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TESTIMONY OF PROFESSOR DAVID COLE BEFORE THE
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Thank you for inviting me to testify on the USA PATRIOT Act (hereinafter "Patriot Act"). I am a professor of constitutional law at Georgetown University Law Center, and a volunteer attorney with the Center for Constitutional Rights. The views I express here are my own.

I want to make three points. First, the Patriot Act debate must be understood in context. The debate is fundamentally driven by concerns not only about the four corners of the legislation itself, but by what it reflects about the Bush Administration's approach toward civil liberties in the "war on terrorism." Full Congressional consideration of the concerns expressed around the nation about the Patriot Act, therefore, must not be limited to the sixteen specific sunsetting provisions, and not even to the Patriot Act itself, but should also consider the impact of executive initiatives outside the Act that have raised serious civil liberties issues. I will first seek to set out these broader concerns as background for the Patriot Act debate, and urge that Congress consider the Patriot Act inquiry the beginning, not the end, of its inquiry into civil liberties in the war on terrorism. .

Second, while several of the Patriot Act provisions that are subject to the sunset raise substantial civil liberties concerns, other provisions, not sunsetted, raise even more grave constitutional problems. To my mind, the worst provisions from a civil liberties standpoint are those addressing immigration and material support to "terrorist organizations." I will spend the bulk of my time addressing these provisions, particularly as others on this panel will focus on the sunsetting provisions.

Third, in my view, of the Patriot Act's sunsetting provisions, Section 218 raises the most substantial constitutional questions, and calls for significant reforms. That provision is often credited for bringing down "the wall" between foreign intelligence and law enforcement,. That claim is greatly exaggerated. Moreover, Section 218's enactment creates a range of very serious constitutional concerns about the scope of FISA authority and the procedures for introducing FISA evidence in criminal trials that merit sustained Congressional consideration.

I. THE PATRIOT ACT DEBATE IN CONTEXT

Debate about the Patriot Act has been heated almost since its enactment. While only a single Senator, Russell Feingold, voted against it when it was passed just six weeks after 9/11, six states (Alaska, Hawaii, Idaho, Maine, Montana, and Vermont) and over 370 cities and towns have since then enacted resolutions condemning the civil liberties abuses of the Patriot Act and of the Bush Administration's war on terrorism more generally. A bipartisan coalition of liberal and conservative groups has formed an alliance to restore checks and balances, and a tripartisan caucus has formed in the House with the same goals in mind. A bipartisan coalition in the Senate has introduced the SAFE Act, designed to amend many of the surveillance provisions of the Patriot Act.

Defenders of the Patriot Act often lament that in this debate, the Act gets an undeservedly bad rap. It's true that the Act sometimes gets blamed for things with which it has nothing to do. Indeed, many of the worst human rights abuses committed by the Bush Administration in the name of the "war on terror" are not attributable to the Patriot Act -

including the pretextual use of immigration law and the material witness law to lock up thousands of Arab and Muslim foreign nationals who had nothing to do with terrorism; the indefinite detention of some persons, including U.S. citizens, as "enemy combatants," without any trial or even hearing; the development and application of computer data mining programs that afford the government ready access to a wealth of private information about all of us without any basis for suspicion; the FBI's monitoring of public meetings and religious services without any basis for suspecting criminal activity under guidelines relaxed by John Ashcroft; and the use of "coercive interrogation" to extract information from suspects in the war on terror, by such tactics as "waterboarding," in which the suspect is made to fear that he is drowning in order to "encourage" him to talk.

To take just one example, consider the Administration's use of immigration law to embark on a nationwide campaign of ethnic profiling targeting foreign nationals of Arab and Muslim descent. The Administration called in 80,000 men for "special registration," simply because they came from Arab and Muslim countries. The FBI sought to interview 8,000 young men, again simply because they came from Arab and Muslim countries. And the government has admitted to detaining over 5,000 foreign nationals, nearly all of them Arab and Muslim, in anti-terrorism preventive detention initiatives since 9/11. Many of those detained were initially arrested without any charges at all. They were detained even where the government had no factual basis for believing that they were dangerous or a risk of flight. Men were locked up and designated "of interest" on the basis of such information as a tip that "too many Middle Eastern men" were working at a convenience store. They were held in secret and tried in secret. And in many instances, they were held long after their immigration cases were resolved, simply because the FBI had not yet "cleared" them of connections to terrorism. These measures were putatively designed to identify terrorists. Yet of the 80,000 registered, 8,000 interviewed, and 5,000 detained, not a single one stands convicted of a terrorist crime to this day.

