindful to continue to watch but also remind you that there's a lot at stake in your ability to do your job professionally, competently and within the law.

So I hope you carry that message back.

With that, I'd like to -- I don't really have a question: I just wanted to make that comment because of my experience and relationship with the FBI in the past.





DINH:

Thank you, Mr. Chairman.

Thank you, Ranking Member Hoekstra and members of the committee. It is an honor, although not necessarily a pleasure, to be here with you today.

My formal statement is submitted for the record so, with your permission, I'll speak very frankly.

I am disappointed; I'm dismayed; and, frankly, I was sick to my stomach when I found out about these misuses, when I was on vacation a couple of weeks ago.

The reason for that, as you all know, is that, when I was assistant attorney general, my colleagues spent many days, hours and nights with you and with your staff, in working through to revise and reform the pre-existing NSL authorities that are disparate amongst our laws, to come up with the provisions in the USA Patriot Act.

With the authority that you gave the Department of Justice and the FBI comes a very particular responsibility to use it wisely and correctly.

That responsibility was not discharged. Instead, what we saw was reckless actions and careless management. That is inexcusable. It cannot be swept under the rug.

And if there is a silver lining in the last several weeks, it is that nobody has tried to sweep this under the rug: that the FBI director, deputy director, the attorney general, the deputy attorney general have all owned up and said, "These were mistakes."

DINH:

"They are inexcusable. We are not going to try and excuse it or explain it, but we will implement procedures in order to prevent their recurrence and investigations in order to ascribe responsibility, wherever they may lead."

That is the most that we can ask, in hindsight, of our management team.

What we need to ask further is now in foresight. What do we do?

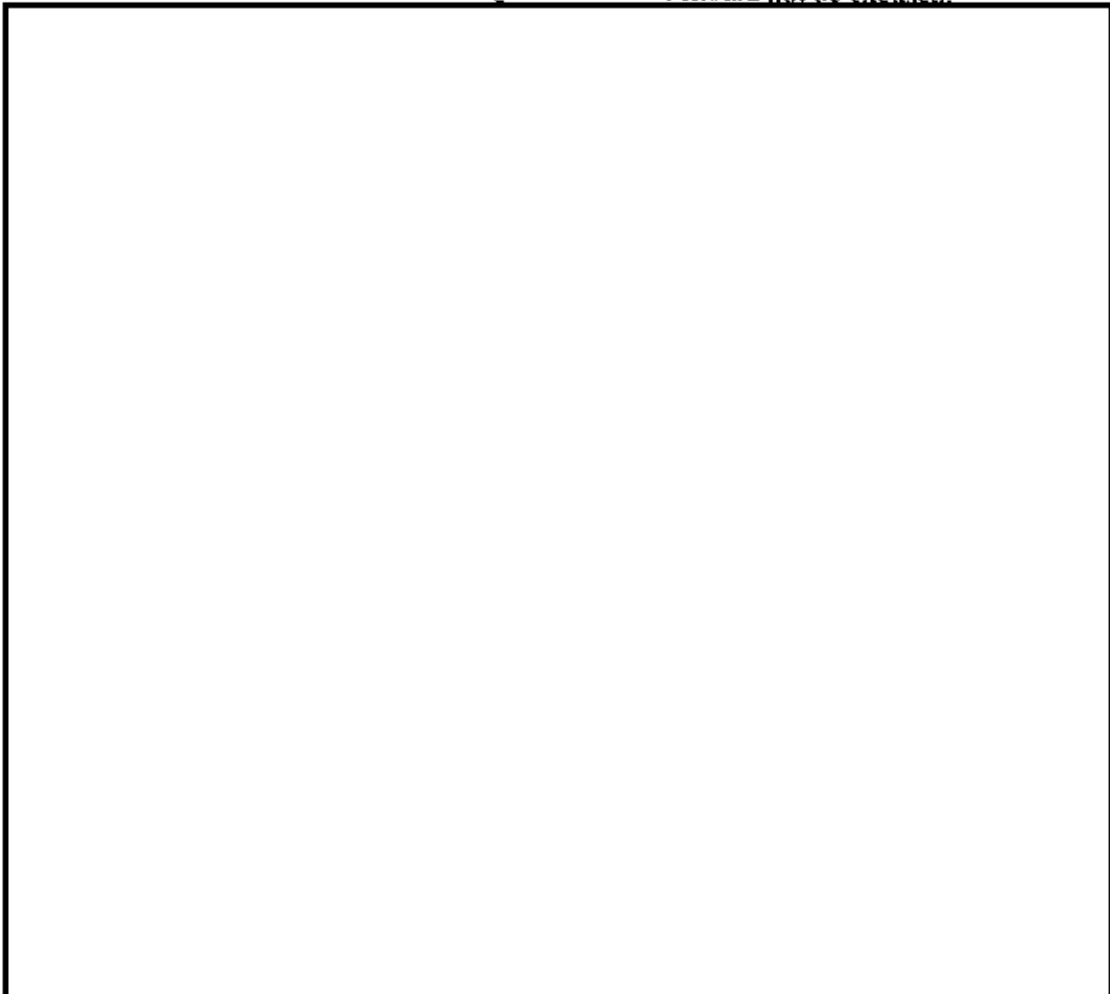
My disappointment and my dismay is especially acute because I realize, as I think most members of the committee do, how important these authorities are to protecting our national security and our law enforcement efforts.

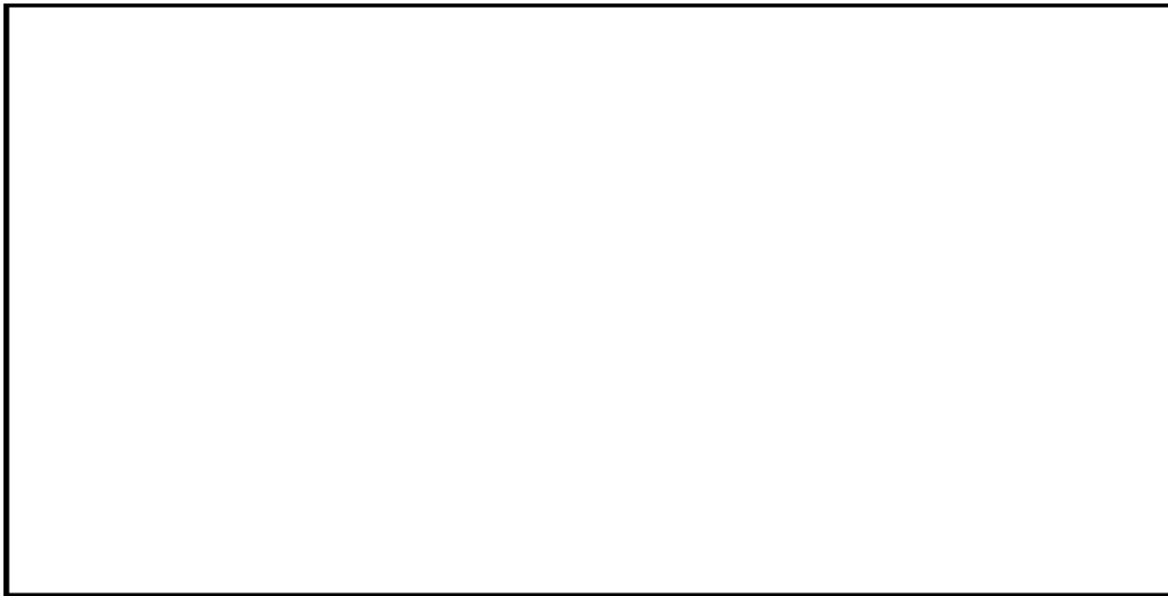
Because they are so important, they should not be misused and give the opportunity for political activism so that the law enforcement and national security officials would be disabled from using these important bread-and-butter tools in protecting America in the future.

