THE USA PATRIOT ACT: PROMOTING THE COOPERATION OF FOREIGN INTELLIGENCE GATHERING AND LAW ENFORCEMENT

Craig S. Lerner
George Mason University School of Law


George Mason University
Legal Studies Research Paper Series
LS 16-16

This paper is available on the Social Science Research Network at ssrn.com/abstract=2759016
THE USA PATRIOT ACT: PROMOTING THE COOPERATION OF FOREIGN INTELLIGENCE GATHERING AND LAW ENFORCEMENT

Craig S. Lerner*

INTRODUCTION

In the aftermath of the September 11 attacks on the Pentagon and World Trade Centers, many in the media compared the tragedy to Pearl Harbor and other legendary “intelligence failures.”\(^1\) At first, observers excoriated the FBI and CIA for not identifying the terrorists before they arrived on American soil. Within weeks of the attacks, however, a flurry of revelations surfaced that several September 11 hijackers had been identified and were even being followed by intelligence and law enforcement agencies. What emerged was a distressing, and bitterly criticized, failure to share and coordinate that information, both within and among federal agencies.\(^2\) All the information the government needed to stop the attacks was available prior to September 11; no one in the federal government, it was said, “connected the dots.”\(^3\) Investigations undertaken by an FBI agent in one part of the country turned up evidence that FBI headquarters failed to share with its agents conducting similar investigations elsewhere in the

---

* Assistant Professor of Law, George Mason University. The author thanks Nelson Lund and Daniel Polsby for helpful comments.

1 See, e.g., Richard Cohen, Editorial, The Terrorism Story, and How We Blew It, WASH. POST, Oct. 4, 2001, at A31 (“It is clear by now that the United States suffered a massive intelligence failure. The CIA and, especially, the FBI have much to account for.”); Evan Thomas & Mark Hosenball, How He’ll Haunt Us, NEWSWEEK, Dec. 31, 2001, at 14 (noting that September 11 has been “called the most massive intelligence failure since Pearl Harbor”). Cf. Louis Freedberg, A Critical Task for Tarnished Agencies, S.F. CHRON., Sept. 23, 2001, at A1 (noting that in his speech to Congress two days after the September 11 attacks, “President Bush indirectly acknowledged the intelligence failures”). But see Heather MacDonald, Why the FBI Didn’t Stop 9/11, CITY JOURNAL, Autumn 2002 (arguing that although “[t]he media have portrayed [the events that preceded 9/11] as ‘intelligence failures,’” the real problem was with laws enacted in the 1970’s, and interpretations of those laws by the Department of Justice under President Clinton).


3 See Aaron Zitner, Senators Urge Flexibility in Bush’s Plan to Expand Cabinet, L.A. TIMES, June 10, 2002, at A17 (“Critics have said the [FBI and CIA] failed to ‘connect the dots’ of data uncovered by their own agents that, pieced together, might have given clues to the coming Sept. 11 attacks.”).
country. And information gleaned about potential terrorists by CIA sources was shielded from U.S. law enforcement agents, even after the suspects had arrived on U.S. shores.

In Congressional hearings that culminated in the passage of the United States of America Patriot Act ("Patriot Act"), lawmakers took turns lecturing on the incompetence of the FBI and CIA. How information about potential terrorists could have been so rigidly compartmentalized, rather than freely shared, was a source of consternation to puzzled members of Congress. To be sure, the actions of the FBI and CIA prior to September 11 were, in part at least, the predictable result of having various bureaucracies with overlapping jurisdictions and competing claims to preeminence. But the disinclination to share information was not simply a matter of small-minded bureaucrats putting turf battles above the national interest; it also reflected an honest effort on the part of many in both agencies to comply with the law, at least as it was perceived.

None of this should have been a surprise to members of Congress. A few months before the September 11 attacks, in July 2001, a GAO report to Congress detailed the legal barriers the FBI and Department of Justice ("DOJ") perceived as impeding a robust cooperation among law enforcement and intelligence agents. Those barriers, many contended, were not whimsical, but the conscious design of a Congress that for several decades emphasized the dangers to civil liberties that would result from merging the federal government's law enforcement and national security powers. The July 2001 GAO report cataloged the ensuing difficulties in the course of

4 See Michael Duffy & Nancy Gibbs, How Far Do We Want The FBI To Go?, TIME, June 10, 2002, at 24 (discussing a 1999 memo from an FBI agent in Oklahoma City, reporting "large numbers of Middle Eastern males receiving flight training," which was not shared by headquarters with agents in Minneapolis, who were investigating Zacarias Moussassou). See also 148 CONG. REC. S5795-01, (daily ed. June 20, 2002) (statement of Sen. Spector) (criticizing the failure of FBI headquarters to share a 2001 memorandum from an agent in Phoenix, reporting "aeronautical students with a large picture of Osama bin Laden in their room," with other anti-terrorism units).