These and many other initiatives undertaken in our name unquestionably constitute abuses of basic liberties - from the right to privacy to the right not to be locked up arbitrarily to the right not to be tortured. But they did not stem from the Patriot Act. The Patriot Act has nonetheless become a symbol for the Administration's disregard for basic civil liberties and constitutional principles because it was the Administration's first salvo in the war on terrorism, and because its approach is emblematic of so much of the Administration's subsequent actions. It infringes constitutional freedoms, discriminates against foreign nationals, and undermines checks and balances on executive power. Moreover, it was adopted, like so many other anti-terrorism initiatives, without sufficient deliberation, and with virtually no attention paid to the costs to liberty and freedom posed by its reforms.. As such, it is a fitting symbol for a widespread unease with the Administration's tactics in the war on terror.

The fact that so many civil liberties abuses have arisen outside the Patriot Act does not relieve Congress of its responsibility to investigate these abuses and to provide corrective legislation where appropriate. Congress could, for example, expressly bar the government from inflicting torture and cruel, inhuman, and degrading treatment on any of its detainees anywhere in the world, but it has not. Congress could call for an Independent Commission to investigate the torture scandal, but it has not. Congress could place limits on political spying by the FBI, but it has not. Congress could ensure that data mining programs build in privacy protections, but again it has not. In short, the concerns expressed by many Americans about the Patriot Act go far beyond the literal terms of that document. So, too, should Congress's oversight and inquiry.

It is worth comparing judicial and legislative responses to the war on terrorism. The courts have begun to play an important checking role in the war on terror. They have rejected the Bush Administration's assertion that it could lock up anyone anywhere in the world without judicial review. They have required that the detainees at Guantanamo be provided with access to counsel. They have invalidated the processes employed by the Combatant Status Review Tribunals and the military tribunals. They have declared unconstitutional various provisions of the Patriot Act. They have rejected a Justice Department regulation that permitted immigration prosecutors to keep immigrants detained even after immigration judges found no basis for their detention. They have ruled that they have jurisdiction to consider a habeas petition from a U.S. citizen held for twenty months without charges in Saudi Arabia allegedly at U.S. behest. They have required the Pentagon, FBI, and CIA to disclose extensive records relating to the torture scandal. They have declared unconstitutional the government's practice of holding immigration hearings entirely in secret. And they have thrown out terrorism convictions based on prosecutorial misconduct.

Never before have courts played such an important checking role in the context of a national security crisis. Perhaps the courts have learned the lesson of excessive deference in World War I, World War II, and the Cold War. Perhaps

they have learned the lesson of the importance of checks and balances of the Watergate era. Whatever the reason, the courts have played an increasingly significant checking function.

But the courts are not the only branch with responsibility to uphold the Constitution and to check aggrandizing behavior by the Executive. Congress shares that responsibility. With a few exceptions, Congress has not played that role in the current crisis. The Patriot Act debate is a welcome start, but it should be only the beginning.

II. IMMIGRATION AND MATERIAL SUPPORT

Much of the Patriot Act is uncontroversial from a civil liberties perspective. Provisions increasing resources for patrolling the northern border, strengthening money laundering laws, eliminating some barriers to information sharing between law enforcement and intelligence officials, and improving visa processing, raise few concerns. But many provisions of the Patriot Act are deeply troubling from a civil liberties standpoint. And in many instances, the reforms they introduce have not been shown to have made us safer. I will focus my remarks on the immigration and material support provisions, because these provisions simultaneously raise the most significant constitutional concerns and have received the least attention.

A. Immigration Provisions

The immigration provisions of the Patriot Act, Sections 411 and 412, authorize exclusion of foreign nationals for speech, deportation for innocent associations with disfavored groups, and detention without charges. They go far beyond any legitimate need to protect the nation from terrorist threats. And they infringe on basic rights of speech, association, and due process. Yet Congress has not taken up these concerns, and is poised to make the problems far worse in a little-noticed part of the Iraq supplemental appropriations bill approved by the House on May 5, 2005, and slated for a vote in the Senate this week.

