STATEMENT OF

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BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

THE USA PATRIOT ACT SECTIONS 206 AND 215 AND THE "LONE WOLF" PROVISION OF THE INTELLIGENCE REFORM AND TERRORISM PREVENTION ACT OF 2004

PRESENTED ON

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I. Introduction

Chairman Leahy, Ranking Member Sessions and Members of the Committee, thank you for the invitation to appear before you today. Thank you also for holding this important hearing and soliciting our thoughts about the Patriot Act and the three provisions that are scheduled to expire at the end of this year.

My name is Ken Wainstein, and I am a partner at the law firm of O'Melveny & Myers. Prior to my leaving the government in January of this year, I served in a variety of capacities, including Homeland Security Advisor to the President, Assistant Attorney General for National Security at the Department of Justice, United States Attorney, General Counsel and Chief of Staff of the FBI and career federal prosecutor. I was honored to work for many years alongside the men and women who devote themselves to the protection of our country, and to participate in the policy and legislative response to the terrorist threat that became manifest on September 11, 2001. I have also been honored to participate -- along with my co-panelists -- in what has been a very constructive national discussion over the past eight years about the appropriate parameters of the government's investigative capabilities in our country's fight against international terrorism.

Today, I will discuss some of the investigative authorities that our government relies upon to protect our national security and, in particular, the three amendments to the Foreign Intelligence Surveillance Act (FISA) that are scheduled to expire at the end of this year absent reauthorization. It is my position that all three authorities -- the roving wiretap authority, the business records order provision and the authority to surveil a "lone wolf" international terrorist -- are important to our national security and should be reauthorized.

II. Background to the Reauthorization Decision

Before addressing these three specific provisions, however, it is useful to consider where we find ourselves today in the evolution of our national security authorities since September 11, 2001. Immediately after the attacks of that day, Congress took stock of our national security authorities and found them inadequate. They were inadequate for several reasons: (1) they were designed more for the traditional adversaries of the Cold War and less for the asymmetrical terrorist threat we face today; (2) they did not afford sufficient coordination and information sharing between law enforcement and intelligence professionals; and (3) they did not provide to national security professionals many of the basic investigative tools that had long been available to law enforcement investigators. The upshot was that the agents on the front lines of our counterterrorism program lacked the tools they needed to identify, investigate and neutralize plots before they matured into terrorist attacks.

With the memory of 9/11 fresh in their minds, Congress drew up an omnibus package of needed authorities and passed the original Patriot Act 45 days after the attacks. While not perfect, the Patriot Act was a strong and a necessary piece of legislation. From my first days at the FBI in 2002, I could see the impact these authorities were having on our counterterrorism operations -- from the newly-permitted coordination between law enforcement and intelligence personnel to the enhanced access to business records that are vitally important to a fast-moving

threat investigation. The Patriot Act authorities were having the intended effect -- they were strengthening our capacity to prevent the next 9/11 attack.

With the approach of the 2005 sunsets that were built into the original Patriot Act, Congress undertook to re-examine these authorities and engage in a vigorous debate over their reauthorization. To its enduring credit, Congress went through a lengthy process of carefully scrutinizing each provision and identifying those where additional limitations or oversight could provide protection against misuse without reducing their operational effectiveness. This process resulted in the 2006 Reauthorization Act that provided significant new safeguards for many of the primary authorities in the original Patriot Act. It also made permanent all but two of the sixteen provisions that were scheduled to sunset that year.

With the benefit of that thorough re-examination and eight years of experience with the Patriot Act authorities, we are now at the point of institutionalizing them into the fabric of our counterterrorism operations. Our law enforcement and intelligence communities have adopted the procedures, training and policies to incorporate the new authorities into their operations; they have implemented the additional safeguards imposed by the Reauthorization Act; and they operate subject to substantial oversight by the Foreign Intelligence Surveillance Court (the FISA Court) and by Congress, which receives regular classified reports and briefings on the use of these authorities. And importantly, they are using the Patriot Act tools to significant effect. As FBI Director Mueller has testified, "the PATRIOT Act has changed the way the FBI operates, and . . . many of our operational counterterrorism successes since September 11 are the direct result of the changes incorporated in the PATRIOT Act." Hearing before the Select Committee on Intelligence, April 27, 2005.