5 See Dan Eggen & Dana Priest, FBI Agent Urged Search for Hijacker, WASH. POST, Sept. 21, 2002, at A1 (noting that "congressional investigators found that the CIA repeatedly failed to alert the FBI or others to [Khalid] Almihdhar [one of the 9/11 terrorists] and his possible connections to terror").


7 See, e.g., Hearing on FBI Counterterrorism Efforts, and Agency Reorganization Before the Senate Comm. on the Judiciary, 107th Cong. (June 6, 2002), available at 2002 WL 1232579.

8 See Dana Priest & Dan Eggen, FBI Faulted on Al Qaeda Assessment, Wash. Post, Sept. 20, 2002, at A1 (quoting Senator C. Saxby Chambliss' reaction to a briefing on the "division of responsibility between . . . the FBI and the CIA": "This is amazing, just amazing.").

9 This point is emphasized in MacDonald, supra note 1.

high-profile investigations, including those of Aldrich Ames and Wen Ho Lee, as intelligence officers and prosecutors bickered over conflicting interpretations of the legal barriers to cooperation.\footnote{\textit{Id.} at 13–14, 16.}

The Patriot Act was intended, in part, to alleviate these problems by removing certain legal barriers to information sharing. Although the provisions in question constitute only a tiny fraction of the voluminous law, they excited controversy well beyond their physical dimensions in the U.S. Code. Part II of this Article discusses some of the Patriot Act's amendments to the Foreign Intelligence Surveillance Act of 1978 (FISA).\footnote{Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (current version at 50 U.S.C. §§ 1801-62 (2003)).} Part III then considers amendments to grand jury secrecy rules.\footnote{\textit{See} \textit{Fed. R. Crim. P.} 6(e).} The changes to the FISA enhance the authority of intelligence officers to pool information with prosecutors in the DOJ. The changes to the grand jury secrecy rules, by contrast, enhance the powers of prosecutors to share evidence with intelligence officers.

Taken together, these two provisions authorize greater collaboration among intelligence officers and law enforcement personnel, spawning litigation over the provisions' scope and constitutionality. Although the Patriot Act plainly expands the powers of those charged with responding to terrorist threats, it would be incorrect to view those powers as wholly unregulated and discretionless. Indeed, the Patriot Act could be viewed as shifting the duties of regulation from the judicial branch to the legislative and executive branches. Given that questions of national security and privacy rights, and their appropriate balance, are among the most important policy issues confronting the nation, it would surely seem appropriate, and even preferable, that such debates take place openly, and in our elected branches.

I. THE PATRIOT ACT AND THE FISA

Surveillance conducted in the name of national security has, for nearly a quarter of a century, been governed by two legal provisions. First, the Foreign Intelligence Surveillance Act of 1978 (FISA) creates special guidelines for searches and wiretaps conducted for national security purposes.\footnote{See infra notes 29-36 and accompanying text.} Second, the Fourth Amendment of the Constitution imposes limits on domestic law enforcement, generally requiring officers to obtain a warrant from a magistrate before conducting a search.\footnote{\textit{See} \textit{Katz v. United States}, 389 U.S. 347, 357 (1967) (proclaiming that “searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated excep-}
tember 11 attacks, some observers asked whether laws originally designed (whether in 1792 or 1978) to protect our civil liberties are hindering an effective response to the threat posed by foreign terrorists. Others urged Congress not to overreact and jettison core protections against state over-reaching. Whether the changes to the FISA reflected in the Patriot Act, which are explored below, reflect an appropriate balance is the subject of ongoing controversy.