1. Deportation for Associations

Section 411 of the Patriot Act allows the government to expel foreign nationals - even long-time lawful permanent residents - based solely on their association with a disfavored organization. The Act permits deportation for "material support" to any organization blacklisted as "terrorist" by the Secretary of State or the Attorney General. It is no defense to show that one's support to the group furthered only lawful, nonviolent ends, nor is it any defense to show that the group has not engaged in any terrorist activities. If this law had been on the books in the 1980s, any foreign national who donated to the African National Congress for its largely lawful, nonviolent opposition to apartheid in South Africa would have been deportable, because the State Department designated the African National Congress a terrorist group until it came to power in South Africa with the fall of apartheid.

The reach of the Patriot Act deportation provisions is illustrated by a current case I am handling for the Center for Constitutional Rights. It involves Khader Hamide and Michel Shehadeh, two Palestinians in Los Angeles who have lived here as lawful permanent residents for more than thirty years each. They have never been charged with a crime. Yet the government is seeking their deportation under the Patriot Act, passed in 2001, for conduct they engaged in nearly two decades earlier, in the 1980s. The government alleges that they are deportable under the Patriot Act for having distributed magazines of a Palestine Liberation Organization faction, and for having raised money for humanitarian aid to Palestinians in the West Bank and Lebanon. On the government's view, it does not matter that these activities were lawful at the time they were engaged in, or that they are protected by the First Amendment.

A second case that illustrates how far-reaching this provision is involves the deportation of an Indian man. In that case, the court held that the Patriot Act authorized the man's deportation for having set up a tent for religious services and food, simply because some unidentified members of a designated terrorist organization reportedly came to the services and partook of the food. There was no showing that the Indian man intended to further any terrorist activity by setting up the tent. Such deportations do not make the United States safer.

2. Ideological Exclusion

Section 411 is even more expansive with regard to the grounds for denying foreign nationals entry in the first place. It resurrects the practice of "ideological exclusion," keeping people out of the country not for their past or current conduct, not even based on any reasonable concern that they might engage in criminal or terrorist conduct once here, but based solely on their speech. If they say something that the Secretary of State considers to "endorse terrorism," they may be kept out. In 2004, the Bush Administration apparently invoked this provision in denying a visa to Tariq Ramadan, a highly respected Swiss scholar of Islam who had been offered a chair at Notre Dame.

3. Preventive Detention Without Charges

Section 412 of the Patriot Act allows the Attorney General to lock up foreign nationals without charges for seven days, and indefinitely thereafter if they are charged with an immigration violation. The law does not require any showing that the foreign national poses a danger to the community or a risk of flight - the only two constitutionally valid reasons for preventive detention. And it permits the Attorney General to keep the foreign national locked up even after he has been granted relief from removal, which is akin to saying that the government can keep a prisoner behind bars even after the governor has granted him a pardon. The government has not yet invoked this provision, calling into question its claim that the authority was absolutely essential to fight terrorism.

4. The REAL ID Act and the Revival of McCarran-Walter

Congress has done little to address these problems legislatively. While it has held at least two hearings on the many immigration abuses that have been perpetrated in the name of the war on terrorism since 9/11, it has adopted no legislation responsive to such concerns, and has not even held a hearing on the Civil Liberties Restoration Act, which seeks to remedy some of the worst abuses. And Congress is about to enact still broader exclusion and deportation grounds as part of the Iraq supplemental appropriations bill. The REAL ID portion of that bill includes little-discussed provisions that dramatically expand the grounds for deportation and exclusion, and for all practical purposes revive the McCarran-Walter Act approach, in which foreign nationals, even permanent residents, can be deported for speech, associations, and conduct that would clearly be constitutionally protected if engaged in by U.S. citizens.