III. The Counterterrorism Authorities Subject to Expiration this Year

With the continuing threat from what the President has aptly described as al Qaeda's "far-reaching network of violence and hatred," it is important that our counterterrorism professionals retain the ability to use all of our Patriot Act authorities. This is particularly true of the three provisions that are subject to reauthorization this year. These provisions were born of the harsh lesson of 9/11; they were carefully reviewed by Congress during the reauthorization process and two were augmented with substantial safeguards; and they have been effectively incorporated into our counterterrorism operations with due regard for privacy and civil liberties and with extensive oversight by the FISA Court and Congress. Given this track record, it is now time to institutionalize these authorities, with the clear understanding that Congress can -- and should -- keep a close eye on their use and propose future amendments if it perceives they are being misapplied.

A. Section 206 -- Roving Surveillance Authority

Section 206 of the Patriot Act authorized the government to conduct "roving" surveillance of a foreign power or agent thereof. Previously, national security investigators who were conducting electronic surveillance of a foreign terrorist or spy were required to go back to the FISA Court for a new order every time that target used a different telephone or other communication device. With this new authority, they could now secure authorization to

maintain continuous surveillance as a target moves from one communication device to another -- which is standard tradecraft for many surveillance-conscious terrorists and spies.

This is a critical investigative tool, especially given the proliferation of inexpensive cell phones, calling cards and other innovations that make it easy to dodge surveillance by rotating communication devices. While law enforcement personnel investigating regular crimes like drug trafficking have been using roving wiretaps since 1986, national security agents trying to prevent terrorist attacks only received this authority with the passage of the Patriot Act in 2001. Since then, the FBI has used it on approximately 140 occasions, and its use has been "tremendously important" and "essential, given the technology and growth of technology that we've had." Testimony of FBI Director Mueller, Hearing before the Senate Judiciary Committee, September 16, 2009.

While some have raised privacy concerns about this authority, a fair review of Section 206 shows that Congress incorporated a number of safeguards to ensure its judicious and responsible use. First, this new provision did nothing to affect the government's touchstone evidentiary burden; the government must still demonstrate probable cause that the target is a foreign power or an agent of a foreign power. Second, the statute ensures that the FISA Court will closely monitor any roving surveillance; within ten days of conducting roving surveillance on a new communication device, the government is required to give the FISA Court a full report explaining why it believes the target is now using that device and how it will adapt the standard minimization procedures to limit the acquisition, retention and dissemination of communications involving United States persons that might be collected from that surveillance. Finally, the government can use this authority only under limited circumstances; a Section 206 order can issue only if the government provides the FISA Court with "specific facts" demonstrating that actions of the target -- such as switching cell phones -- "may have the effect of thwarting" its ability to identify and conduct surveillance on the communication facility he is using.

These safeguards and the operational need to surveil terrorists and spies as they rotate their phones and other communication devices make a very strong case for reauthorizing the "roving wiretap" authority in Section 206.

B. Section 215 -- Business Records Orders under FISA

Section 215 authorized the FISA Court to issue orders for the production of the same kind of records and other tangible things that law enforcement officers and prosecutors have historically been authorized to acquire through grand jury subpoenas. As a long-time criminal prosecutor, I can tell you that the authority to compel production of business records is absolutely essential to our law enforcement investigations.

