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February 13, 2004

Honorable David M. Dunfield, Mayor
Members, City Commission
City of Lawrence
City Hall
P.O. Box 708
Lawrence, Kansas 66044

Dear Mayor Dunfield, and City Commissioners;

Thank you for providing the Department of Justice, though the United States Attorney's Office for the District of Kansas, with the opportunity to comment on the proposed resolution calling for repeal of the USA Patriot Act. I regret that my travel schedule does not permit me to be present in person, but know that the Department of Justice is more than ably represented by my chief deputy, First Assistant Jim Flory, who as you know is a Douglas County resident and former Douglas County District Attorney.

I commend the concern expressed by the draft Resolution for the preservation of civil liberties, and particularly agree with the statement contained therein that there is "no inherent conflict between national security and the preservation of liberty" and that "Americans can be both safe and free."

However, the statement that several recent enactments, including the USA Patriot Act, infringe upon fundamental Constitutional rights and liberties, is simply incorrect. I have had the opportunity to discuss the Patriot Act in numerous forums, and have discovered that there is great misunderstanding about what the Patriot Act does, and what it does not do. Concern about the Patriot Act lead to Congressional hearings last fall, at the conclusion of which bipartisan support for its provisions was reaffirmed. Senator Diane Feinstein (D. California) was quoted in the *Washington Post* as saying that virtually all of the complaints she had received about the Patriot Act involved, either matters which had never been enacted into law nor proposed by the administration; or, matters with had nothing to do with the Patriot Act. She further indicated that she had received no evidence of any abuses under the Patriot Act, and that when she contacted those entities who had sued the Department of Justice alleging violations of civil liberties under the Patriot Act, and requested specific examples, they had none.

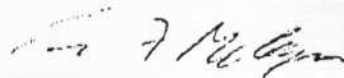
Act: There are two foundational facts I believe important to recognize about the USA Patriot

- The Patriot Act could not, and did not attempt to, change the standards under the Fourth Amendment of the United States Constitution for searches and seizures. Although the Patriot Act updated the law to reflect modern technology, it left unchanged the requirements which an independent judge must find satisfied before searches or seizures are authorized. The Patriot Act did not purport to create procedures whereby searches or seizures would no longer require judicial authorization.
- No violations of civil liberties by action taken under the Patriot Act have been reported. The Patriot Act in fact required increased reporting to Congress regarding civil liberties. Recent reports have indicated civil liberty concerns from other areas; but these reports are reports which the Patriot Act required, they are not reports of matters which have occurred because of Patriot Act provisions. Contrary to published articles suggesting otherwise, the only connection these reports have to the Patriot Act is that the Patriot Act further secured the civil liberties by helping to uncover unrelated issues impacting liberties.

I have attached to this letter 2 documents, for further reference. The first is report from the Department of Justice summarizing what the Patriot Act actually does – demonstrating that its impact was to update the law to match modern technology and meet modern threats. The second is a paper prepared by my colleague the United States Attorney for the Western District of Pennsylvania entitled "Ten Myths about the USA Patriot Act" which explains what the Patriot Act does not do, contrary to popular misconception.

The role of government is to secure our liberties. The victims of September 11 lost their lives and liberties due to a loss of security. Through tools such as the Patriot Act, we are working to re-secure those liberties. A repeal of the Patriot Act, or a coordinated effort to thwart its provisions, would not result in greater liberty, but would result in a loss of liberty. I would urge this Commission to show its support for securing the personal liberties which we enjoy under our constitutional form of government by supporting those efforts to secure liberty, such as the USA Patriot Act.

Sincerely yours,



Eric F. Melgren
United States Attorney
District of Kansas

Preserving Life & Liberty

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted...

Declaration of Independence

PDF version

Major Speeches

Dispelling the Myths

Passed by Congress

Congress Speaks

Support of the People

Stories and Articles

Text of the Patriot Act

Anti-Terror Record

Department of Justice
etc.

The Department of Justice's first priority is to prevent future terrorist attacks. Since its passage following the September 11, 2001 attacks, the Patriot Act has played a key part - and often the leading role - in a number of successful operations to protect innocent Americans from the deadly plans of terrorists dedicated to destroying America and our way of life. While the results have been important, in passing the Patriot Act, Congress provided for only modest, incremental changes in the law. Congress simply took existing legal principles and retrofitted them to preserve the lives and liberty of the American people from the challenges posed by a global terrorist network.

The USA PATRIOT Act: Preserving Life and Liberty

(Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism)

✓ Congress enacted the Patriot Act by overwhelming, bipartisan margins, arming law enforcement with new tools to detect and prevent terrorism: The USA Patriot Act was passed nearly unanimously by the Senate 98-1, and 357-66 in the House, with the support of members from across the political spectrum.