Under the REAL ID provisions, foreign nationals will be deportable for membership in or support of any so-called "terrorist organization." I say "so-called" because the Act defines terrorist organization so broadly that it includes any group of two or more individuals that has ever used or threatened to use a weapon against person or property (except for mere personal monetary gain). The organization need not ever have been designated as "terrorist" by anyone, so long as it used or threatened to use a weapon. Under this definition, the Israeli military, the Northern Alliance, the African National Congress, the Irish Republican Army, the Nicaraguan Contras, the Palestine Authority, and many militant anti-Castro Cuban groups would be "terrorist organizations," even though none has been so designated by the Secretary of State.

The REAL ID Act then makes it a deportable offense to be a member of such a group, to "endorse" such a group through speech, or to provide such a group with any "material support." The provisions are retroactive, so people can be deported today for speech and associations lawfully engaged in years ago. And its punishment extends even to children, who may be expelled simply for having a parent who advocated a disfavored idea.

Under this law, an immigrant whose mother supported the African National Congress's lawful, nonviolent antiapartheid work during the 1980s would be deportable today, as would an immigrant who supported the Northern Alliance, the Israeli military, or the Palestinian Authority. DHS will argue that it is no defense to say that one's support had no connection to the group's violent activities, nor to point out that the United States itself has supported and continues to support many such organizations. Indeed, in the very same appropriations bill that includes this law, Congress has appropriated $5 million to assist the Palestinian Authority with an audit.

Fifteen years ago, Congress repealed the then-infamous McCarran-Walter Act. Each time that law had been invoked to bar a writer (Carlos Fuentes, Gabriel Garcia Marquez), a politician (Ireland's Gerry Adams, Nicaragua's Tomas Borge), a scholar (Belgian economist Ernst Mandel), or a NATO general (Italy's Nino Pasti), the government's actions were roundly condemned. We exported the notion that the free exchange of ideas was critical to a healthy democracy, but simultaneously barred unpopular ideas and politics at the door. In 1990, Congress laid that history to

rest by repealing the McCarran-Walter Act and affirming that we were a strong enough country to tolerate ideas with which we disagreed.

We are now on the verge of reviving the McCarran-Walter Act in the name of the war on terrorism. None of these measures is necessary to protect the United States. Even before the Patriot Act, the government could deny entry to and deport any foreign national involved in terrorist activity, or who supported terrorist activity in any way. What it could not do was exclude and deport for speech, associations, and activities that do not further terrorism. But there is little reason to believe that these provisions have made us safer. Does it really make us safer to keep out a world-renowned scholar of Islam? Or to deport two men for distributing magazines in the 1980s?

B. Criminal Material Support Provisions

The Patriot Act also expanded the most expansive "anti-terrorism" criminal law on the books prior to its passage - 18 U.S.C. §2339B, which criminalizes the provision of "material support" to designated "terrorist organizations." The Patriot Act expanded this already expansive law by criminalizing pure speech. It amended the criminal ban on material support to designated terrorist organizations by banning "expert advice or assistance" - without regard to what the advice consists of . In a case that I am handling for the Center for Constitutional Rights, a federal court declared this Patriot Act provision unconstitutional. In that case, I represent a human rights organization that seeks to provide human rights training to a Kurdish organization in Turkey that has been designated a "terrorist organization." The government has argued that it may criminalize as "expert advice" this human rights organization's advice on human rights advocacy, without regard to the fact that the advice was being offered to encourage the group to pursue peaceful means to resolve its disputes and to discourage resort to violence. The court held the provision unconstitutionally vague.

In the first prosecution brought under this provision, the government argued that a student at the University of Idaho should be found guilty for operating a website that featured links to other websites that in turn included speeches preaching violent jihad. It was irrelevant, the government contended, that there was no evidence that the student himself had advocated any violence. An Idaho jury acquitted the student on all terrorism charges.

Congress amended the ban on "expert advice or assistance" in the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (Dec. 17, 2004) ("Intelligence Reform Act"). But the amendment fails to resolve the constitutional problem with the ban. The federal court declared the ban unconstitutionally vague, so Congress added a definition. But the definition unfortunately only makes the term more ambiguous. It defines "expert advice or assistance" as "advice or assistance derived from scientific, technical or other specialized knowledge." 18 U.S.C. §2339A(b)(3). Given that "expert advice" would on its own terms already seem to imply some sort of specialized knowledge, it is difficult to see how the Intelligence Reform Act clarifies the provision in any meaningful sense.