Prior to the enactment of Section 215, our national security personnel did not have that authority and they were hamstrung in their effort to obtain business records during international terrorism and espionage investigations. Whereas criminal prosecutors and investigators could issue a subpoena for any record that is relevant to their grand jury investigation, national security personnel could secure a court order only for records that pertain to a person who can be shown by "specific and articulable facts" to be a foreign power or an agent of a foreign power. In

addition, they were permitted to request FISA production orders only for those records held by a business that qualified as "a common carrier, public accommodation facility, physical storage facility or vehicle rental facility." The latter limitation meant, for example, that an agent investigating whether a terrorist had purchased bulk quantities of fertilizer to produce a bomb could not have used a FISA order to obtain the relevant records because a feed store is not "a common carrier, public accommodation facility, physical storage facility or vehicle rental facility."

Section 215 addressed these weaknesses by adopting the relevance standard for issuance of an order and by expanding the reach of this authority to any type of entity. With this new latitude, the Section 215 authority has been used by the FBI on approximately 250 occasions, *id.*, and has "been exceptionally useful" in its national security investigations. Testimony of FBI Director Mueller, Hearing before the House Judiciary Committee, May 20, 2009.

Like the roving surveillance authority, Congress built into Section 215 a panoply of safeguards to protect against misuse. In fact, it is clear that FISA Court orders under Section 215 are significantly more protective of civil liberties than the grand jury subpoenas that are regularly issued by criminal prosecutors around the country. While both authorities require that the records sought are relevant to an authorized investigation, only the Section 215 order requires court approval; a prosecutor, by contrast, can issue a subpoena without any court review at all. Moreover, unlike the grand jury subpoena authority, Section 215 explicitly disallows the issuance of court orders if the underlying investigation is only looking into conduct -- such as political speech or religious worship -- that is protected by the First Amendment. Finally, Section 215 provides for substantial congressional oversight by requiring the Department of Justice to submit detailed reports to Congress about its use of that authority.

In the Reauthorization Act of 2006, Congress added significant new safeguards to this authority. Addressing concerns raised about particularly sensitive records, it imposed the requirement of high-level approval within the FBI before a 215 order could be sought for "library circulation records, library patron lists, book sales records, book customer lists, firearms sales records, tax return records, educational records, or medical records containing information that would identify a person." It also provided procedures by which the recipient of a 215 order can appeal to the FISA Court to challenge and litigate the validity of the order and the basis for its nondisclosure requirement -- or "gag order."

With these safeguards in place, there is no reason to return to the days when it was easier for prosecutors to secure records in a simple assault prosecution than for national security investigators to obtain records that may help prevent the next 9/11. Section 215 should be reauthorized.

C. The Lone Wolf Provision

Section 6001 of the Intelligence Reform and Terrorism Protection Act (IRTPA) allows the government to conduct surveillance on a non-US person who "engages in international terrorism or activities in preparation therefor" without demonstrating his affiliation to a particular international terrorist organization. When FISA was originally passed in 1978, the contemplated

terrorist target of FISA surveillance was the agent of an organized terrorist group like the Red Brigades or one of the Palestinian terrorist organizations of that era. Today, we face a terrorist adversary in al Qaeda that is a global network of like-minded terrorists -- a network whose membership fluctuates with the shifting of alliances between regional groups. We also face the specter of self-radicalizing foreign terrorists who may not be part of a particular terrorist group, but who are nonetheless just as dangerous and just as committed to pursuing the violent objectives of international terrorism. Given the increasing fluidity in the organization and membership of our international terrorist adversaries, there is a greater likelihood today that we will encounter a foreign terrorist whose affiliation to an identifiable terrorist organization cannot be ascertained. To ensure that the government can surveil such a person, Congress passed the "lone wolf" provision permitting his surveillance based simply on the showing that he is involved in international terrorism. Importantly, this authority can only be used when the target of the surveillance is a non-US person.

The government recently reported that it has not yet used the "lone wolf" provision. Nonetheless, given the threat posed by foreign terrorists -- regardless of affiliation -- and the need to keep them under surveillance, it is important that we keep this authority available for the day when the government may need to use it.

IV. Conclusion

Thank you once again for the opportunity to discuss the sunsetting Patriot Act provisions, their importance to our counterterrorism program, and my reasons for believing they should all be reauthorized this year. I look forward to answering any questions you might have.