The Act Improves Our Counter-Terrorism Efforts in Several Significant Ways:

1. The Patriot Act allows investigators to use the tools that were already available to investigate organized crime and drug trafficking. Many of the tools the Act provides to law enforcement to fight terrorism have been used for decades to fight organized crime and drug dealers, and have been reviewed and approved by the courts. As Sen. Joe Biden (D-DE) explained during the floor debate about the Act, "the FBI could get a wiretap to investigate the mafia, but they could not get one to investigate terrorists. To put it bluntly, that was crazy! What's good for the mob should be good for terrorists." (Cong. Rec., 10/25/01)

- **Allows law enforcement to use surveillance against more crimes of terror.** Before the Patriot Act, courts could permit law enforcement to conduct electronic surveillance to investigate many ordinary, non-terrorism crimes, such as drug crimes, mail fraud, and passport fraud. Agents also could obtain wiretaps to investigate some, but not all, of the crimes that terrorists often commit. The Act enabled investigators to gather information when looking into the full range of terrorism-related crimes, including: chemical-weapons offenses, the use of weapons of mass destruction, killing Americans abroad, and terrorism financing.
- **Allows federal agents to follow sophisticated terrorists trained to evade detection.**

For years, law enforcement has been able to use "roving wiretaps" to investigate ordinary crimes, including drug offenses and racketeering. A roving wiretap can be authorized by a federal judge to apply to a particular suspect, rather than a particular phone or communications device. Because international terrorists are sophisticated and trained to thwart surveillance by rapidly changing locations and communication devices such as cell phones, the Act authorized agents to seek court permission to use the same techniques in national security investigations to track terrorists.

- **Allows law enforcement to conduct investigations without tipping off terrorists.** In some cases if criminals are tipped off too early to an investigation, they might flee, destroy evidence, intimidate or kill witnesses, cut off contact with associates, or take other action to evade arrest. Therefore, federal courts in narrow circumstances long have allowed law enforcement to delay for a limited time when the subject is told that a judicially-approved search warrant has been executed. Notice is always provided, but the reasonable delay gives law enforcement time to identify the criminal's associates, eliminate immediate threats to our communities, and coordinate the arrests of multiple individuals without tipping them off beforehand. These delayed notification search warrants have been used for decades, have proven crucial in drug and organized crime cases, and have been upheld by courts as fully constitutional.
- **Allows federal agents to ask a court for an order to obtain business records in national security terrorism cases.** Examining business records often provides the key that investigators are looking for to solve a wide range of crimes. Investigators might seek select records from hardware stores or chemical plants, for example, to find out who bought materials to make a bomb, or bank records to see who's sending money to terrorists. Law enforcement authorities have always been able to obtain business records in criminal cases through grand jury subpoenas, and continue to do so in national security cases where appropriate. These records were sought in criminal cases such as the investigation of the Zodiac gunman, where police suspected the gunman was inspired by a Scottish occult poet, and wanted to learn who had checked the poet's books out of the library. In national security cases where use of the grand jury process was not appropriate, investigators previously had limited tools at their disposal to obtain certain business records. Under the Patriot Act, the government can now ask a federal court (the Foreign Intelligence Surveillance Court), if needed to aid an investigation, to order production of the same type of records available through grand jury subpoenas. This federal court, however, can issue these orders only after the government demonstrates the records concerned are sought for an authorized investigation to obtain foreign intelligence information not concerning a U.S. person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a U.S. person is not conducted solely on the basis of activities protected by the First Amendment.

2. The Patriot Act facilitated information sharing and cooperation among government agencies so that they can better "connect the dots." The Act removed the major legal barriers that prevented the law enforcement, intelligence, and national defense communities from talking and coordinating their work to protect the American people and our national security. The government's prevention efforts should not be restricted by boxes on an organizational chart. Now police officers, FBI agents, federal prosecutors and intelligence officials can protect our communities by "connecting the dots" to uncover terrorist plots before they are completed. As Sen. John Edwards (D-N.C.) said about the Patriot Act, "we

simply cannot prevail in the battle against terrorism if the right hand of our government has no idea what the left hand is doing." (Press release, 10/26/01)

- Prosecutors can now share evidence obtained through grand juries with intelligence officials -- and intelligence information can now be shared more easily with federal prosecutors. Such sharing of information leads to concrete results. For example, a federal grand jury recently indicted an individual in Florida, Sami al-Arian, for allegedly being the U.S. leader of the Palestinian Islamic Jihad, one of the world's most violent terrorist outfits. Palestinian Islamic Jihad is responsible for murdering more than 100 innocent people, including a young American named Alisa Flatow who was killed in a tragic bus bombing in Gaza. The Patriot Act assisted us in obtaining the indictment by enabling the full sharing of information and advice about the case among prosecutors and investigators. Alisa's father, Steven Flatow, has said, "When you know the resources of your government are committed to right the wrongs committed against your daughter, that instills you with a sense of awe. As a father you can't ask for anything more."