I hope against hope that this process, this dialogue, will reaffirm the necessity of these tools while, at the same time, reaffirm the need for oversight and controls to ensure that they are used properly, aggressively, but within proper channels and with the appropriate checks and balances.

One of the things that was also dismaying in the inspector general's report that the chairman has pointed out is that where there are properly authorized authorities, Section 215, for example, they were not fully utilized because there was confusion, lack of training and lack of knowledge regarding the applicability and usefulness in specific investigations.

So useful tools are not being used while essential tools were being abused. That's what I call reckless action and careless management. And it should not be excused.





REYES:

Thank you.
Mr. Dinh?

DINH:

I don't know enough about Director Mueller's testimony or the proposal on the table in order to comment intelligently on it. So I can't give you a full answer.

I do know, however, that you have variations of it. Section 215 and also the national security letters, in order to obtain third-party records -- which are essential at a beginning of an investigation -- I think a good first step would be, as the chairman had noted, is to make sure the training is in place, that 215 is fully utilized, and national security letters are properly utilized. And then see where the gaps in enforcement are, and where the envelope was pushed, but the needs of law enforcement was not met with the existing authorities.

It may well be the envelope has been stretched, and I simply don't know it.

REYES:

Thank you, Mr. Dinh.
Mr. Hoekstra?

HOEKSTRA:

I'll pass.

REYES:

Ms. Eshoo?

ESHOO:

Thank you. And thank you to the members of this panel. I wish all the members were still here to hear your testimony, because I think that the follow-on to the first panel and which you have given to us is really very, very important.

I have some observations, and they may not be in any particular order. But it seems to me that what we heard from the first panel -- with the exception, obviously, of the inspector general -- is, "Mea culpa, mea culpa, but don't touch us."

Now, these powers are really sweeping, and I think that Congresswoman Schakowsky stated that very, very clearly.

What seems to be the mantra of the law enforcement community, namely the FBI in this case, is: "We have to be able to keep these powers, and they should not be subjected to any scrutiny by the court."

I'm convinced that the protections of liberty have to come upfront. I don't believe that no matter what the FBI puts into place -- of course, a lot of things they've put into place have just fallen apart, so I mean, they just talk about it, it doesn't really seem to happen.

We've spent hundreds of millions of taxpayer dollars and come up with, "Close your eyes. What do you see?" "Nothing." So, these are just kind of promises on the (inaudible).

So I'm at a place now where the protections of liberty have to come upfront. And I think that that's something that's strengthful (sic). It's not weakening.

I'm going to go to Mr. Dinh first, because my sense is that you're going to object to that. But can you tell me why the FISA model cannot work?

DINH:

That's a very good question and a very pertinent observation, Congresswoman. The two...

ESHOO:

You don't have to flatter me.

DINH:

No, no, no, no. I do that to everyone.

(LAUGHTER)

There are two observations. One, first that, as Mr. Dempsey points out in his written testimony, third-party records of the type that are subject to NSLs and Section 215 authority have not been recognized by the Supreme Court as constitutionally protected, private matter such that it's subject to the Fourth Amendment because they've been given to a third party.

And so the level of judicial supervision that is appropriate for a content-related intercept or a subpoena would not be appropriate for this type of information, either...

(CROSSTALK)

ESHOO:

But hasn't the FBI suggested that they don't collect content in this?

DINH:

They don't. They don't. And I understand you have a modification and I don't want to put words in your mouth. But that's one...

ESHOO:

Of course, we don't know. There's no way to check.

DINH:

That's one observation. The other observation is the following: The importance of these types of information is similar to what the ordinary criminal investigators put pen registers and trace and trap devices to, which is to find links not in content, but in communication patterns.

ESHOO:

Why don't we go to Mr. Dempsey?
(CROSSTALK)

DEMPSEY:

Well, I would just say that, Mr. Dinh, you know, you can't have your cake and eat it too. You've testified here about the importance and value and usefulness of the Section 215 Patriot Act court order process for getting third-party business records.

So we have two parallel processes here now: one which is a court order process: one which is this FBI self-issued document for some of the most sensitive information imaginable -- banking records, communications records, insurance records.

You know, the FBI agents already prepared internally. I think, a factual explanation -- or they should be preparing -- why they need this record. I think that the court process can be made flexible, timely, responsive. It won't be perfect necessarily, but we need to get all three branches of government involved in this process.

And I think it can be done in a workable way. And in many regards, Sections 215 is the model for that.

GRAVES:

And if I could just add, Congresswoman.

ESHOO:

Just quickly.

GRAVES:

Every court in the country has emergency procedures to access it on an emergency basis, even the FISA Court. And the suggestion that they can't get records that they need immediately or pretty quickly through the court I think is just not proven by the accessibility of the federal courts and the federal judges across the country.

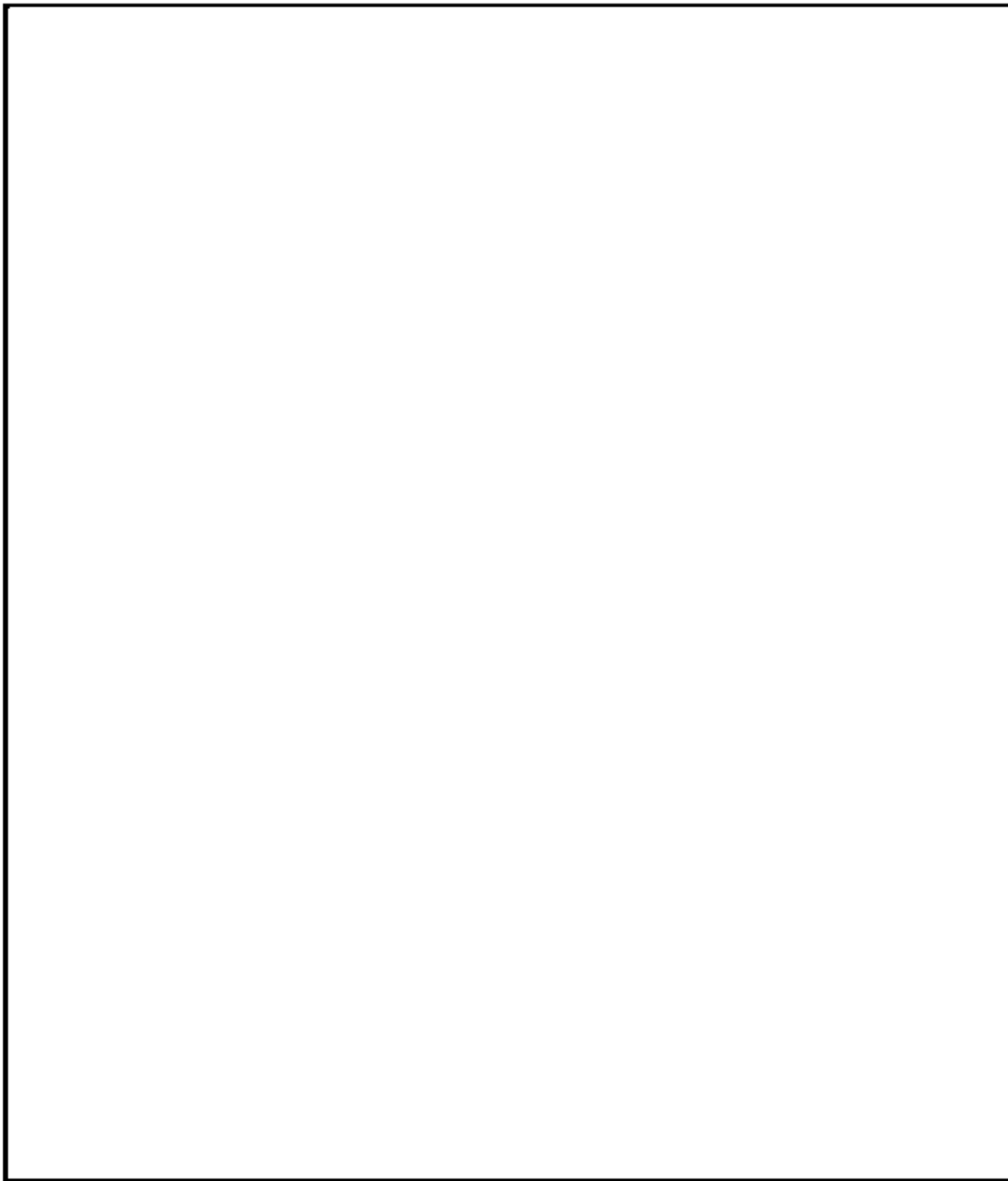
And if we need more judges, we can provide more judges.