A. Background on National Security Surveillance

For much of America's history, Presidents authorized surveillance of citizens and aliens, domestically and abroad, in national security operations with no supervision by the courts and limited Congressional oversight. In the fulfillment of the duty to "preserve, protect and defend the Constitution," Presidents acted as though they were not bound by the Fourth Amendment's requirement that officials obtain prior approval from a magistrate before conducting a search. At least with respect to electronic surveillance through the mid-twentieth century, such a claim was largely uncontroversial; the Supreme Court repeatedly held that nontrespassory "searches" (e.g., wiretaps attached to telephone wires on public property) did not implicate the Fourth Amendment at all. The Supreme Court re-

---

16 This claim came from both sides of the political aisle. On the left, Alan Dershowitz argued in favor of an "interrogation warrant" to allow police to force those suspected of terrorist acts to answer questions, once they are granted immunity. He noted, however, that this is "not currently permissible under our Constitution." Talk of the Nation (NPR radio broadcast, June 17, 2002), transcript available at 2002 WL 3297027. On the right, John Derbyshire wrote that unless we "abandon[] key constitutional protections ... deaths from terrorism [could number in the millions]." John Derbyshire, Unpleasant Truths, NAT'L REV. ONLINE, Aug. 2, 2002, available at http://www.nationalreview.com/derbyshire/derbyshire080202.asp.

17 See, e.g., David Cole, Enemy Aliens and American Freedoms, THE NATION, Sept. 23, 2002, at 20 ("With the exception of the right to bear arms, one would be hard pressed to name a single constitutional liberty that the Bush Administration has not overridden in the name of protecting our freedom.").


19 U.S. CONST. art. II, § 1, cl. 7.


21 See Olmstead v. United States, 277 U.S. 438 (1928) (holding that an electronic device placed on telephone wires in public places did not implicate the Fourth Amendment, even though it enabled police to overhear telephone conversations from people's homes). The Court in Olmstead emphasized
versed this position in the 1967 case *Katz v. United States*, holding that the Fourth Amendment governed electronic surveillance, even where there was no physical invasion of a "constitutionally protected" place.

Significantly, the Supreme Court in *Katz* reserved the question as to "[w]hether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving national security." In a similar vein, Congress, in enacting a federal wiretap law in 1968, widely known as Title III, reiterated the constitutional authority of the President to gather foreign intelligence information. This constitutional authority was, however, thrown into question a few years later. A 1972 Supreme Court decision held that domestic threats to national security did not justify a departure from the Fourth Amendment's prior judicial authorization requirement. Subsequent lower court opinions questioned the legality of wiretaps of domestic organizations with no proven connection to a foreign power, such as the Jewish Defense League, that were approved solely by the Attorney General. In the mid-1970s, a number of Congressional committees, most famously the Church Committee, heard evidence of widespread domestic abuses by the CIA, FBI and NSA, including surveillances of Martin Luther King, the Students for a Democratic Society, the Ku Klux Klan, African-American activists, Vietnam War protesters and a number of Washington, D.C. journalists.

Congress enacted the FISA in 1978 in part to prevent these practices and to curtail the powers of intelligence officers to operate on American soil. The FISA created a legal and judicial framework for "foreign intelligence" surveillance operations conducted in America distinct from the regime governing ordinary law enforcement surveillance. Eleven judges—named the Foreign Intelligence Surveillance Court (FISC)—consider ap-

that "[t]he insertions were made without trespass upon any property of the defendants." *Id.* at 457.

23 *Id.* at 351-54.
24 *Id.* at 358 n.23.
25 Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, provides:

"Nothing in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or the hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities." 18 U.S.C. 2511(3) (as enacted by Title III in 1968). Section 2511(3) was repealed when Congress enacted the FISA in 1978. See Pub. L. 95-511, §§ 201(b) & (c) (1978).
29 The FISA, as passed in 1978, provided that the FISC consist of 7 judges. The Patriot Act ex-
lications for judicial orders authorizing physical searches and electronic surveillance\(^\text{30}\) when the professed purpose is to gather "foreign intelligence."\(^\text{31}\) A FISC judge must enter the requested order when he or she concludes that there is "probable cause to believe that the target of the [search or surveillance] is a foreign power or an agent of a foreign power."\(^\text{32}\) Thus, the standard for the approval of a FISA order is different from, and arguably lower, than that which governs the magistrate's approval of a warrant in the law enforcement context: The question for the FISC judge is not whether there is probable cause of criminal activity,\(^\text{33}\) but whether there is probable cause to link the proposed subject of the search to a foreign power.