3. The Patriot Act updated the law to reflect new technologies and new threats. The Act brought the law up to date with current technology, so we no longer have to fight a digital-age battle with antique weapons—legal authorities leftover from the era of rotary telephones. When investigating the murder of *Wall Street Journal* reporter Daniel Pearl, for example, law enforcement used one of the Act's new authorities to use high-tech means to identify and locate some of the killers.

- **Allows law enforcement officials to obtain a search warrant anywhere a terrorist-related activity occurred.** Before the Patriot Act, law enforcement personnel were required to obtain a search warrant in the district where they intended to conduct a search. However, modern terrorism investigations often span a number of districts, and officers therefore had to obtain multiple warrants in multiple jurisdictions, creating unnecessary delays. The Act provides that warrants can be obtained in any district in which terrorism-related activities occurred, regardless of where they will be executed. This provision does not change the standards governing the availability of a search warrant, but streamlines the search-warrant process.
- **Allows victims of computer hacking to request law enforcement assistance in monitoring the "trespassers" on their computers.** This change made the law technology-neutral; it placed electronic trespassers on the same footing as physical trespassers. Now, hacking victims can seek law enforcement assistance to combat hackers, just as burglary victims have been able to invite officers into their homes to catch burglars.

4. The Patriot Act increased the penalties for those who commit terrorist crimes.

Americans are threatened as much by the terrorist who pays for a bomb as by the one who pushes the button. That's why the Patriot Act imposed tough new penalties on those who commit and support terrorist operations, both at home and abroad. In particular, the Act:

- **Prohibits the harboring of terrorists.** The Act created a new offense that prohibits knowingly harboring persons who have committed or are about to commit a variety of terrorist offenses, such as: destruction of aircraft; use of nuclear, chemical, or biological weapons; use of weapons of mass destruction; bombing of government

property; sabotage of nuclear facilities; and aircraft piracy.

- **Enhanced the inadequate maximum penalties for various crimes likely to be committed by terrorists:** including arson, destruction of energy facilities, material support to terrorists and terrorist organizations, and destruction of national-defense materials.
- **Enhanced a number of conspiracy penalties,** including for arson, killings in federal facilities, attacking communications systems, material support to terrorists, sabotage of nuclear facilities, and interference with flight crew members. Under previous law, many terrorism statutes did not specifically prohibit engaging in conspiracies to commit the underlying offenses. In such cases, the government could only bring prosecutions under the general federal conspiracy provision, which carries a maximum penalty of only five years in prison.
- **Punishes terrorist attacks on mass transit systems.**
- **Punishes bioterrorists.**
- **Eliminates the statutes of limitations for certain terrorism crimes and lengthens them for other terrorist crimes.**

The government's success in preventing another catastrophic attack on the American homeland since September 11, 2001, would have been much more difficult, if not impossible, without the USA Patriot Act. The authorities Congress provided have substantially enhanced our ability to prevent, investigate, and prosecute acts of terror.

Privacy and Security Notice

Ten Myths about the USA PATRIOT Act

By Mary Beth Buchanan

United States Attorney for the Western District of Pennsylvania

May 2003

MYTH: The USA PATRIOT Act permits the indefinite detention of immigrants on minor visa violations.

The organization People for the American Way claims:

The new law gives the government seven days to charge detained immigrants with criminal or immigration violations or release them. The prior limit had been 24 hours. Once charged, if not deportable, such immigrants could face indefinite detention if the Attorney General finds "reasonable grounds to believe" there is involvement in terrorism or activity that poses a danger to national security. Indefinite detention circumvents due process by dramatically lowering the standard to "reasonable grounds to believe" – well below the probable cause standard required for pretrial detention in criminal proceedings and certainly well below the burden of proof for criminal conviction. Further, defendants in immigration proceedings are not constitutionally entitled to a court-appointed public defender, and must hire their own counsel. The notion of wrongly accused impoverished immigrants without counsel being indefinitely detained brings to mind the specter of mass incarceration, by a different method. In fact, without using the provisions of the new law, the Department of Justice reportedly detained more than 1,100 people after September 11.¹

Similarly, the American Civil Liberties Union asserts:

[I]mmigrants who are found not to be deportable for terrorism, but have an immigration status violation, such as overstaying a visa, could face indefinite detention if their country refuses to accept them. Detention would be allowed on the Attorney General's finding of "reasonable grounds to believe" involvement in terrorism or activity that poses a danger to national security, and detention could be indefinite upon a determination that such an individual threatens national security, or the safety of the community or any person. . . .