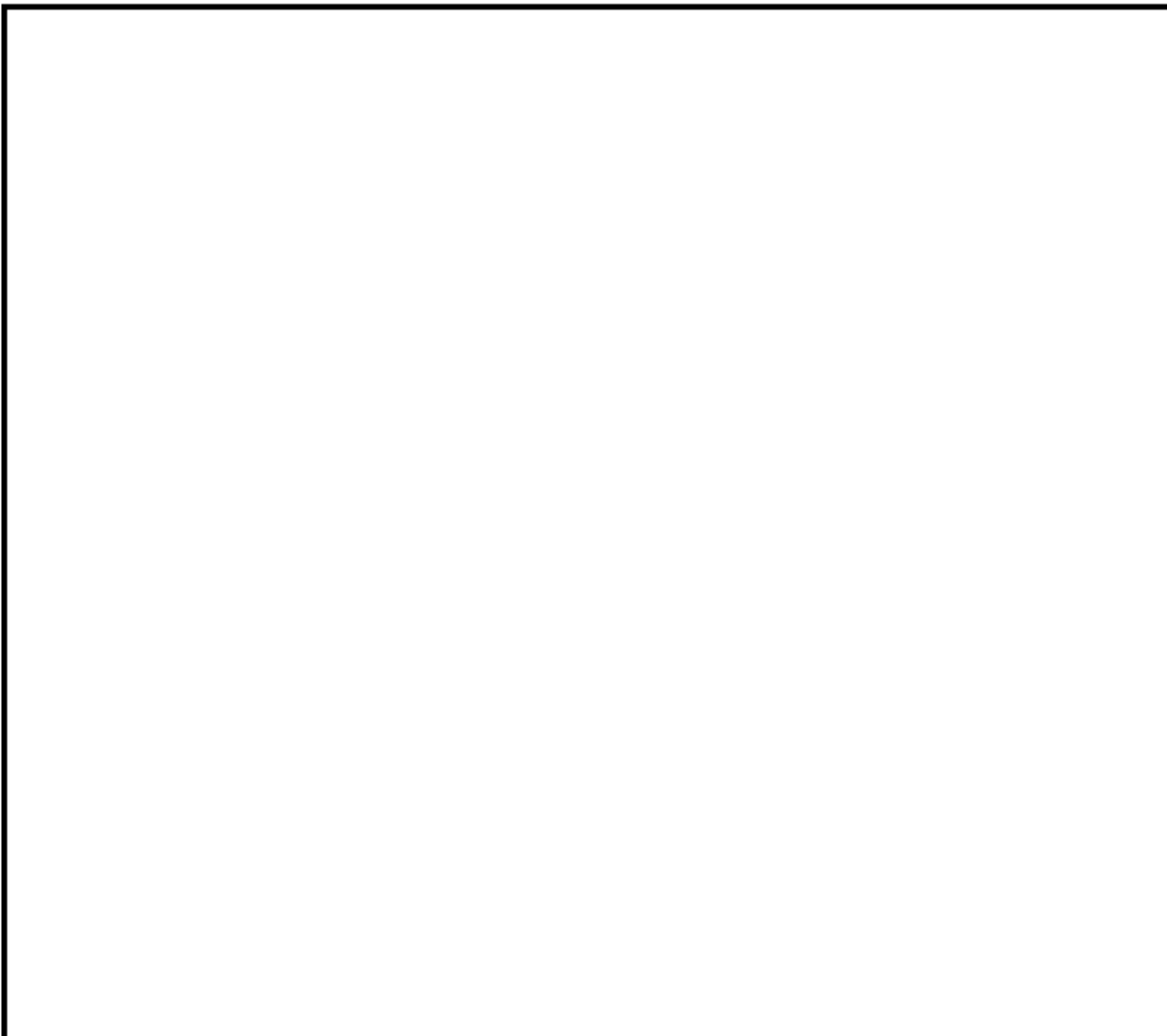
ESHOO:

But, Mr. Chairman, I think that this is an area that we're not only going to continue to pursue, but I think really cries out for legislation. I think there's an undeniable conclusion here, and that is that the FBI is incapable of policing itself.

But that's not all right. It's not OK just to make that statement and to leave it there. And I, for one, am interested in pursuing a legislative remedy to this because of what not only the inspector general has brought out, but the widespread abuse that stands as a result of it.

Thank you.





List of Panel Members and Witnesses

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ATA MALAYSIA USA PATRIOT ACT & EXTRA-TERRITORIAL APPREHENSIONS



FBI National Security Law
Branch

USA PATRIOT ACT

◆ **THE UNITING AND
STRENGTHENING AMERICA BY
PROVIDING APPROPRIATE
TOOLS REQUIRED TO INTERCEPT
AND OBSTRUCT TERRORISM**

◆ Passed October 26, 2001

◆ Senate 98-1 votes; House 357-66

USA PATRIOT ACT

- ◆ Impetus of ACT- September 11, 2001 terrorist attacks on the World Trade Center and the Pentagon.
- ◆ Purpose of ACT – To prevent another terrorist attack!!!

USA PATRIOT ACT

- ◆ Counterterrorism/Foreign Counterintelligence tools-

Section 215



- Allows *FISA* order if significant purpose is to obtain foreign intelligence;

USA PATRIOT ACT

- ◆ Counterterrorism/Foreign Counterintelligence tools-

Section 3121



- Permits FBI to acquire business records if relevant to an FBI investigation.

END???

◆ QUESTIONS????

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MAR 15 2012

Mr. Alexander Abdo
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004

Re: AG/11-00790 (F)
DAG/11-00791 (F)
ASG/11-00792 (F)
OLA/11-00793 (F)
VRB:DRH:SBT

Dear Mr. Abdo:

This responds to your Freedom of Information Act (FOIA) request dated and received in this Office on May 31, 2011, for all records concerning the government's interpretation or use of section 215 of the PATRIOT Act from March 9, 2006 to the present. The scope of your request was subsequently narrowed per stipulation filed December 9, 2011. This response is made on behalf of the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, and Legislative Affairs.

Please be advised that searches have been conducted in the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, and Legislative Affairs (OLA), as well as of the electronic database of the Departmental Executive Secretariat, which is the official records repository for the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, and maintains certain OLA records. We also conducted a search of the records indices of the administration of former Attorneys General Gonzales and Mukasey. The indices supplement the electronic database of the Departmental Executive Secretariat and list file folder titles, arranged according to subject, for the records of former Office of the Attorney General, Deputy Attorney General, and Associate Attorney General staff. In addition, as we advised in our letter of August 31, 2011, the National Security Division located and referred material to this Office. In total, sixteen records, totaling 262 pages, have been located that are responsive to your request.

I have determined that eight documents, totaling twenty-six pages, are appropriate for release without excision and copies are enclosed.

Additionally, four documents, totaling ten pages, are being withheld in full pursuant to Exemptions 1 and 5 of the FOIA, 5 U.S.C. § 552(b)(1), (b)(5), which pertain to information that is properly classified in the interest of national security pursuant to Section 1.4(c) of Executive Order 13526 and to certain inter- or intra-agency communications protected by the deliberative process privilege. For your information, the withheld material consists of briefing material and three classified letters between the Department and Congress that are identical but for the addressee. None of the information being withheld is appropriate for discretionary disclosure.