Other amendments in the Intelligence Reform Act are equally problematic. Federal courts in the Humanitarian Law Project case had also held unconstitutionally vague the bans on providing "training" and "personnel" to designated terrorist organizations, and Congress sought to add definitions of these terms as well. But as with "expert advice or assistance," the definitions provide little if any clarity. The Intelligence Reform Act limits "training" to "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. §2339A(b)(2). But this does not clarify the law. Indeed, when the government previously proposed that the statute be interpreted to include that precise limitation, the Ninth Circuit unanimously rejected the argument that it would save the statute: "The government insists that the term is best understood to forbid the imparting of skills to foreign terrorist organizations through training. Yet presumably, this definition would encompass teaching international law to members of designated organizations."

The statute may be even more vague now, for it requires individuals to attempt to guess at whether their instruction involves a "specific skill" or "general knowledge." Is human rights advocacy or peacemaking a specific skill, or general knowledge? Is driving a car "general knowledge" or a "specific skill"? What about training in lobbying Congress, speaking to the public, or engaging in public advocacy in the press?

At oral argument before the en banc Ninth Circuit in Humanitarian Law Project, the government's attorney, Douglas Letter, was asked specifically to apply this new definition to a number of hypotheticals. In that colloquy, Mr. Letter maintained that teaching English would constitute a forbidden "specific skill," that teaching geography would be permissible because it constitutes "general knowledge," but that teaching the political geography of terrorist organizations would constitute a "specific skill." Letter's response only underscores the hopeless ambiguity created by the new distinction. What if a course on geography included within it a section on the political geography of terrorist organizations? What if it included a section on the history of geography, or the geography of a specific region? Would these be impermissible "specific skills," or permissible parts of "general knowledge?" The new definition provides no more guidance on these questions than the previous prohibition on "training." Thus, the new prohibition on "training" falls for the same reasons that the old did.

Congress's definition of "personnel" also offers little precision. The new definition of "personnel" draws a distinction between acting under the organization's "direction and control," which is prohibited "personnel," and acting "entirely independently" in support of a group, which is permitted. But that distinction does not solve the problem. Advocating for a designated group by writing an op-ed opposing its designation or arguing that the material support statute is unconstitutional is clearly protected speech. Yet under the statute, it would be permissible only if undertaken "independently," and not if done under the group's "direction and control." Would running the op-ed by the group's leader for approval, or discussing its themes with him, constitute acceptance of "direction," or would that be "independent"?

What about a lawyer providing her legal services to a group in connection with its challenge to a designation? A lawyer could generally be said to be acting under the "direction" of her client, as, subject only to professional obligations, a client's wishes are determinative. When this issue arose in litigation involving the lawyer Lynne Stewart, the government argued that "personnel" meant "under direction and control." Attempting to apply that concept, the government's lawyer opined that a lawyer acting as "house counsel" would be acting impermissibly under the organization's "direction and control," but an outside counsel doing the same work would be seen as "independent." United States v. Sattar, 272 F.Supp.2d 348, 359 (S.D.N.Y. 2003). The court in Sattar held the "personnel" ban unconstitutionally vague. Id.

Finally, the Intelligence Reform Act expanded the material support ban by adding a new bar on the provision of any "services," a term not further defined in the law. That term is at least as broad as "expert ... assistance" or "personnel," both of which have already been held unconstitutionally vague. Thus, Congress added another unconstitutionally vague term to a statute already found to be shot through with such provisions.

The deeper problem with the material support statute, at least as interpreted by the government, is that it imposes liability on individuals without requiring any proof that they intended to further any terrorist or violent act. According to the government, one who provides human rights training to a designated organization is guilty even if it is undisputed that human rights training cannot be used to further terrorism, and even if it is undisputed that the human rights training actually had the intent and effect of reducing the recipient group's resort to violence. Under this law, one who worked with terrorist organizations for the sole purpose of teaching them Mahatma Gandhi's principles of nonviolence in order to dissuade them from violence would nonetheless be criminally liable as a terrorist.

That approach violates both First and Fifth Amendment principles. The Supreme Court long ago held that one has a right to support a group that engages in both legal and illegal activities, and that the government may not prosecute one for his connection to such a group absent proof of specific intent to further the group's illegal activities.