Although critics have complained that the standard for an FISA surveillance order is too lax,\(^\text{34}\) the law included a variety of safeguards. First, FISA surveillance must comply with "minimization procedures" that are designed to limit the acquisition, retention, and dissemination of information about United States persons.\(^\text{35}\) Second, and more importantly, a high-level executive branch official must verify that the surveillance is intended to gather foreign intelligence and not simply to collect evidence of ordinary criminal activity. As the FISA was originally enacted in 1978, an application for a surveillance order was required to include a certification to the FISC that "the purpose of the [surveillance or search] was to obtain foreign intelligence information."\(^\text{36}\)

Litigation over the "the purpose" language became commonplace in the ensuing years. When evidence gathered in the course of FISA surveillance was later sought to be introduced by prosecutors in a criminal case, defendants invariably moved to suppress the evidence, arguing that the authorities had misstated their purpose in obtaining an FISA order.\(^\text{37}\)
fendants argued that the government's purpose when conducting the FISA surveillance had been to collect evidence of criminal activity and not to gather foreign intelligence. The argument ran that the government sought to circumvent the more rigorous requirements imposed by the Fourth Amendment and Title III, which together govern wiretaps in ordinary criminal investigations, through the FISA mechanism.

Although such suppression motions repeatedly failed, the case law that evolved proved deeply troubling to intelligence officers and law enforcement agents. Courts interpreted the "the purpose" language in the FISA certification requirement to mean the "primary purpose," and they regularly held that FISA surveillance was valid only so long as it was conducted primarily for the purpose of gathering foreign intelligence. The mere expectation that the fruits of any FISA surveillance might someday be used in a criminal prosecution did not, courts held, invalidate the search. However, a string of cases suggested that as soon as criminal prosecution became the driving force in any surveillance—as soon, that is, as the primary purpose shifted from the gathering of foreign intelligence to the enforcement of the criminal law—officials were required to discontinue surveillance though the FISA mechanism and seek a warrant or wiretap order in the ordinary manner (i.e., by obtaining a search warrant from a magistrate or a Title III order). Thus, courts in the 1980's began to interpret the

"the surveillance was not lawfully authorized or conducted").

See, e.g., United States v. Pelton, 835 F.2d 1067, 1075 (4th Cir. 1987) ("We also reject Pelton's claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily 'for the purpose of obtaining foreign intelligence information.'").

Id.

See, e.g., United States v. Johnson, 952 F.2d 565 (1st Cir. 1991); United States v. Pelton, 835 F.2d 1067, 1075 (4th Cir. 1987); United States v. Duggan, 743 F.2d 59 (2d Cir. 1984).

41 The interpretation of "the purpose" in the FISA as the "primary purpose" stems from a 1980 case decided after the FISA had been enacted but on the basis of pre-existing law. In United States v. Turong Ding Hung, 629 F.2d 908 (4th Cir. 1980), the Fourth Circuit held that ""the executive should be excused from securing a [law enforcement] warrant only when the surveillance is conducted primarily for foreign intelligence reason." Id. at 915. The court explained that "once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, more importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution." Id.

42 See, e.g., United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991) ("Although evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance.") (internal citation omitted).

43 See, e.g., United States v. Duggan, 743 F.2d 59, 78 (2d Cir. 1984) ("[O]therwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial.").

44 See, e.g., United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991) ("FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gather-
certification requirement in the FISA to reflect a dichotomous world in which foreign intelligence investigations were different from criminal investigations.

This dichotomy had a doubtful basis in the actual text and the legislative history of the FISA, a topic to which I return below. Nonetheless, this string of precedents raised concerns at the highest levels of the DOJ during the 1994 prosecution of Aldrich Ames, the CIA official arrested on charges of spying for the Soviet Union. The FISC had issued an order authorizing electronic surveillance of Ames’s home, and evidence obtained in this manner became part of the case against him. Ames pleaded guilty before trial and was sentenced to life imprisonment. According to the July 2001 GAO report, many within the law enforcement and intelligence community breathed a sigh of relief when the plea agreement was reached, for they were concerned that “had the Ames case proceeded to trial, early and close coordination between [intelligence officers and prosecutors] might have raised questions as to whether the primary purpose of the surveillance and searches of Ames’ residence had been a criminal investigation and not intelligence gathering.”

Officials worried that a suppression motion would have been granted in the case, jeopardizing the prosecution. “To date,” the GAO Report continued, “the issue remains a matter of concern to the FBI and [DOJ]. [DOJ] officials indicated that while such loss had not occurred because Ames had pleaded guilty, the fear of such a loss, nonetheless, was real.”