Moreover, one document, totaling five pages, is a duplicate of material previously withheld in full pursuant to Exemption 1 by the National Security Division. This material is already the subject of litigation in the Southern District of New York, *New York Times Co. v. DOJ*, 11 Civ. 6990 (WHP) and *ACLU et al. v. FBI et al.*, 11 Civ. 07562 (WHP).

Because one document, totaling thirteen pages, originated with the Office of the Legal Counsel (OLC), we have referred that material to OLC for processing and direct response to you. You may contact OLC as follows:

Elizabeth Farris, Supervisory Paralegal
Office of Legal Counsel
Room 5515
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Telephone: (202) 514-2038
Email: usdoj-officeoflegalcounsel@usdoj.gov

Additionally, because two classified documents, totaling 208 pages, originated with the Office of the Inspector General (OIG), we have referred that material to OIG for further processing. You may contact OIG as follows:

Deborah Waller, Paralegal Specialist
Office of the Inspector General
Room 4726
950 Pennsylvania Avenue, NW
Washington, DC 20530

Telephone: (202) 616-0646
E-mail: oigfoia@usdoj.gov

Although I am aware that your request is the subject of ongoing litigation and that appeals are not ordinarily acted on in such situations, I am required by statute and regulation to inform you of your right to file an administrative appeal.

Sincerely,



Vanessa R. Brinkmann
Counsel, Initial Request Staff

Enclosures

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SA

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United States Senate

SELECT COMMITTEE ON INTELLIGENCE
2009-10-20 09:44:50

SSCI #2009-1438

March 31, 2009

The Honorable Eric H. Holder, Jr.
 Attorney General
 Department of Justice
 Washington, D.C. 20530

The Honorable Dennis C. Blair
 Director of National Intelligence
 Washington, D.C. 20511

Dear Attorney General Holder and Director Blair:

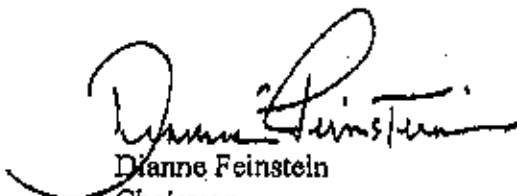
Three provisions of the Foreign Intelligence Surveillance Act of 1978, as amended, are scheduled to sunset on December 31, 2009. Two of them—on roving wiretaps and business records—were enacted or significantly amended by sections 206 and 215 of the USA PATRIOT Act of 2001, and extended for four years by the USA PATRIOT Improvement and Reauthorization Act of 2005. The third—on lone wolf surveillance authority—was enacted as section 6001 of the Intelligence Reform and Terrorism Prevention Act of 2004, and also extended for four years by the Reauthorization Act.

We would like to begin consideration of these provisions soon so that legislation can be enacted in advance of the end of the year. We would, therefore appreciate receiving from you, by May 1, 2009, your recommendations together with a written presentation of the facts and reasons that support those recommendations. To the extent that national security permits, please do so in an unclassified manner to enhance public understanding of your recommendations. Please supplement that unclassified presentation with a classified annex as appropriate.


If there are further recommendations you would like to make jointly to our Committee for legislative consideration this year based on experience under the FISA Amendments Act of 2008 or other matters relating to national security investigations, please include them in your response to this request.

The Honorable Eric H. Holder, Jr.
The Honorable Dennis C. Blair
March 31, 2009
Page Two

We intend to schedule a hearing in May that will provide the Committee with an initial opportunity to consider your recommendations.



Dianne Feinstein
Chairman

Sincerely,

Christopher S. Bond
Vice Chairman



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 14, 2009

The Honorable Dianne Feinstein
Chairwoman
The Honorable Christopher S. Bond
Vice Chairman
Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

Dear Senators Feinstein and Bond:

Thank you for your letter requesting our recommendations on the three provisions of the Foreign Intelligence Surveillance Act ("FISA") currently scheduled to expire on December 31, 2009. We believe that the best legislation will emerge from a careful examination of these matters. In this letter, we provide our recommendations for each provision, along with a summary of the supporting facts and rationale. We have discussed these issues with the Office of the Director of National Intelligence, which concurs with the views expressed in this letter.

We also are aware that Members of Congress may propose modifications to provide additional protection for the privacy of law abiding Americans. As President Obama said in his speech at the National Archives on May 21, 2009, "We are indeed at war with al Qaeda and its affiliates. We do need to update our institutions to deal with this threat. But we must do so with an abiding confidence in the rule of law and due process; in checks and balances and accountability." Therefore, the Administration is willing to consider such ideas, provided that they do not undermine the effectiveness of these important authorities.

1. Roving Wiretaps, USA PATRIOT Act Section 206 (codified at 50 U.S.C. § 1805(e)(2))

We recommend reauthorizing section 206 of the USA PATRIOT Act, which provides for roving surveillance of targets who take measures to thwart FISA surveillance. It has proven an important intelligence-gathering tool in a small but significant subset of FISA electronic surveillance orders.

This provision states that where the Government sets forth in its application for a surveillance order "specific facts" indicating that the actions of the target of the order "may have the effect of thwarting" the identification, at the time of the application, of third parties necessary to accomplish the ordered surveillance, the order shall direct such third parties, when identified to furnish the Government with all assistance necessary to accomplish surveillance of the target identified in the order. In other words, the "roving" authority is only available when the

Government is able to provide specific information that the target may engage in counter-surveillance activity (such as rapidly switching cell phone numbers). The language of the statute does not allow the Government to make a general, "boilerplate" allegation that the target may engage in such activities; rather, the Government must provide specific facts to support its allegation.

There are at least two scenarios in which the Government's ability to obtain a roving wiretap may be critical to effective surveillance of a target. The first is where the surveillance targets a traditional foreign intelligence officer. In these cases, the Government often has years of experience maintaining surveillance of officers of a particular foreign intelligence service who are posted to locations within the United States. The FBI will have extensive information documenting the tactics and tradecraft practiced by officers of the particular intelligence service, and may even have information about the training provided to those officers in their home country. Under these circumstances, the Government can represent that an individual who has been identified as an officer of that intelligence service is likely to engage in counter-surveillance activity.

The second scenario in which the ability to obtain a roving wiretap may be critical to effective surveillance is the case of an individual who actually has engaged in counter-surveillance activities or in preparations for such activities. In some cases, individuals already subject to FISA surveillance are found to be making preparations for counter-surveillance activities or instructing associates on how to communicate with them through more secure means. In other cases, non-FISA investigative techniques have revealed counter-surveillance preparations (such as buying "throwaway" cell phones or multiple calling cards). The Government then offers these specific facts to the FISA court as justification for a grant of roving authority.

Since the roving authority was added to FISA in 2001, the Government has sought to use it in a relatively small number of cases (on average, twenty-two applications a year). We would be pleased to brief Members or staff regarding actual numbers, along with specific case examples, in a classified setting. The FBI uses the granted authority only when the target actually begins to engage in counter-surveillance activity that thwarts the already authorized surveillance, and does so in a way that renders the use of roving authority feasible.

Roving authority is subject to the same court-approved minimization rules that govern other electronic surveillance under FISA and that protect against the unjustified acquisition or retention of non-pertinent information. The statute generally requires the Government to notify the FISA court within 10 days of the date upon which surveillance begins to be directed at any new facility. Over the past seven years, this process has functioned well and has provided effective oversight for this investigative technique.