In Scales v. United States, 367 U.S. 203 (1961), the Supreme Court held that the First Amendment right of association and the Fifth Amendment requirement of personal guilt precludes the imposition of vicarious criminal liability based on an individual's "status or conduct" in connection with a group, unless the government also shows that the individual specifically intended to further the group's illegal activities. The Court wrote:

In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.

Scales, 367 U.S. at 224.

The Ninth Circuit in Humanitarian Law Project v. Reno, 205 F.3d 1130, 133-34 (9th Cir. 2000), held that the statute's general ban on material support satisfies the First Amendment because it penalizes not membership itself, but material support. But the Humanitarian Law Project court's distinction between material support and membership is intellectually untenable, as it would render the right of association a meaningless formality. The right to be a member of a group without the right to support the group in any way - by dues payments, donations, or even volunteering one's services - would be a worthless fiction. Groups literally cannot exist without the material support of their members. If the HLP court's rationale were correct, Congress could have evaded all the Supreme Court decisions barring imposition of guilt for membership in the Communist Party simply by criminalizing the payment of dues or provision of services to the Party. Indeed, on the HLP court's reasoning, a law selectively prohibiting all donations to the Green Party would be constitutional so long as individuals retained an entirely symbolic "right" to join the Party.

In the real world, there is no meaningful distinction between a prohibition on membership and a sweeping prohibition on material support. Both have the impermissible effect of barring any conduct in association with the proscribed group. Nor is there any meaningful distinction in judicial doctrine. The Supreme Court in Scales expressly stated that penalizing "conduct" on the basis of its connection to a proscribed group was unconstitutional absent a specific intent showing, 367 U.S. at 224, and the Supreme Court and lower courts have repeatedly recognized that "contributing money is an act of political association that is protected by the First Amendment." Service Employees Int'l Union v. Fair Political Practices Comm'n, 955 F.2d 1312, 1316 (9th Cir.), cert. denied, 505 U.S. 1230 (1992).

C Administrative Material Support Provisions

Section 106 of the Patriot Act amends an administrative scheme that has also been used to target "material support" of organizations and individuals deemed "terrorist." This provision authorizes the government to freeze assets of domestic corporations and individuals without showing any violation of law, and without any meaningful adversarial testing of its basis for doing so. It allows the government to freeze all assets of any individual or entity simply by declaring that it is "under investigation" for violating an economic embargo on providing goods or services to a designated "terrorist." The government has placed such embargoes on dozens of organizations and hundreds of individuals, all around the world. The government claims that the authority to designate stems from the International Emergency Economic Powers Act, which never mentions the word "terrorist." There is no statutory or even regulatory definition of a "terrorist" for purposes of IEEPA, and therefore a terrorist is whatever the Administration says it is.

Section 106 permits the Treasury Department to freeze all assets of a U.S. citizen or corporation merely by stating that they are "under investigation" for having a financial transaction with such an embargoed entity. The provision then allows the Treasury Department to defend its actions in court by submitting secret evidence that the challenger cannot see or rebut. This authority has been used to freeze the assets of several of the largest Muslim charities in the United States. When the charities have sued in federal court to challenge their designation, they have been met with secret evidence. Moreover, given that there is no statutory or regulatory definition of a designated "terrorist" under IEEPA, it is entirely unclear what standard courts are to apply in assessing whether a designation is appropriate. This law gives the Executive branch a wide-ranging blank check to freeze the assets of any entity or person it chooses, under a literally standardless authority, and then to defend its actions in secret. It is possible that some or all of the half-dozen or so charities that the government has targeted were guilty of funneling money to further terrorism. But it is also possible that all of the charities are entirely innocent. We cannot know, because the Patriot Act eliminated any fair process for distinguishing the innocent from the guilty.

There is no question that funding terrorist activity should be prohibited. It was prohibited long before the Patriot Act. What the criminal and administrative provisions added by the Patriot Act do is extend government sanctions - including substantial prison sentences - to conduct that is not intended to further terrorist activity, and that in fact does not further terrorist activity. In addition, the Treasury Department provisions deprive those targeted of any fair opportunity to show that their actions had nothing to do with terrorism. In the name of cutting off funds for terrorism, then, these provisions criminalize speech and deny citizens basic due process rights.