To address the concerns raised by the Ames case, the DOJ promulgated procedures on July 19, 1995 to clarify the rules governing coordination between FBI intelligence officers and prosecutors in the DOJ’s Criminal Division. The 1995 procedures instructed FBI agents to notify and consult with prosecutors after discovering evidence of “a significant federal crime” in the course of an intelligence investigation. Yet to ensure that the...
primary purpose of the FISA investigation continued to be the collection of foreign intelligence, and not the enforcement of the criminal law, the 1995 procedures imposed limits on any consultations, and prohibited prosecutors from instructing intelligence officers “on the operation, continuation, or expansion of FISA surveillance searches.”

Coordination problems persisted after the adoption of the 1995 procedures, and amendments to those procedures proposed in 2000 simply cluttered ineffectual rules with meaningless qualifications. Criminal prosecutors continued to complain that intelligence officers were reluctant to share information and pool resources in FISA investigations out of a concern that the FISC (in a surveillance renewal application) or a court (in a subsequent criminal case) would find that the primary purpose of the surveillance had morphed into a law enforcement one. The Attorney General’s report on the investigation of scientist Wen Ho Lee intimated that the criminal investigation had been undermined by the intelligence community’s failure to solicit advice from prosecutors. Congress, privy to the Wen Ho Lee report, did nothing at the time to change the FISA, or even conduct hearings on possible reforms of the law.

By 2001, FISA investigations proved to be of Byzantine complexity. In an effort to comply with the FISA, as it had been interpreted by the courts, and in particular its requirement that “the purpose” of an investigation was to gather foreign intelligence, FBI and DOJ personnel conducted FISA investigations with informational “walls” separating intelligence and law enforcement agents. Lawyers from the DOJ’s Office of Intelligence Policy and Review (OIPR), and sometimes even the FISC itself, calibrated the flow of information between the two camps to ensure that an investigation could defend itself against the subsequent charge that its primary purpose had been to enforce the criminal law, and not to gather foreign intelligence. Top FBI officials were not as punctilious in respecting these informational walls as may have been suggested in dozens of applications to the FISC. Over the course of the late 1990s, FBI agents on several occa-
sions arguably misstated the extent of the coordination between intelligence officers and prosecutors. Affronted by what it perceived as these false claims, the FISC, and in particular its then-Chief Judge, Royce Lamberth, reprimanded the FBI agent in charge of FISA applications by name, effectively ending that agent’s previously promising career—an action which sent shock waves throughout the FBI. A less nefarious interpretation of the “misrepresentations,” wholly ignored by the FISC, is that agents in the late 1990’s were honestly struggling to interpret what sort of cooperation and informational sharing the complex statute permitted and prohibited.

B. September 11

The September 11 attacks sparked a reevaluation of the FISA. For several years, FISA critics argued that the law did not go far enough in restricting the President’s powers in purportedly national security operations to search American citizens. Critics of the FISA often argued that the standard for an FISA warrant—probable cause that the target is an agent of foreign power—was too lenient. And the FISC, it was said, was simply a rubber stamp, and therefore provided insufficient protections against law enforcement efforts justified by a professed interest in gathering “foreign intelligence.”

After the September 11 attacks, several observers and public officials contended that these criticisms of the FISA were off-the-mark: The FISA,

56 The FISC berated the FBI for inaccuracies in FISA applications in a recent court opinion. See In re All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 620-21 (Foreign Int’l. Surv. Ct. 2002) (“May 17, 2002 FISC opinion”). A Freedom of Information Act request by a civil liberties organization has uncovered an FBI memorandum discussing some of the problems encountered in FISA applications. See http://www.epic.org/privacy/terrorism/fisa/default.html.

57 After the FISC chastised the FBI’s lead Hamas investigator for inaccuracies in FISA applications, “the FBI and Justice Department hunkered down completely. FBI headquarters and the OIPR, already a crippling drag on terrorist investigations, became paralyzing weights. Recalls [former U.S. Attorney in Manhattan] Mary Jo White: ‘The walls went higher. Nothing could have been worse.’ It was as if the Wall had become covered with concertina wire and broken glass, says [former FBI agent James] Kallstrom. Morale plummeted. Agents in the New York bureau put signs on their desks saying: ‘You may not talk to me.’” MacDonald, supra note 1.