What amounts to a life sentence should at a minimum be based on clear proof at a hearing, not on a certification of merely the level of suspicion that normally allows only a brief and stop and frisk on the street.²

An article in The Nation magazine argued:

The most troubling provisions of the USA Patriot Act, enacted within six weeks of September 11, are similarly reserved for non-citizens. The act permits the Attorney General to detain noncitizens on his own say-so, without a hearing; bars foreign citizens from entering the country, based solely on their speech; and authorizes deportation based on any support for a disfavored group, without any requirement that the support be connected to a terrorist group. Had this law been in place in the 1980s, it would have authorized the government to deny entry to those who publicly endorsed the African National Congress, and would have empowered the Attorney General to detain and deport anyone who contributed to Nelson Mandela's lawful antiapartheid political activities, because until the ANC defeated apartheid in South Africa, our State Department designated it as a terrorist organization.³

THE TRUTH

- The USA Patriot Act added Section 236A to the Immigration and Nationality Act, Title 8, United States Code, Section 1101 *et seq.* The act gives the Attorney General the power to detain aliens suspected of terrorism and also delineates the process by which detentions are to be reviewed.
- Under Title 8, United States Code, Section 1226a(a)(1), the Attorney General has the authority to take into custody any alien he certifies as a threat to the national security of the United States. The Attorney General's certification must be based upon "reasonable grounds to believe that the alien:" has or will commit espionage or sabotage; attempt an overthrow of the government; has or will commit terrorist acts; or is otherwise engaged in activities that threaten national security. Title 8, United States Code, Section 1226a(a)(3).
- Following detention, the Attorney General must place the alien in removal proceedings or level criminal charges. This must be done within seven days following commencement of the detention. If this is not done within the required time period, "the attorney general shall release the alien." Title 8, United States Code, Section 1226a(a)(5).
- In situations where the alien is not likely to be deported within "the reasonably foreseeable future," the alien "may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any other person." Title 8, United States Code, Section 1226a(a)(6).
- The Attorney General is also required to review the initial certification every six months. The alien also has the right to request review every six months and is permitted to present evidence in support of the request.

- Judicial review of decisions made under Title 8, United States Code, Sections 1226a(a)(3) or (a)(6) is available by *habeas corpus* proceedings.
- It should be noted that "[i]f the alien is finally determined not to be removable, detention pursuant to this subsection shall terminate." Title 8, United States Code, Section 1226a(a)(2).
- As explained by the Chairman of the Senate Judiciary Committee:

[The USA PATRIOT Act includes] provisions to grant the Attorney General the authority to certify that an alien meets the criteria of the terrorism grounds of the Immigration and Nationality Act, or is engaged in any other activity that endangers the national security of the United States, upon a "reasonable grounds to believe" standard, and take such aliens into custody. This authority is delegable only to the Deputy Attorney General. The Attorney General must either begin removal proceedings against such aliens or bring criminal charges within seven days, or release them from custody. An alien who is charged but ultimately found not to be removable is to be released from custody. An alien who is found to be removable but has not been removed, and whose removal is unlikely in the reasonably foreseeable future, may be detained if the Attorney General demonstrates that release of the alien will adversely affect national security or the safety of the community or any person. Judicial review of any action taken under this section, including review of the merits of the certification, is available through *habeas corpus* proceedings, with appeal to the U.S. Court of Appeals for the D.C. Circuit. The Attorney General shall review his certification of an alien every six months.⁴

- The Patriot Act did not eliminate due process considerations from the certification and detention process. In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court addressed the standards by which the detention of deportable aliens is to be reviewed. The issue in *Zadvydas*, was whether Title 8, United States Code, Section 1231(a)(6), authorizes the Attorney General to detain a removable alien indefinitely beyond the removal period or only for a period reasonably necessary to secure the alien's removal from the United States. The Court held that the indefinite detention of resident aliens who were unlikely to be deported "would raise a serious constitutional problem." *Id.* at 682.
- Nevertheless, there exists authority indicating that indefinite detention is constitutionally permissible in certain situations provided that there exists special justification for the detention and sufficient procedural protections for the detainee. In *Zadvydas*, the Supreme Court specifically mentioned that "suspected terrorists" constituted "a small segment of particularly dangerous individuals" who be could subject to indefinite detention. *Id.*, at 691. Furthermore, the only procedural protections available to the detainee in *Zadvydas* consisted of administrative proceedings. The USA Patriot Act provides for *habeas corpus* review on the merits of any detention.

- It is important to note that Act's critics quoted above filed to mention that the Attorney General's certification is subject to judicial review.

MYTH: Thousands of people were rounded up after September 11, 2001 and detained for long periods of time without any criminal charges.