III. SECTION 218 AND "THE WALL"

Of the surveillance provisions that are subject to sunset, to my mind the most constitutionally dubious may be Section 218. That provision substantially expanded authority to conduct wiretaps and searches under the Foreign Intelligence Surveillance Act (FISA) without probable cause of criminal activity. The number of FISA searches has dramatically increased since the Patriot Act was passed, and for the first time now exceeds the number of wiretaps issued on probable cause of criminal activity. Yet because of the secrecy that surrounds FISA searches, we know virtually nothing about them. The target of a FISA search is never notified that he was searched, unless evidence from the search is subsequently used in a criminal prosecution. Even then the defendant cannot see the application for the search, and therefore cannot meaningfully test its legality in court. And while the Attorney General is required to file an extensive report on his use of criminal wiretaps, listing the legal basis for each wiretap, its duration, and whether it resulted in a criminal charge or conviction, no such information is required under FISA The annual report detailing use of the criminal wiretap authority exceeds 100 pages; the report on the use of FISA is a one-page letter.

Section 218 of the Patriot Act expanded the reach of FISA searches and wiretaps by allowing their use even where the government's primary purpose for investigating is criminal law enforcement. Prior to the Patriot Act, where the government's primary focus was criminal law enforcement, it was required to satisfy the criminal probable cause standards set forth by the Fourth Amendment of the Constitution. It had to show probable cause that the target of the search had evidence of crime in his possession, or had committed a crime. Where, by contrast, the government's principal purpose was not criminal law enforcement but foreign intelligence gathering, it could obtain a warrant for a search or wiretap under FISA simply by showing that the target was an "agent of a foreign power." That term is loosely defined to include any employee of any political organization made up of a majority of noncitizens. The warrant application need not show probable cause of criminal activity. Thus, literally applied, FISA would authorize a search or wiretap of a British lawyer working for Amnesty International, without any requirement of suspicion that the lawyer be engaged in illegal activity.

The Patriot Act extended that loose standard to investigations undertaken primarily for criminal law enforcement purposes, so long as "a significant purpose" of the search is also foreign intelligence gathering. A secret court upheld this amendment in a secret one-sided appeal by the government soon after the Patriot Act was enacted.

Defenders of this provision often claim that it eliminated a "wall" between criminal law enforcement and foreign intelligence agencies. But that is an exaggeration. FISA did not require such a wall before the Patriot Act was enacted. It did not bar prosecutors or law enforcement agents from turning over information to intelligence agents, nor did it stop foreign intelligence agents from sharing with criminal prosecutors evidence of crime that they had discovered in their investigations, whether under FISA or otherwise. Evidence obtained in FISA searches could be, and was, used in criminal trials long before the Patriot Act.

There were unquestionably many barriers to information sharing before 9/11. But their principal source was not FISA, but administrative and bureaucratic culture. Agencies were engaged in turf wars, and there were few if any mechanisms or incentives in place to break down the institutional boundaries between agencies. Legitimate concerns about not revealing sources make information sharing difficult even in the most well organized operations. But the blame for these problems cannot be laid at the foot of FISA.

Critics of the wall sometimes suggest that before the Patriot Act, once a foreign intelligence investigation became primarily a criminal investigation, the government would have to take down the tap. But that is also not true. Once an investigation became primarily criminal in nature, government agents would simply have to satisfy the standards applicable to criminal investigations - namely, by showing that they had probable cause that the tap would reveal evidence of criminal conduct. The tap or the search could then continue. If an investigation has become primarily criminal in nature, it should not be too much to ask that the government show probable cause of criminal conduct to carry out a search or wiretap.

Indeed, the Constitution demands no less. FISA's constitutionality turns on an untested assumption that the government may engage in searches and wiretaps for foreign intelligence purposes on a lower showing of suspicion than is required for criminal law investigations. FISA does not require the government to show probable cause that evidence of a crime will be found, but only probable cause that the target of the search is an "agent of a foreign power." "Foreign power" is in turn defined so broadly that it encompasses any political organization comprised of a majority of noncitizens. Where "U.S. persons" are the target of a FISA search, the government must make additional showings, but to search the home of a foreign national here on a work permit, for example, the government need only

show that he's an employee of an organization made up principally of noncitizens. It need not show that the individual be engaged in any criminal wrongdoing whatsoever, much less terrorism.