58 See, e.g., Hearing on Searches and Seizures By U.S. Intelligence Agencies Before House Permanent Select Comm. on Intelligence, 103d Cong. (July 14, 1994) (testimony of Kate Martin, American Civil Liberties Union), available at 1994 WL 14190196.

59 For example, Morton Halperin, who once served on the National Security Council and whose telephone was once wiretapped on orders of Henry Kissinger, was recently quoted as saying that “there is a lower standard to getting FISA taps.” Jeffrey Toobin, Crackdown, THE NEW YORKER, Aug. 30, 2002, at 56.

60 See Benjamin Wittes, Inside America’s Most Secretive Court, N.J. L.J., Feb. 26, 1996 (quoting law professor Jonathan Turley: “The FISA court is ripe for abuse. There is little question that these judges exercise virtually no judicial review.”).
far from providing too few checks on national security operations, provided all too many, it was said.\(^{61}\) Post-September 11 revelations suggested that it was not necessarily easier to obtain a FISA warrant than a garden-variety law enforcement warrant. The FISA application process, thrown under a microscope after September 11, was revealed to be, oddly, more laborious than the ordinary law enforcement warrant approval process.\(^{62}\) Nor was success in obtaining an FISA warrant nearly as foreordained as was commonly advertised by the law's critics.\(^{63}\) First of all, it is not necessarily easier to link the proposed target of an investigation to a foreign power than it is to show probable cause of criminal activity.

Indeed, such a showing is, in some circumstances, a harder one to substantiate. In the weeks before the September 11 attacks, FBI headquarters refused to approve an FISA warrant application to search the laptop computer of Zacarias Moussaoui, who had been detained by the FBI's Minneapolis field office, precisely because it concluded that there was insufficient evidence (amounting to probable cause) connecting Moussaoui to a foreign power.\(^{64}\) Even had headquarters approved the application in August, there likely would have been insufficient time to process the application prior to the September 11 attacks. As a former FBI agent observed, "[T]he FISA request still had to be reviewed by the Department of Justice Office of Intelligence Policy and Review; come back to the FBI for the director’s certification, which is required by law; return to Justice for the attorney general’s approval, also required by law; and get scheduled on the [FISC] court docket. . . . Simply put, it is unlikely that the request would have reached the court before 9/11."\(^{65}\)

Furthermore, the certification required by the FISA—that the purpose of the surveillance was to gather foreign intelligence and impliedly not to

---


\(^{62}\) At least judged by the number of bureaucratic hoops to jump through, a FISA warrant is harder to obtain than a garden-variety warrant. Whereas police officers can ordinarily secure law enforcement warrants in a manner of hours, the FISA application process, involving the highest levels of the Department of Justice, as well as FBI or CIA, bureaucracy, generally takes weeks or even months. See infra note 65.

\(^{63}\) Critics of the FISA harped on the virtually total success rate of FISA applications. See Vanessa Blum, *Spy Court Steps onto Foreign Soil: Panel meets for First Time to Decide DOJ Reach in Terror War*, LEGAL TIMES, Sept. 2, 2002, at 1 (noting that only one out of approximately 13,000 FISA applications has ever been denied). What these critics failed to acknowledge was the onerous pre-screening mechanisms implemented within the FBI and DOJ before FISA applications were even presented to the FISC. Some FISA applications, such as the one proposed by FBI agent Collen Rowley to search Zacarias Moussaoui's laptop computer, were "rejected" prior to their submission to the FISC.

\(^{64}\) The Moussaoui episode is explored at length in Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 957-71 (2003).

enforce the criminal law—hopelessly complicated the FISA application process. The DOJ lobbied Congress to change a single word in the certification requirement, from "the purpose" to "a purpose," to clarify that the certification of an FISA request was appropriate when foreign intelligence gathering was not necessarily the sole or even primary purpose of the investigation. The Department argued that "[t]he change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities, which is critical to the success of anti-terrorism efforts."66 The proposed replacement of "the" with "a" struck some observers as almost comically legalistic. To this charge, Michael Chertoff, then head of the DOJ’s Criminal Division, responded, "It may sound that way, but we’re operating against a twenty-five year history with the [FISA]. The language has given rise to a mind set where people feel forced to choose between one kind of investigation and the other [foreign intelligence or law enforcement]. But we can’t make that choice anymore."67

C. Patriot Act

In enacting the Patriot Act,68 Congress responded to the information-sharing and coordination issues that had, for a decade, complicated FISA investigations. By dissolving certain legal and cultural barriers, the Patriot Act was designed to enhance the ability of the FBI and DOJ to collaborate in investigations with overlapping foreign intelligence and law enforcement purposes.