We believe that the basic justification offered to Congress in 2001 for the roving authority remains valid today. Specifically, the ease with which individuals can rapidly shift between communications providers, and the proliferation of both those providers and the services they offer, almost certainly will increase as technology continues to develop. International terrorists, foreign intelligence officers, and espionage suspects — like ordinary criminals — have learned to use these numerous and diverse communications options to their advantage. Any effective surveillance mechanism must incorporate the ability to rapidly address an unanticipated change in the target's communications behavior. The roving electronic surveillance provision has functioned as intended and has addressed an investigative requirement that will continue to be critical to national security operations. Accordingly, we recommend reauthorizing this feature of FISA.

2. "Business Records," USA PATRIOT Act Section 215 (codified at 50 U.S.C. § 1861-62)

We also recommend reauthorizing section 215 of the USA PATRIOT Act, which allows the FISA court to compel the production of "business records." The business records provision addresses a gap in intelligence collection authorities and has proven valuable in a number of contexts.

The USA PATRIOT Act made the FISA authority relating to business records roughly analogous to that available to FBI agents investigating criminal matters through the use of grand jury subpoenas. The original FISA language, added in 1998, limited the business records authority to four specific types of records, and required the Government to demonstrate "specific and articulable facts" supporting a reason to believe that the target was an agent of a foreign power. In the USA PATRIOT Act, the authority was changed to encompass the production of "any tangible things" and the legal standard was changed to one of simple relevance to an authorized investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities.

The Government first used the USA PATRIOT Act business records authority in 2004 after extensive internal discussions over its proper implementation. The Department's inspector general evaluated the Department's implementation of this new authority at length, in reports that are now publicly available. Other parts of the USA PATRIOT Act, specifically those eliminating the "wall" separating intelligence operations and criminal investigations, also had an effect on the operational environment. The greater access that intelligence investigators now have to criminal tools (such as grand jury subpoenas) reduces but does not eliminate the need for intelligence tools such as the business records authority. The operational security requirements of most intelligence investigations still require the secrecy afforded by the FISA authority.

For the period 2004-2007, the FISA court has issued about 220 orders to produce business records. Of these, 173 orders were issued in 2004-06 in combination with FISA pen

The Honorable Dianne Feinstein
The Honorable Christopher S. Bond
Page 4

register orders to address an anomaly in the statutory language that prevented the acquisition of subscriber identification information ordinarily associated with pen register information. Congress corrected this deficiency in the pen register provision in 2006 with language in the USA PATRIOT Improvement and Reauthorization Act. Thus, this use of the business records authority became unnecessary.

The remaining business records orders issued between 2004 and 2007 were used to obtain transactional information that did not fall within the scope of any other national security investigative authority (such as a national security letter). Some of these orders were used to support important and highly sensitive intelligence collection operations, of which both Members of the Intelligence Committee and their staffs are aware. The Department can provide additional information to Members or their staff in a classified setting.

It is noteworthy that no recipient of a FISA business records order has ever challenged the validity of the order, despite the availability, since 2006, of a clear statutory mechanism to do so. At the time of the USA PATRIOT Act, there was concern that the FBI would exploit the broad scope of the business records authority to collect sensitive personal information on constitutionally protected activities, such as the use of public libraries. This simply has not occurred, even in the environment of heightened terrorist threat activity. The oversight provided by Congress since 2001 and the specific oversight provisions added to the statute in 2006 have helped to ensure that the authority is being used as intended.

Based upon this operational experience, we believe that the FISA business records authority should be reauthorized. There will continue to be instances in which FBI investigators need to obtain transactional information that does not fall within the scope of authorities relating to national security letters and are operating in an environment that precludes the use of less secure criminal authorities. Many of these instances will be mundane (as they have been in the past), such as the need to obtain driver's license information that is protected by State law. Others will be more complex, such as the need to track the activities of intelligence officers through their use of certain business services. In all these cases, the availability of a generic, court-supervised FISA business records authority is the best option for advancing national security investigations in a manner consistent with civil liberties. The absence of such an authority could force the FBI to sacrifice key intelligence opportunities.

**3. "Lone Wolf," Intelligence Reform and Terrorism Prevention Act of 2004
Section 6001 (codified at 50 U.S.C. § 1801(b)(1)(C))**

Section 6001 of the Intelligence Reform and Terrorism Prevention Act of 2004 defines a "lone wolf" agent of a foreign power and allows a non-United States person who "engages in international terrorism activities" to be considered an agent of a foreign power under FISA even though the specific foreign power (i.e., the international terrorist group) remains unidentified. We also recommend reauthorizing this provision.

Enacted in 2004, this provision arose from discussions inspired by the Zacarias Moussaoui case. The basic idea behind the authority was to cover situations in which information linking the target of an investigation to an international group was absent or insufficient, although the target's engagement in "international terrorism" was sufficiently established. The definition is quite narrow: it applies only to non-United States persons; the activities of the person must meet the FISA definition of "international terrorism;" and the information likely to be obtained must be foreign intelligence information. What this means, in practice, is that the Government must know a great deal about the target, including the target's purpose and plans for terrorist activity (in order to satisfy the definition of "international terrorism"), but still be unable to connect the individual to any group that meets the FISA definition of a foreign power.

To date, the Government has not encountered a case in which this definition was both necessary and available, i.e., the target was a non-United States person. Thus, the definition has never been used in a FISA application. However, we do not believe that this means the authority is now unnecessary. Subsection 101(b) of FISA provides ten separate definitions for the term "agent of a foreign power" (five applicable only to non-United States persons, and five applicable to all persons). Some of these definitions cover the most common fact patterns; others describe narrow categories that may be encountered rarely. However, this latter group includes legitimate targets that could not be accommodated under the more generic definitions and would escape surveillance but for the more specific definitions.

We believe that the "lone wolf" provision falls squarely within this class. While we cannot predict the frequency with which it may be used, we can foresee situations in which it would be the only avenue to effective surveillance. For example, we could have a case in which a known international terrorist affirmatively severed his connection with his group, perhaps following some internal dispute. The target still would be an international terrorist, and an appropriate target for intelligence surveillance. However, the Government could no longer represent to the FISA court that he was currently a member of an international terrorist group or acting on its behalf. Lacking the "lone wolf" definition, the Government could have to postpone FISA surveillance until the target could be linked to another group. Another scenario is the prospect of a terrorist who "self-radicalizes" by means of information and training provided by a variety of international terrorist groups via the Internet. Although this target would have adopted the aims and means of international terrorism, the target would not actually have contacted a terrorist group. Without the lone wolf definition, the Government might be unable to establish FISA surveillance.

These scenarios are not remote hypotheticals; they are based on trends we observe in current intelligence reporting. We cannot determine how common these fact patterns will be in the future or whether any of the targets will so completely lack connections to groups that they cannot be accommodated under other definitions. However, the continued availability of the

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lone wolf definition eliminates any gap. The statutory language of the existing provision ensures its narrow application, so the availability of this potentially useful tool carries little risk of overuse. We believe that it is essential to have the tool available for the rare situation in which it is necessary rather than to delay surveillance of a terrorist in the hopes that the necessary links are established.

Thank you for the opportunity to present our views. We would be happy to meet with your staff to discuss them. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,



Ronald Weich
Assistant Attorney General



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 14, 2009

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your letter requesting our recommendations on the three provisions of the Foreign Intelligence Surveillance Act ("FISA") currently scheduled to expire on December 31, 2009. We believe that the best legislation will emerge from a careful examination of these matters. In this letter, we provide our recommendations for each provision, along with a summary of the supporting facts and rationale. We have discussed these issues with the Office of the Director of National Intelligence, which concurs with the views expressed in this letter.

We also are aware that Members of Congress may propose modifications to provide additional protection for the privacy of law abiding Americans. As President Obama said in his speech at the National Archives on May 21, 2009, "We are indeed at war with al Qaeda and its affiliates. We do need to update our institutions to deal with this threat. But we must do so with an abiding confidence in the rule of law and due process; in checks and balances and accountability." Therefore, the Administration is willing to consider such ideas, provided that they do not undermine the effectiveness of these important authorities.