If FISA searches are constitutional, then, they must be justified on the basis of some application of the "administrative search" exception to the general Fourth Amendment rule requiring probable cause and a warrant for criminal law enforcement searches. That exception permits searches in limited settings on less than probable cause where the search serves some special need beyond criminal law enforcement. The FISA Court of Review relied on precisely this exception to find FISA searches valid. But the Supreme Court has carefully limited the "administrative search" exception to situations in which the government is pursuing a special need divorced from criminal law enforcement - e.g., highway or railroad safety, secondary school discipline, or enforcement of an administrative regime. It has refused to apply the exception where the government is engaged in criminal law enforcement, as in a checkpoint to search for cars carrying drugs. And the Court has also refused to apply the exception where the government has a "special need," but is using criminal law enforcement to further that need. Thus, it struck down a hospital program that subjected pregnant mothers to drug tests for the ultimate purpose of protecting the health of the fetus, where the hospital shared the test results with prosecutors in order to threaten the mothers with criminal prosecution if they did not seek drug treatment.

Where an investigation becomes primarily focused on criminal law enforcement, therefore, the "administrative search" exception no longer applies, and Supreme Court doctrine would compel the government to meet the traditional standards of criminal probable cause. Before the Patriot Act, FISA conformed to that requirement. By abandoning that distinction and allowing searches on less than probable cause where the government is primarily seeking criminal prosecution, Section 218 raises a serious constitutional question. Thus, Section 218 was not only unnecessary to bring down the wall, but may render FISA unconstitutional.

Two reforms short of repeal are worth considering. First, if Section 218 is to be retained, thereby expanding the scope of FISA searches, Congress should revisit FISA's definition of "agent of a foreign power" and "foreign intelligence information." Those terms, particularly as applied to non-U.S. persons, are sweeping, and have nothing to do with terrorism. As noted above, the definitions are so broad that they would authorize a tap of a British lawyer for Amnesty International, to gather any information that might relate to foreign affairs. It is one thing to claim that FISA authorities should be available to investigate terrorism; it is another matter entirely to extend those same powers to persons engaged in no criminal activity whatsoever. Thus, the definitions of "agent of foreign power" and "foreign intelligence information" should be narrowed.

Finally, Section 218 and other reforms have made it increasingly likely that information obtained through FISA wiretaps and searches will be used against defendants in criminal cases. In light of these developments, a useful reform at this point would be a provision permitting criminal defendants - or their cleared counsel - an opportunity to review the initial application for the FISA wiretap or search when contesting the admissibility of evidence obtained through a FISA search. Under current law, they have no such opportunity. Without access to the warrant application, defendants and their attorneys cannot meaningfully challenge the legality of the tap or search in the first place. And when government officials know that their actions will never see the light of day, they are more likely to be tempted to cut corners. An amendment requiring disclosure of FISA applications where evidence is sought to be used in a criminal trial would encourage adherence to the law by putting federal officials on notice that at some point the legality of the FISA warrant would be subjected to adversarial testing. Concerns about confidentiality could be met by limiting access to cleared counsel where necessary, and/or by applying the protections of the Classified Information Procedures Act. But there is no good reason for the current blanket exemption against the production of all such applications in criminal cases. The presumption should be in favor of adversarial testing where evidence is to be used in a criminal case.

CONCLUSION

In its treatment of foreign nationals, its expansive definition of "material support" to terrorist groups, and its authorization of surveillance not tied to probable cause of criminal activity, the Patriot Act has substantially eroded fundamental constitutional freedoms. It did so in the name of fighting terrorism, but many of its authorities are written far more broadly than that motive would warrant - penalizing speech and association, eliminating fair procedures for distinguishing the guilty from the innocent, and authorizing searches without probable cause and secrecy without

compelling justification. Measures more carefully tailored to terrorist activity might well have been justified. But the last thing the Patriot Act could ever be accused of is careful tailoring