Testimony of

The Honorable Patrick Fitzgerald

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STATEMENT OF
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NORTHERN DISTRICT OF ILLINOIS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

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INTRODUCTION

Mr. Chairman, members of the Committee, thank you for asking us here today. I very much look forward to this opportunity to discuss with you the efforts of the United States Attorney's Offices in the investigation and prosecution of terrorists, and particularly how those efforts have changed since the passage of the post-9/11 anti-terrorism tools.

You have heard my colleague Chris Wray describe "the wall" that was perceived to separate criminal and intelligence investigators that ended with passage of the Patriot Act. The end of "the wall" was long overdue and was the single greatest change that could be made to protect our country. As a prosecutor who has worked on terrorism matters for nine years now, I thank you on behalf of federal prosecutors, FBI agents and the public for that long overdue change to make America safe.

It is nearly impossible to comprehend the bizarre and dangerous implications that "the wall" caused without reviewing a few examples. While most of the investigations conducted when the wall was in place remain secret, a few matters have become public. I was on a prosecution team in New York that began a criminal investigation of Usama Bin Laden in early 1996. The team - prosecutors and FBI agents assigned to the criminal case - had access to a number of sources. We could talk to citizens. We could talk to local police officers. We could talk to other U.S. Government agencies. We could talk to foreign police officers. Even foreign intelligence personnel. And foreign citizens. And we did all those things as often as we could. We could even talk to al Qaeda members - and we did. We actually called several members and associates of al Qaeda to testify before a grand jury in New York. And we even debriefed al Qaeda members overseas who agreed to become cooperating witnesses.

But there was one group of people we were not permitted to talk to. Who? The FBI agents across the street from us in lower Manhattan assigned to a parallel intelligence investigation of Usama Bin Laden and al Qaeda. We could not learn what information they had gathered. That was "the wall." A rule that a federal court has since agreed was fundamentally flawed - and dangerous.

Let me review some examples of how the wall played out. On August 1998, al Qaeda struck at

the American embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, nearly simultaneously killing 224 people. The team of FBI agents and prosecutors, which had obtained a sealed indictment of Bin Laden two months earlier, deployed to East Africa and almost immediately learned of al Qaeda's involvement and arrested two bombers in Nairobi. One month later, in September 1998, a man named Ali Mohamed was questioned before a federal grand jury in Manhattan. Ali Mohamed, a California resident, had become a United States citizen in 1989 after serving in the United States Army from 1986. Ali Mohamed lied in that grand jury proceeding and left the courthouse to go to his hotel, followed by FBI agents, but not under arrest. He had imminent plans to fly to Egypt. It was believed at the time that Mohamed lied and that he was involved with the al Qaeda network but Mohamed had not by then been tied to the bombings. The decision had to be made at that moment whether to charge Mohamed with false statements. If not, Mohamed would leave the country. That difficult decision had to be made without knowing or reviewing the intelligence information on the other side of the "wall." It was ultimately decided to arrest Mohamed that night in his hotel room. As described below, the team got lucky but we never should have had to rely on luck. The prosecution team later obtained access to the intelligence information, including documents obtained from an earlier search of Mohamed's home by the intelligence team on the other side of "the wall." Those documents included direct written communications with al Qaeda members and a library of al Qaeda training materials that would have made the decision far less difficult. (We could only obtain that access after the arrest with the specific permission of the Attorney General of the United States, based upon the fact that we had obligations to provide the defendant with discovery materials and because the intelligence investigation of Mohamed had effectively ended.) The criminal case gathered additional evidence through further investigation. Mohamed later pleaded guilty in federal court admitting that he was a top trainer to the leadership of al Qaeda and Egyptian Islamic Jihad, and that he had participated in the surveillance of a number of overseas American targets, including the American embassy in Nairobi, Kenya, and had later shown the sketches of that embassy to Bin Laden himself. Mohamed admitted he had trained some of the persons in New York who had been responsible for the 1993 World Trade Center bombing. Mohamed stated that had he not been arrested on that day in September 1998, he had intended to travel to Afghanistan to rejoin Usama Bin Laden. Thus, while the right decision to arrest was made partly in the dark, the "wall" could easily have caused a different decision that September evening that would have allowed a key player in the al Qaeda network to escape justice for the embassy bombing in Kenya and rejoin Usama Bin Laden in a cave in Afghanistan, instead of going to federal prison.

What is ironic is that this is an example of where the wall came into play where both criminal and intelligence investigations existed. In many other cases, the wall prevented criminal cases from being opened or pursued at all. In 1993, after the World Trade Center bombing, conspirators, including Sheik Omar Abdel Rahman, planned to bomb the Holland and Lincoln tunnels, the FBI building, the United Nations and the George Washington Bridge. Prosecutors were in the dark about the details of the plot until very late in the day for fear that earlier prosecutorial involvement would breach the wall. During the investigation of the Millenium attacks, criminal prosecutors were forced to observe the wall, while other U.S. government agencies dealt with al Qaeda-directed attacks, both overseas and, to some extent, on our soil. Criminal prosecutors received information only in part and with lag time so as not to breach the wall. The persons who determined what could be shared with the prosecutors were on the other side of the wall, making their best guess as to what would be helpful. This is no way to defend

our country from imminent attack. Moreover, the above examples occurred in New York where the working relationship between prosecutors and agents in the field was strong. In many other areas in the country, the wall was so high that criminal agents and prosecutors simply had no idea what intelligence investigators were doing, and often even who they were.