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Roving authority is subject to the same court-approved minimization rules that govern other electronic surveillance under FISA and that protect against the unjustified acquisition or retention of non-pertinent information. The statute generally requires the Government to notify the FISA court within 10 days of the date upon which surveillance begins to be directed at any new facility. Over the past seven years, this process has functioned well and has provided effective oversight for this investigative technique.

We believe that the basic justification offered to Congress in 2001 for the roving authority remains valid today. Specifically, the ease with which individuals can rapidly shift between communications providers, and the proliferation of both those providers and the services they offer, almost certainly will increase as technology continues to develop. International terrorists, foreign intelligence officers, and espionage suspects — like ordinary

The Honorable Patrick J. Leahy
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**3. "Lone Wolf," Intelligence Reform and Terrorism Prevention Act of 2004
Section 6001 (codified at 50 U.S.C. § 1801(b)(1)(C))**

Section 6001 of the Intelligence Reform and Terrorism Prevention Act of 2004 defines a "lone wolf" agent of a foreign power and allows a non-United States person who "engages in international terrorism activities" to be considered an agent of a foreign power under FISA even though the specific foreign power (i.e., the international terrorist group) remains unidentified. We also recommend reauthorizing this provision.

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information likely to be obtained must be foreign intelligence information. What this means, in practice, is that the Government must know a great deal about the target, including the target's purpose and plans for terrorist activity (in order to satisfy the definition of "international terrorism"), but still be unable to connect the individual to any group that meets the FISA definition of a foreign power.

To date, the Government has not encountered a case in which this definition was both necessary and available, *i.e.*, the target was a non-United States person. Thus, the definition has never been used in a FISA application. However, we do not believe that this means the authority is now unnecessary. Subsection 101(b) of FISA provides ten separate definitions for the term "agent of a foreign power" (five applicable only to non-United States persons, and five applicable to all persons). Some of these definitions cover the most common fact patterns; others describe narrow categories that may be encountered rarely. However, this latter group includes legitimate targets that could not be accommodated under the more generic definitions and would escape surveillance but for the more specific definitions.

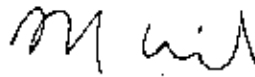
We believe that the "lone wolf" provision falls squarely within this class. While we cannot predict the frequency with which it may be used, we can foresee situations in which it would be the only avenue to effective surveillance. For example, we could have a case in which a known international terrorist affirmatively severed his connection with his group, perhaps following some internal dispute. The target still would be an international terrorist, and an appropriate target for intelligence surveillance. However, the Government could no longer represent to the FISA court that he was currently a member of an international terrorist group or acting on its behalf. Lacking the "lone wolf" definition, the Government could have to postpone FISA surveillance until the target could be linked to another group. Another scenario is the prospect of a terrorist who "self-radicalizes" by means of information and training provided by a variety of international terrorist groups via the Internet. Although this target would have adopted the aims and means of international terrorism, the target would not actually have contacted a terrorist group. Without the lone wolf definition, the Government might be unable to establish FISA surveillance.

These scenarios are not remote hypotheticals; they are based on trends we observe in current intelligence reporting. We cannot determine how common these fact patterns will be in the future or whether any of the targets will so completely lack connections to groups that they cannot be accommodated under other definitions. However, the continued availability of the lone wolf definition eliminates any gap. The statutory language of the existing provision ensures its narrow application, so the availability of this potentially useful tool carries little risk of overuse. We believe that it is essential to have the tool available for the rare situation in which it is necessary rather than to delay surveillance of a terrorist in the hopes that the necessary links are established.

The Honorable Patrick J. Leahy
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Thank you for the opportunity to present our views. We would be happy to meet with your staff to discuss them. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,



Ronald Weich
Assistant Attorney General

cc: The Honorable Jeff Sessions
Ranking Minority Member



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, DC

April 30, 2010

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Dianne Feinstein
Chairman
Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Silvestre Reyes
Chairman
Permanent Select Committee on Intelligence
U.S. House of Representatives
Washington, D.C. 20515

Dear Madam and Messrs. Chairmen:

This report is submitted pursuant to sections 107 and 502 of the Foreign Intelligence Surveillance Act of 1978 (the "Act"), as amended, 50 U.S.C. § 1801 *et seq.*, and section 118 of USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177 (2006). In accordance with those provisions, this report covers all applications made by the Government during calendar year 2009 for authority to conduct electronic surveillance for foreign intelligence purposes under the Act, all applications made by the Government during calendar year 2009 for access to certain business records (including the production of tangible things) for foreign intelligence purposes, and certain requests made by the Federal Bureau of Investigation pursuant to national security letter authorities. In addition, while not required to do so by statute, the Government is providing information concerning the number of applications made during calendar year 2009 for authority to conduct physical searches for foreign intelligence purposes.

Applications for Electronic Surveillance Made During Calendar Year 2009
(section 107 of the Act, 50 U.S.C. § 1807)

During calendar year 2009, the Government made 1,376 applications to the Foreign Intelligence Surveillance Court (hereinafter "FISC") for authority to conduct electronic surveillance and physical searches for foreign intelligence purposes. The 1,376 applications include applications made solely for electronic surveillance, applications

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The Honorable Dianne Feinstein
The Honorable John Conyers, Jr.
The Honorable Silvestre Royes

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made solely for physical search, and combined applications requesting authority for electronic surveillance and physical search. Of these, 1,329 applications included requests for authority to conduct electronic surveillance.

Of these 1,329 applications, eight were withdrawn by the Government. The FISC denied one application in whole, and one in part, and made modifications to the proposed orders in fourteen applications. Thus, the FISC approved collection activity in a total of 1,320 of the applications that included requests for authority to conduct electronic surveillance.

Applications for Access to Certain Business Records (Including the Production of Tangible Things) Made During Calendar Year 2009 (section 502 of the Act, 50 U.S.C. § 1862(c)(1))

During calendar year 2009, the Government made twenty-one applications to the FISC for access to certain business records (including the production of tangible things) for foreign intelligence purposes. The FISC did not deny, in whole or in part, any such application filed by the Government during calendar year 2009. The FISC made modifications to nine proposed orders in applications for access to business records.

Requests Made for Certain Information Concerning Different United States Persons Pursuant to National Security Letter Authorities During Calendar Year 2009 (USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177 (2006))

Pursuant to Section 118 of the USA PATRIOT Improvement and Reauthorization Act, Pub. L. 109-177 (2006), the Department of Justice provides Congress with annual reports regarding requests made by the Federal Bureau of Investigation (FBI) pursuant to the National Security Letter (NSL) authorities provided in 12 U.S.C. § 3414, 15 U.S.C. § 1681u, 15 U.S.C. § 1681v, 18 U.S.C. § 2709, and 50 U.S.C. § 436.

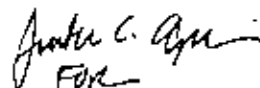
In 2009, the FBI made 14,788 NSL requests (excluding requests for subscriber information only) for information concerning United States persons. These sought information pertaining to 6,114 different United States persons.

The Honorable Patrick J. Leahy
The Honorable Dianne Feinstein
The Honorable John Conyers, Jr.
The Honorable Silvestro Reyes

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We hope this information is helpful. Please do not hesitate to contact this office if you need additional assistance regarding this matter.