According to the American Civil Liberties Union:

Thousands of men, mostly of Arab and South Asian origin, have been held in secretive federal custody for weeks and months, sometimes without any charges filed against them.⁵

Said Time Magazine:

Thousands were jailed and then let go. Only a few have been charged.⁶

THE TRUTH

- As the Director of Public Affairs of the Department of Justice recently explained:

"[A]bout 750 foreign nationals" were detained. "Thousands" would imply two or three thousand for which there is no basis in fact. All were in the country illegally, and all were charged with immigration and/or criminal charges. In addition, most of them -- approximately 500 to date -- have been deported, not "let go" or "released." That an alien was deported rather than prosecuted does not mean that the alien had no knowledge of or connection to terrorism. In many cases, the best course of action to protect national security may have been to remove potentially dangerous individuals from the country and ensure that they could not return. In other cases, an individual may have been deported on grounds seemingly unrelated to terrorism, if the assertion of specific terrorism charges could have compromised ongoing investigations or sensitive intelligence matters.⁷

MYTH: The USA Patriot Act eviscerates judicial oversight of federal law enforcement activities.

According to an article in The Nation magazine:

The Patriot Act broadly undermines the rights of all Americans. It reduces judicial oversight of a host of investigative measures, including wiretaps, expands the government's ability to track individuals' Internet use and gives federal officials expansive new powers that are in no way limited to investigating terrorist crimes. It authorizes an end run around the Fourth Amendment by allowing the government to conduct wiretaps and searches in criminal investigations without probable cause of a crime, as long as the government claims that it also seeks to gather foreign intelligence--an authority that is particularly questionable in light of recent disclosures from the Foreign Intelligence Surveillance Court that the FBI has repeatedly provided misinformation in seeking such authority in the past.⁸

According to the organization People For The American Way:

Monitoring an individual's communications normally would require law enforcement to demonstrate probable cause of criminal activity to a judge. The counter-terrorism law, however, dramatically lowers the surveillance standard with respect to certain aspects of the Internet by requiring only that law enforcement personnel *certify* that the surveillance is relevant to a criminal investigation. The court *must* accept the certification, even if the court believes that law enforcement is on a fishing expedition. Such a provision falls far short of active judicial oversight.⁹

THE TRUTH

- The USA Patriot Act does not abrogate the role played by the judiciary in the oversight of the activities of federal law enforcement.
- Federal agents still have to obtain judicial approval before they can search a residence. U.S. Const. Amend. IV.
- Federal agents still have to obtain judicial approval before they can install a wiretap. Title 18, United States Code, Section 2518(1); Title 50, United States Code, Section 1804.
- District courts still have the power to suppress evidence obtained in violation of the Fourth, Fifth and Sixth Amendments. Fed.R.Crim.P. 12(b)(3)(C).
- District courts still have the power to dismiss faulty or insufficient indictments. Fed.R.Crim.P. 12(b)(3)(B).

- Court orders are necessary before federal agents install a trap and trace device on a telephone. Title 18, United States Code, Section 3121; Title 50, United States Code, Section 1842.

MYTH: The USA PATRIOT ACT empowered the government to start monitoring e-mails and web surfing by ordinary citizens.

The American Civil Liberties Union proclaimed:

Under this sweeping legislation, the government can now . . . monitor your e-mails and watch what Internet sites you visit.¹⁰

THE TRUTH

- The USA Patriot Act amended Title 18, United States Code, Section 3123(a) by authorizing courts to issue pen register and trap and trace orders that are valid "anywhere within the United States" and apply to facilities other than telephone lines. The court must have jurisdiction over the crime being investigated and the government must certify that the information "likely to be obtained" is "relevant to an ongoing criminal investigation." With such orders, the government is not permitted to intercept the content of the communication and is restricted to obtaining routing and addressing information. A search warrant issued by a court is required to read the contents of email if the email message is unopened and less than 180 days old. Title 18, United States Code, Section 2703 (a), provides in part:

A governmental entity may require the disclosure by a provider of electronic communication service of the **contents of a wire or electronic communication**, that is in electronic storage in an electronic communication system for one hundred and eighty days or less, **only pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation or equivalent State warrant.** (emphasis added)

- The Patriot Act did not change the standard needed to obtain a pen register. Under prior law, the government already could obtain a pen register for a telephone by certifying that the information likely to be obtained was relevant to an on-going investigation.

MYTH: The USA PATRIOT ACT is a present danger to the constitutional rights and privacy rights of library users.