When I hear - as I do almost daily - from opponents of the Patriot Act that the law was passed in haste and ought simply be repealed, I think back to the days when we required prosecutors and agents to make decisions about national security - life and death - while only looking at half the cards in their hand and know that the change came a decade too late, not a moment too soon.

Prior to the Patriot Act, there was also concern with the prosecutor's uncertain ability to share grand jury testimony affecting national security with the intelligence community. In 1997, Wadih el Hage, a key member of the al Qaeda cell in Nairobi, Kenya, was of important intelligence interest to the United States. He thereafter departed Kenya en route to Dallas, Texas, in September 1997, changing flights in New York City. At that point, el Hage was subpoenaed from the airport to a federal grand jury in Manhattan where he was questioned about Bin Laden, al Qaeda and his associates in Kenya, including among others his close associate "Harun." El Hage chose to lie repeatedly to the grand jury, but even in his lies he provided some information of potential use to the intelligence community - including potential leads as to the location of his confederate Harun and the location of Harun's files in Kenya. Unfortunately, as el Hage left the grand jury room, we knew that we could not then prove el Hage's lies in court. And we also knew that we would not be permitted to share the grand jury information with the intelligence community. We could not, however, responsibly withhold information of intelligence value. Fortunately, we found a way to address the problem that in most other cases would not work. Upon request, el Hage voluntarily agreed to be debriefed by an FBI agent outside of the grand jury when it was explained that the FBI agent was not allowed in the grand jury but was also interested in what el Hage wanted to say. El Hage then repeated the essence of what he told the grand jury to the FBI agent, including his purported leads on the location of Harun and his files. The FBI then lawfully shared that information with the intelligence community. In essence, we solved the problem only by obtaining the consent of a since convicted terrorist. We do not want to have to rely on the consent of al Qaeda terrorists to address the gaps in our national security.

In August 1998, the American Embassy was bombed in Nairobi, Kenya. Investigation in Kenya quickly determined that Harun (who had left the country after the search of el Hage's home in 1997, correctly fearing that American officials were looking for him and returned much later) was responsible for the bombing. Harun's missing files were uncovered in the investigation, stored at a charity office in Nairobi. (Harun is a fugitive today and an important al Qaeda operative.) The point here is that, had el Hage provided truthful information about the al Qaeda cell in Kenya a year before the embassy attacks, we would not have been permitted to share that grand jury material had the team not used the FBI interview to work around the problem. This example should not be written off as "no harm, no foul": we should not have to wait for people to die with no explanation than that interpretations of the law blocked the sharing of specific information that provably would have saved those lives before acting. The Patriot Act addressed that problem of separating the dots from those charged with connecting them.

These concrete examples demonstrate that the need to tear down -- and keep down -- the wall between criminal and intelligence investigations was real and compelling and not abstract. I can tell you that the change makes a huge difference in the way we approach national security today. Today, as United States Attorney in Chicago, the prosecutors in my office enjoy a good working

relationship with the FBI agents in Chicago. We are aware of the intelligence investigations they do and they are aware of our criminal cases and we coordinate to make sure that the law is followed and that all information is shared appropriately. In simple terms, we are making sure that if people who pose a threat to our country can be arrested, my office knows about it. Then, together with the FBI, we decide what, if any, national security sources and methods will be exposed by a prosecution and make an informed decision whether it is in the interest of our country's national security to proceed. It sounds simple and logical. It is. But it was not that way before the Patriot Act. I understand that this new way of approaching terrorism matters is the norm elsewhere in the country as well, as my colleague Mr. McNulty can attest.

I know that my colleague Mr. McNulty described the comprehensive efforts to fight terrorism being followed in the Eastern District of Virginia. I can assure the committee that the men and women of the Northern District of Illinois are equally engaged in the fight against terrorism with our colleagues from the law enforcement agencies. In brief, we are investigating and prosecuting national security matters that touch directly on terrorism, terrorism financing and espionage, and we are directing significant resources to passport and visa fraud, money laundering, smuggling and export matters where criminal violators utilize gaps in our nation's security that could and likely are being exploited by terrorists. I will not discuss matters currently in litigation before the court, nor, obviously, those not yet public, but I can assure the committee that I am proud of the effort the Northern District is making in coordination with law enforcement, specifically the Joint Terrorist Task Force led by the FBI, to make use of the information now available because of the end of the wall. I can also assure the committee that we are mindful of the Constitution as we go about doing our part in the effort to keep our country and its values safe.

From my work with the Terrorism Subcommittee of the Attorney General's Advisory Committee, I can also tell you that my colleagues around the country, in districts large and small, understand that fighting terrorism is their number one priority and are equally engaged in that fight. My colleague Mr. Wray has already provided you with other examples of the work being done in the field.

CLOSING

Mr. Chairman, I thank you for inviting us here and giving us the opportunity to explain in concrete terms how the Patriot Act has changed the way we fight terrorism. I would also like to thank this Committee for its continued leadership and support. I also wish to assure this Committee that the men and women of the Northern District of Illinois appreciate the Constitution and the values it represents as we go about out work. With your support we will continue to make great strides in keeping both our country and our constitution safe.

I will be happy to respond to any questions you may have.