Sincerely,



Ronald Weich
Assistant Attorney General

cc: The Honorable Jeff Sessions
Ranking Minority Member
Senate Committee on the Judiciary

The Honorable Christopher S. Bond
Vice Chairman
Senate Select Committee on Intelligence

The Honorable Lamar S. Smith
Ranking Minority Member
House Committee on the Judiciary

The Honorable Peter Hoekstra
Ranking Minority Member
House Permanent Select Committee on Intelligence



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 29, 2011

The Honorable Joseph R. Biden, Jr.
President
United States Senate
Washington, DC 20510

Dear Mr. President:

This report is submitted pursuant to sections 107 and 502 of the Foreign Intelligence Surveillance Act of 1978 (the "Act"), as amended, 50 U.S.C. § 1801 *et seq.*, and section 118 of USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177 (2006). In accordance with those provisions, this report covers all applications made by the Government during calendar year 2010 for authority to conduct electronic surveillance for foreign intelligence purposes under the Act, all applications made by the Government during calendar year 2010 for access to certain business records (including the production of tangible things) for foreign intelligence purposes, and certain requests made by the Federal Bureau of Investigation pursuant to national security letter authorities. In addition, while not required to do so by statute, the Government is providing information concerning the number of applications made during calendar year 2010 for authority to conduct physical searches for foreign intelligence purposes.

Applications Made to the Foreign Intelligence Surveillance Court During Calendar Year 2010 (section 107 of the Act, 50 U.S.C. § 1807)

During calendar year 2010, the Government made 1,579 applications to the Foreign Intelligence Surveillance Court (hereinafter "FISC") for authority to conduct electronic surveillance and/or physical searches for foreign intelligence purposes. The 1,579 applications include applications made solely for electronic surveillance, applications made solely for physical search, and combined applications requesting authority for electronic surveillance and physical search. Of those, 1,511 applications included requests for authority to conduct electronic surveillance.

Of those 1,511 applications, two were withdrawn by the Government. The FISC did not deny any applications in whole, or in part. The FISC made modifications to the proposed orders in fourteen applications. Thus, the FISC approved collection activity in a total of 1,506 of the applications that included requests for authority to conduct electronic surveillance.

The Honorable Joseph R. Biden, Jr.

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Applications for Access to Certain Business Records (Including the Production of Tangible Things) Made During Calendar Year 2010 (section 502 of the Act, 50 U.S.C. § 1862(e)(1))

During calendar year 2010, the Government made 96 applications to the FISC for access to certain business records (including the production of tangible things) for foreign intelligence purposes. The FISC did not deny, in whole or in part, any such application filed by the Government during calendar year 2010. The FISC made modifications to 43 proposed orders in applications for access to business records.

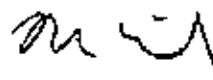
Requests Made for Certain Information Concerning Different United States Persons Pursuant to National Security Letter Authorities During Calendar Year 2010 (USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177 (2006))

Pursuant to Section 118 of the USA PATRIOT Improvement and Reauthorization Act, Pub. L. 109-177 (2006), the Department of Justice provides Congress with annual reports regarding requests made by the Federal Bureau of Investigation (FBI) pursuant to the National Security Letter (NSL) authorities provided in 12 U.S.C. § 3414, 15 U.S.C. § 1681u, 15 U.S.C. § 1681v, 18 U.S.C. § 2709, and 50 U.S.C. § 436.

In 2010, the FBI made 24,287 NSL requests (excluding requests for subscriber information only) for information concerning United States persons. These sought information pertaining to 14,212 different United States persons.

We hope that this information is helpful. Please do not hesitate to contact this office if you would like additional assistance regarding this or any other matter.

Sincerely,



Ronald Welch
Assistant Attorney General

United States Senate
WASHINGTON, DC 20510

DEPT. OF JUSTICE
EXECUTIVE SECRETARIAT

2011 SEP 22 AM 10:45

September 21, 2011

The Honorable Eric Holder
Attorney General
United States Department of Justice
Washington, D.C. 20530

Dear Attorney General Holder:

As you know, we have been concerned for some time that the U.S. government is relying on secret interpretations of surveillance authorities that – in our judgment – differ significantly from the public's understanding of what is permitted under U.S. law.

We believe that policymakers can have legitimate differences of opinion about what types of domestic surveillance should be permitted, but we also believe that the American people should be able to learn what their government thinks that the law means, so that voters have the ability to ratify or reject decisions that elected officials make on their behalf.

Unfortunately, however, the decision to classify the government's interpretations of the law itself makes an informed debate on this issue impossible. Moreover, the absence of publicly available information about the government's understanding of its authorities increases the risk of the public being misled or misinformed about the official interpretation of public laws.

While we are sure that you would agree that government officials should not describe government authorities in a way that misleads the public, during your tenure Justice Department officials have – on a number of occasions – made what we believe are misleading statements pertaining to the government's interpretation of surveillance law.

The first set of statements that concern us are the repeated claims by Justice Department officials that the government's authority to obtain business records or other 'tangible things' under section 215 of the USA Patriot Act is analogous to the use of a grand jury subpoena. This comparison – which we consider highly misleading – has been made by Justice Department officials on multiple occasions, including in testimony before Congress. As you know, Section 215 authorities are not interpreted in the same way that grand jury subpoena authorities are, and we are concerned that when Justice Department officials suggest that the two authorities are "analogous" they provide the public with a false understanding of how surveillance law is interpreted in practice.

More recently, we were troubled to learn that a Justice Department spokesman stated that "Section 215 [of the Patriot Act] is not a secret law, nor has it been implemented under secret legal opinions by the Justice Department." This statement is also extremely misleading. As the NSA General Counsel testified in July of this year, significant

Interpretations of section 215 of the Patriot Act are contained in classified opinions of the Foreign Intelligence Surveillance Court and these opinions – and the legal interpretations they contain – continue to be kept secret. In our judgment, when the government relies on significant interpretations of public statutes that are kept secret from the American public, the government is effectively relying on secret law.


Again, we hope you will agree that misleading statements of this nature are not in the public interest and must be corrected. Americans will eventually and inevitably come to learn about the gap that currently exists between the public's understanding of government surveillance authorities and the official, classified interpretation of these authorities. We believe that the best way to avoid a negative public reaction and an erosion of confidence in US intelligence agencies is to initiate an informed public debate about these authorities today. However, if the executive branch is unwilling to do that, then it is particularly important for government officials to avoid compounding the problem by making misleading statements such as the ones we have described here.

We urge you to correct the public record with regard to these statements, and ensure that everyone who speaks for the Justice Department on this issue is informed enough about it to avoid similarly misleading statements in the future.

Thank you for your attention to this matter.

Sincerely,


Ron Wyden
United States Senator


Mark Udall
United States Senator



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

October 19, 2011

The Honorable Ron Wyden
United States Senate
Washington, D.C. 20510

Dear Senator Wyden:

Thank you for your September 21, 2011 letter to the Attorney General concerning the government's authority to obtain records under section 215 of the USA PATRIOT Act. We are sending an identical response to Senator Mark Udall, who joined in your letter.

As you know, section 215 allows the federal government to apply to the Foreign Intelligence Surveillance Court ("FISA Court") for a court order directing the production of any tangible things for an authorized investigation to protect against international terrorism or clandestine intelligence activities. In order to issue an order, the FISA Court must determine that there are reasonable grounds to believe that: (1) the tangible things sought are relevant to an authorized national security investigation, other than a threat assessment; (2) the investigation is being conducted under Guidelines approved by the Attorney General under Executive Order 12333; and (3) if a U.S. person is the subject of the investigation, the investigation is not being conducted solely on the basis of First Amendment protected activities. In addition, by law, the FISA Court may only require the production of records that can be obtained with a grand jury subpoena or any other court order directing the production of records or tangible things. See 50 U.S.C. § 1861(c)(2)(D).