The American Library Association recently resolved:

WHEREAS, certain provisions of the USA PATRIOT Act . . . and other related measures expand the authority of the federal government to investigate citizens and non-citizens, to engage in surveillance, and to threaten civil rights and liberties guaranteed under the United States Constitution and Bill of Rights; and

WHEREAS, the USA PATRIOT Act and other recently enacted laws, regulations, and guidelines increase the likelihood that the activities of library users, including their use of computers to browse the Web or access e-mail, may be under government surveillance without their knowledge or consent; now, therefore, be it

* * *

RESOLVED, that the American Library Association considers that sections of the USA PATRIOT ACT are a present danger to the constitutional rights and privacy rights of library users and urges the United States Congress to:

- 1) provide active oversight of the implementation of the USA PATRIOT Act and other related measures, and the revised Attorney General Guidelines to the Federal Bureau of Investigation;
- 2) hold hearings to determine the extent of the surveillance on library users and their communities; and
- 3) amend or change the sections of these laws and the guidelines that threaten or abridge the rights of inquiry and free expression; and, be it further¹

THE TRUTH

- In the wake of the devastating attacks on America on September 11, 2001, the Act provided the FBI and other federal law enforcement agencies with additional investigative tools to use in terrorism investigations. The provision most criticized by the American Library Association is Section 215, which permits an agent to apply for, and the Foreign Intelligence Surveillance Act (FISA) court to issue, a court order to produce "tangible things," which could include the records of library users. Another provision is Section 214, which permits the FISA court to order the installation of pen register or trap and trace devices on wire or electronic communications media, which could include library computers with Internet access and email capability. Contrary to the myth, however, these devices only reveal the

electronic addresses of the users of these media; they do not give law enforcement agents access to the contents of communications that are transmitted over them. Moreover, both Sections 214 and 215 of the Act provide for congressional oversight by requiring the Attorney General to report annually on the FBI's use of these authorities to Congress.

- FBI agents use the investigative technique of obtaining private records through legal process only as part of existing, duly authorized criminal, counter-terrorism, or foreign intelligence investigations. Such investigations may only be opened pursuant to specific guidelines issued by the Attorney General.
- In most of the comparatively very few instances in which records have been sought from libraries since September 11, 2001, they were obtained either voluntarily where permitted by state law or through long-established and well-recognized legal process, such as federal grand jury subpoenas. FBI Director Robert Mueller reports that, without exception, these records all pertained to specific, identified subjects of investigations.
- A February 2003 report prepared by the Congressional Research Service states: "Moreover, a Justice Department response to House Judiciary Committee questioning suggests that thus far exercise of the authority of Section 215 in a library context has been minimal or nonexistent." *Libraries and the USA PATRIOT Act*, Congressional Research Service, February 26, 2003.

MYTH: The Electronic Surveillance Provisions of the USA Patriot Act enables law enforcement to conduct "roving wiretaps."

Again, from the organization People For The American Way:

Under prior law, a wiretap was restricted to a particular telephone device. While the law needed updating to account take into account the use of multiple cell phones, the USA PATRIOT Act goes too far. Instead of including a reasonable balancing of individuals' privacy interests, the new law now establishes what amounts to a "no privacy zone" which follows a target of surveillance. If a target of surveillance enters your home, your telephone comes within a "no privacy zone" and can be tapped. Under these circumstances, it will be more difficult to ensure that innocent people aren't subject to wiretaps.¹²

THE TRUTH

- Prior to the advent of the USA Patriot Act, the government was permitted to conduct "roving wiretaps." Under Title 18, United States Code, Section 2518(11)(b), a court order authorizing

a wiretap did not have to specify the person whose assistance in the surveillance was required (e.g., a specific telecommunications carrier), where the court found that there was "probable cause to believe that the [target's] actions could have the effect of thwarting interception from a specific facility." The Act's critics made no mention of the prior existence of Section 2518(11)(b) in their position papers. The USA Patriot Act simply amended the Foreign Intelligence Surveillance Act of 1978, Title 50, United States Code, Sections 1801-1811 (FISA), to conform to the parallel provision found in the Federal Wiretap Statute.

- Before the amendment, under FISA a telecommunications carrier could only assist the government when directed to do so by a court order. Terrorists, however, are fairly adept at avoiding detection by using a variety of cell phones, multiple residences and other techniques. Each time a terrorist used a new phone, the government was required to apply to the FISA court for a new order directing the telecommunications carrier associated with the new phone to assist the government with the wiretap. The USA Patriot Act eliminates this cumbersome procedure.
- What the Act really did was update the law to account for modern technology. As Attorney General John Ashcroft noted:

The Patriot Act also modernized our surveillance tools to keep pace with technological change. We now have authority under FISA to track terrorists who routinely change locations and make use of multiple cell phones. Thanks to the new law, it is now clear that surveillance tools that were created for hard line telephones - pen registers, for instance - apply to cell phones and the Internet as well.¹³

MYTH: The USA Patriot Act infringes on political speech and the freedom of association.

According to the American Civil Liberties Union:

[The USA Patriot Act] permits detention and deportation of non-citizens who provide assistance for lawful activities of a group the government claims is a terrorist organization, even if the group has never been designated as a terrorist organization.

* * *

[T]he USA Patriot Act adds a new provision to the Immigration and Nationality Act section 212(a)(3)(B) that permits designation of foreign and domestic groups [as a terrorist organization] without . . . procedural safeguards. Under this new power, the Secretary of State could designate any group that has ever engaged in violent activity

a "terrorist organization" - whether it be Operation Rescue, Greenpeace, or People for the Ethical Treatment of Animals. The designation would render the group's non-citizen members inadmissible to the United States and would make payment of membership dues a deportable offense. Under the bill, people can be deported regardless of whether they knew of the designation and regardless of whether their assistance had anything to do with the group's alleged terrorist activity.

The USA Patriot Act also allows for detention and deportation of individuals who provide lawful assistance to groups that are not designated as terrorist organizations. It then requires the immigrant to prove a negative: that he did not know, and should not have known, that his assistance would further terrorist activity...Guilt by association is generally forbidden under the First Amendment and the history of McCarthyism shows the very real dangers of abuse.¹⁴

Said People For The American Way:

The law established a new crime of domestic terrorism, with a definition so broad as to include certain acts of political protest involving threats or dangers to human life. When political protest harms property or individuals, those particular harmful acts are already punishable under various criminal laws. Sometimes domestic political protest activity inadvertently escalates to violence. To allow such incidents to be treated as terrorism could have a stifling effect on dissent.¹⁵

THE TRUTH

- The USA Patriot Act amended Title 18, United States Code, Section 2331 by adding the definition of "domestic terrorism." Under the enactment, domestic terrorism consists of activities that:

(A) involve acts dangerous to human life that are a violation of the laws of the United States or any State;

(B) appear to be intended-

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination or kidnaping; and

(C) occur primarily within the territorial jurisdiction of the United States.

Title 18, United States Code, Section 2331(5).

- Again, the Patriot Act's critics fail to mention that the definition of "domestic terrorism" is virtually identical to the preexisting definition of "international terrorism" found at Title 18, United States Code, Section 2331(1).

MYTH: The USA Patriot Act enables the government to conduct large-scale investigations of U.S. citizens for "Intelligence purposes."

Again from People for the American Way:

Under prior law, there were stringent restrictions on the sharing of grand jury information by law enforcement personnel. In part these restrictions existed because information presented to grand juries may consist largely of accusations, rather than proof. The new law permits information from grand jury proceedings to be provided to the CIA, *without meaningful court oversight*. Such information sharing has been abused in recent years when the FBI routinely provided reports on domestic anti-Vietnam War activity to the CIA. Thousands of Americans engaged in political protests became the targets of CIA surveillance.¹⁶

THE TRUTH

- Rule 6(e)(3)(D) of the Federal Rules of Criminal Procedure permits the disclosure of grand jury information with other agencies only when "the matters involve foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947) or foreign intelligence information...to any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties."
- The federal official to whom the grand jury information is disclosed "may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information." Fed.R.Crim.P. 6(e)(3)(D)(i).
- Under Fed.R.Crim.P. 6(e)(3)(D)(iii) "Foreign intelligence information" is defined as information, whether or not it concerns an "American person" and "relates to the ability of the United States to protect against --

- actual or potential attack or other grave hostile acts of a foreign power or its agent;
- sabotage or international terrorism by a foreign power or its agent; or
- clandestine intelligence activities by an intelligence service or network of a foreign power or by its agent."

Foreign intelligence information also includes information "whether or not it concerns a United States person, with respect to a foreign power or foreign territory that relates to --

- the national defense or security of the United States; or
 - the conduct of the foreign affairs of the United States."
- The USA Patriot Act requires that the government must provide the district court with written notice that the disclosure was made and identify those to whom the disclosure was made.
- Prior to the Patriot Act amendments, the government was permitted to disclose grand jury information to other attorneys for the government. No notice of the disclosure to district court was required.

MYTH: Various provisions of the USA Patriot Act violate the Fourth Amendment.

The Center for Constitutional Rights claims:

The sneak and peak search warrant provisions of the USA Patriot Act "contravenes the 'common law knock and announce' principle which forms an essential part of the Fourth Amendment's reasonableness inquiry."¹⁷

THE TRUTH

- The USA Patriot Act added subsection (b) to Title 18, United States Code, Section 3103a. The statute provides as follows:
- (b) Delay- With respect to the issuance of any warrant or court order under this section, or any other rule of law, to search for and seize any property or material that constitutes evidence of a criminal offense against the laws of United States, any notice required, or that may be required, to be given may be delayed if-

(1) the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result (as defined in section 2705);

(2) the warrant prohibits the seizure of any tangible property, any wire or electronic communication, or...any stored wire or electronic communication, except where the court finds reasonable necessity for the seizure; and

(3) the warrant provides for the giving of such notice within a reasonable period of its execution, which period may be extended by the court for good cause.