The government has made public that some orders issued by the FISA Court under section 215 have been used to support important and highly sensitive intelligence collection operations, on which members of Congress have been fully and repeatedly briefed. During the last Congress (in December 2009), and in the current Congress (February 2011), the Department of Justice and the Intelligence Community provided a document to the House and Senate Intelligence committees to be made available to all members of the House and Senate describing the classified uses of section 215 in detail. The Intelligence and Judiciary Committees have been briefed on these operations multiple times and have had access to copies of the classified FISA Court orders and opinions relevant to the use of section 215 in those matters. In addition, the Department of Justice has provided Congress with classified and unclassified annual and semi-annual written reports on section 215 use, and, over the years, has provided extensive briefings

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and testimony on the way this statute has been implemented pursuant to lawful FISA Court orders. Most recently, in connection with the reauthorization of the PATRIOT Act, the Attorney General, the Director of the FBI, and relevant heads of Intelligence Community agencies have all testified or briefed members of Congress on the operation of section 215, in addition to multiple congressional hearings at which other senior Department of Justice and Intelligence Community officials testified and briefed the issue over the past year. Armed with this information, the Congress, on a bipartisan basis and by large majorities, has repeatedly reauthorized section 215. In May 2011, the Senate approved the legislation to reauthorize the statute and two other provisions of the USA PATRIOT Act by a vote of 72-23 and the House voted in favor of the legislation by 250-153.

Against this backdrop, we do not believe the Executive Branch is operating pursuant to "secret law" or "secret opinions of the Department of Justice." Rather, the Intelligence Community is conducting court-authorized intelligence activities pursuant to a public statute, with the knowledge and oversight of Congress and the Intelligence Committees of both Houses. There is also extensive oversight by the Executive Branch, including the Department of Justice and relevant agency General Counsels and Inspectors General, as well as annual and semi-annual reports to Congress as required by law.

To be sure, the FISA Court opinions and orders relevant to the use of section 215 and many other intelligence collection authorities are classified. This is necessary because public disclosure of the activities they discuss would harm national security and impede the effectiveness of the intelligence tools that Congress has authorized. This is true of many other intelligence activities that our government throughout its history has carried out in a classified manner in the interest of national security. Since it is not possible to disclose these activities to the public, Congress established the Senate and House intelligence committees to ensure that Congress is able to perform its proper oversight role on behalf of the American people.

We appreciate and share your interest in an informed public debate on how the government interprets and uses its intelligence collection authorities. However, the Intelligence Community has determined that public disclosure of the classified uses of section 215 would expose sensitive sources and methods to our adversaries and therefore harm national security. As you know, the Attorney General and a senior member of the Intelligence Community testified in June 2011 in a closed hearing before the Senate Select Committee on Intelligence concerning the classified uses of section 215. Their classified testimony addressed in detail the operations carried out under the statute, their legal basis, their importance to national security, and the reasons why neither the operations nor their detailed legal basis can be disclosed publicly. As they explained, the Executive Branch has done everything it can to ensure that the people's elected representatives are fully informed of the intelligence collection operations at issue and how they function.

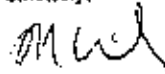
The Honorable Ron Wyden
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Finally, with regard to the analogy between section 215 and grand jury subpoenas, as noted above, section 215 expressly provides that the court "may only require the production of a tangible thing if such thing can be obtained with a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation or with any other order issued by a court of the United States directing the production of records or tangible things." 50 U.S.C. §1861(c)(2)(D). Grand jury subpoenas do not require the approval of a court but rather may be obtained with the approval of a single prosecutor and may request a wide variety of records; the government is not required to make any showing of relevance to a court before issuing such a subpoena. The records obtained pursuant to a grand jury subpoena may concern the lawful activities of U.S. citizens if those records are relevant to an investigation. A motion to quash a grand jury subpoena will be denied unless there is "no reasonable possibility" that the category of information the government seeks will produce information relevant to the general subject of the grand jury's investigation. In contrast, as discussed above, records collected under Section 215 require approval of an Article III judge sitting on the FISA Court, and the government must make an affirmative showing to that Court that the records are relevant to an authorized national security investigation. Particularly in light of the statutory requirement that a section 215 order may only obtain records that could be obtained via a grand jury subpoena (or court order), we continue to believe that the analogy between section 215 and a grand jury subpoena is apt. This is not to say, of course, that the factual context in which section 215 may be used for classified intelligence collection operations is the same as it is for ordinary criminal matters.

In sum, given the constraints as to what can be discussed in an unclassified setting, we believe that we have been as forthcoming as possible in our discussions of section 215.

Thank you for the opportunity to present our views, and please do not hesitate to contact this office if we can be of further assistance regarding this or any other matter.

Sincerely,



Ronald Welch
Assistant Attorney General

JOHN COFFMAN, JR., Michigan
CHAIRMAN

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ONE HUNDRED ELEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2130 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6216

(202) 225-3951

<http://www.house.gov/judiciary>

October 5, 2009

The Honorable Eric H. Holder
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Ave. NW
Washington, DC 20530

Dear Mr. Attorney General:

As the Committee continues its work concerning the USA Patriot Act and related legislation, several sections of which expire this year, we are writing to ask that the Department of Justice make publicly available additional information on the implementation of the Act. We appreciated the Department's September 22 testimony before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, in which it expressed the Administration's willingness to work with Congress on Patriot Act proposals to better protect Americans' privacy and civil liberties, and in which it publicly provided important information about the use of the "lone wolf" provision of the Act. In order for Congress to meaningfully consider whether and how to extend the "business records" section of the Act, however, we ask that the Department work to provide additional public information on the use of that provision.

Specifically, at the September 22 hearing, Deputy Assistant Attorney General Hinnen testified that orders under Section 215 of the Act, which authorizes compulsory production of "business records," have been used to obtain "transactional information" to support "important and highly sensitive intelligence collection." He explained that some members of the Subcommittee and cleared staff have received some briefings on this topic, and that additional information could be made available to them "in a classified setting."

We have appreciated the information that has been provided, and fully understand the importance of safeguarding our country's national security secrets. Too often in 2007 and 2008, however, crucial information remained unknown to the public and many members of Congress when Congress voted on important surveillance legislation affecting the interests of all Americans. As has also been requested in the Senate, we ask that the Department work to make publicly available additional basic information on the use of Section 215, so that Congress can


The Honorable Eric H. Holder
October 5, 2009
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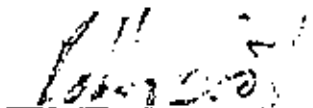
more openly and thoroughly consider the future of this authority while fully protecting our national security secrets.

Please contact the Judiciary Committee office, 2138 Rayburn House Office Building, Washington, D.C. 20515 (tel.: 202-225-3951; fax: 202-225-7680) in response to this request. Thank you for your prompt attention to this matter.

Sincerely,


John Conyers, Jr.
Chairman


Jerrold Nadler
Chairman, Subcommittee
on the Constitution, Civil
Rights and Civil Liberties


Bobby Scott
Chairman, Subcommittee
on Crime, Terrorism and
Homeland Security

cc: Ron Weich
The Honorable Lamar Smith



U.S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

March 15, 2012

Jameel Jaffer
Deputy Legal Director
American Civil Liberties Union
125 Broad St., 18th Floor
New York, New York 10004

Dear Mr. Jaffer:

This letter responds to your Freedom of Information Act (FOIA) request to the Office of Legal Counsel (OLC) dated May 31, 2011. We understand that the ACLU has stipulated in *ACLU v. FBI*, 11 Civ. 7562 (S.D.N.Y.), that the request is limited to OLC legal opinions and memoranda concerning or interpreting Section 215 of the USA Patriot Act. We have searched OLC's files and found two documents that are responsive to your request. We are withholding the documents pursuant to FOIA Exemption Five, 5 U.S.C. § 552(b)(5). They are protected by the deliberative process privilege, and they are not appropriate for discretionary release.

In addition, in response to your FOIA request, the Office of Information Policy has referred one document to OLC for direct response to the ACLU. That document is the same as one of the two documents described above.

Although I am aware that your request is the subject of ongoing litigation and appeals are not ordinarily acted on in such situations, I am required by statute and regulation to inform you of your right to file an administrative appeal. Any administrative appeal must be received within 60 days of the date of this letter by the Office of Information Policy, United States Department of Justice, Flag Building, Suite 570, Washington, D.C. 20530-0001. Both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

Paul P. Colborn
Special Counsel