- An "adverse result," as defined by Title 18, United States Code, Section 2705(a)(2) consists of: the endangerment of the life or physical safety of another individual; flight; the destruction of evidence; the intimidation of potential witnesses; or placing an investigation in serious jeopardy.
- Delayed notification under Section 3103a(b) depends wholly and solely upon judicial approval.
- The section also provides for delayed notice and not the absence of notice.
- It should be noted that magistrate judges have for years been able to authorize nighttime searches in contravention of the common law requirement that search warrants are to be executed during the daytime. Rule 41(c) of the Federal Rules of Criminal Procedure specifically authorizes nighttime execution provided that "reasonable cause" is shown.
- Section 3103a(b) also comports with the common law "knock and announce" requirement. The constitutionality of the doctrine was not resolved by the United States Supreme Court until 1995 in *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). There, the Court held that the knock and announce rule is generally part of the Fourth Amendment's reasonableness requirement, but further noted that the "flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests." *Id.*, at 934.

MYTH: The USA PATRIOT Act is unconstitutional.

According to a city council member in Arcata, California, after passing an ordinance requiring city officials to refuse to participate in investigations authorized by the USA PATRIOT Act:

The Patriot Act is unconstitutional."

THE TRUTH

- In fact, no provision of the Patriot Act has been held unconstitutional by any court in the country. The Patriot Act was voted on 98-1 in the Senate and House of Representatives voted 357-66 to approve it.¹⁹

¹ People for the American Way, *USA Patriot Act: What are the Issues?*, December 2001, at <http://www.pfaw.org/pfaw/general/default.aspx?oid=9392>.

² American Civil Liberties Union, *How the Anti-Terrorism Bill Permits the Indefinite Detention of Immigrants*, October 23, 2001, at <http://www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=9153&c=111>.

³ David Cole, *Enemy Aliens and American Freedoms*, *The Nation*, September 23, 2002.

⁴ Senator Patrick Leahy, *USA PATRIOT Act: Section-By-Section Analysis*, October 25, 2001.

⁵ American Civil Liberties Union, *The USA PATRIOT Act And Government Actions That Threaten Our Civil Liberties*, March 21, 2003, at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12164&c=206>.

⁶ Richard Lacayo, *The War Comes Back Home*, *Time Magazine*, May 12, 2003.

⁷ Letter Of Barbara Comstock, Director Of Public Affairs, To The Editor Of *Time Magazine*, Tuesday, May 13, 2003 at http://www.usdoj.gov/opa/pr/2003/May/03_opa_292.htm.

⁸ David Cole, *Enemy Aliens and American Freedoms*, *The Nation*, September 23, 2002.

⁹ People for the American Way, *USA Patriot Act: What are the Issues?*, December 2001, at <http://www.pfaw.org/pfaw/general/default.aspx?oid=9392>.

¹⁰ American Civil Liberties Union, *What the Patriot Act Means to You*, at <http://www.aclu.org/TakeAction/TakeAction.cfm?ID=11930&c=242>

¹¹ 2003 American Library Association Midwinter Meeting, *Resolution On The USA Patriot Act And Related Measures That Infringe On The Rights Of Library Users* (2002-2003 CD # 20.1)

¹² People for the American Way, *USA Patriot Act: What are the Issues?*, December 2001, at <http://www.pfaw.org/pfaw/general/default.aspx?oid=9392>.

¹³ Statement of John Ashcroft Attorney General of the United States before the Committee on the Judiciary United States Senate Concerning Oversight of the Department of Justice Presented on July 25, 2002.

¹⁴ American Civil Liberties Union: *How the USA Patriot Act Allows for Detention of People Engaging in Innocent Associational Activity*, October 23, 2001.

¹⁵ People for the American Way, *USA Patriot Act: What are the Issues?*, December 2001, at <http://www.pfaw.org/pfaw/general/default.aspx?oid=9392>.

¹⁶ *Ibid*.

¹⁷ Center for Constitutional Rights, *The USA Patriot Act: What's so Patriotic About Trampling the Bill of Rights?*, November 2001.

¹⁸ Richard Lacayo, *The War Comes Back Home*, *Time Magazine*, May 12, 2003.

¹⁹ Letter Of Barbara Comstock, Director Of Public Affairs, To The Editor Of *Time Magazine*, Tuesday, May 13, 2003 at http://www.usdoj.gov/opa/pr/2003/May/03_opa_292.htm.