Most importantly, Section 218 of the Patriot Act changed the certification requirement, authorizing FISA orders when "a significant purpose"—rather than "the purpose"—was the gathering of foreign intelligence information.69 The language ultimately adopted in the Patriot Act reflected a compromise between the more dramatic amendment sought by the DOJ and the status quo defended by civil libertarians. The DOJ sought to replace "the purpose" in the FISA certification requirement with "a purpose."70 The change from "the" to "a" would have made unmistakably clear that FISA investigations were permissible when the enforcement of the criminal law

70 See supra note 66 and accompanying text.
was a purpose, and even the primary purpose, so long as the gathering of
foreign intelligence was also a purpose.

Several members of Congress expressed concern, however, that the
DOJ's proposed amendment would have effected too fundamental a change
in the FISA regime. They worried that the FISA mechanism would be
used by prosecutors conducting law enforcement investigations, especially
when the prosecutors were unable to satisfy the stringent requirements im-
posed by Title III and the Fourth Amendment. Accordingly, Congress
agreed to amend the FISA to permit such investigations where "a signifi-
cant purpose" was to gather foreign intelligence. Senator Specter ex-
plained that "[t]he word 'significant' was added to make it a little easier for
law enforcement to have access to FISA material, but not to make law en-
forcement the primary purpose" of FISA investigations. The DOJ, in a
letter to the House Judiciary Committee, indicated that it was, in the end,
satisfied with the "significant purpose" amendment, for it "has the potential
for helping the government coordinate intelligence and law enforcement
efforts to protect the United States from spies and terrorists."

Other provisions in the Patriot Act were designed to further promote
coordination between intelligence and law enforcement agents. Section 504
instructs intelligence officers and law enforcement personnel, in the course
of FISA investigations, "to coordinate efforts to investigate or protect
against" threats to national security. The section makes clear, moreover,
that such information sharing does not preclude a certification that "a sig-
nificant purpose" of the FISA investigation is the gathering of foreign intel-
ligence. In addition, Title IX of the Patriot Act was designed to remove
cultural barriers that have arisen between the law enforcement and intelli-
gence bureaucracies. Section 905 of the Patriot Act, for example, instructs
the Attorney General to implement guidelines for the delivery of foreign
intelligence information, gathered in the course of a criminal investigation,
to the CIA. The future success of these parchment attacks on embedded
cultural norms remains to be seen.

71 See The Justice Department's Counterterrorism Proposal: Hearing Before the Senate Comm.
on Intelligence, 107th Cong. (Sept. 24, 2001) (comments by Senators Dewine, Feinstein, and Edwards),
available at 2001 WL 1147486.
72 Id.
73 The USA Patriot Act in Practice: Shedding Light on the FISA Process: Hearings Before Senate
Committee on the Judiciary, 107th Cong. (Sept. 10, 2002) [hereinafter 2002 Patriot Act Hearings]
74 Letter from Daniel E. Bryant, Assistant Attorney General, to Hon. F. James Sensenbrenner, Jr.
76 USA Patriot Act § 504.
77 See USA Patriot Act §§ 901-08.
79 Precisely how effective the provision, and the guidelines promulgated in response, is an open
The foregoing provisions, taken collectively, plainly effected a change in the FISA regime. Yet, in hearings held months after the passage of the Patriot Act, Senator Leahy stated that "it was not the intent of these amendments to fundamentally change FISA from a foreign intelligence tool into a law enforcement tool."80 Indeed, although sections 218 and 504 of the Patriot Act seemed to expand the permissible scope of FISA investigations, and facilitate information-sharing among law enforcement and intelligence agents, the bulk of the FISA was unaffected by the Patriot Act. In particular, the minimization requirement, which imposes limits on the acquisition, retention, and dissemination of information acquired in the course of FISA investigations was left unchanged.81 Other provisions of the FISA, which the Patriot Act failed to alter, have subsequently been the subject of proposed amendments in Congress.82 Thus, the question arises: did Congress in the Patriot Act intend to overhaul the FISA regime or simply tinker with a law it deemed fundamentally sound?

D. Litigation

In updated Intelligence Sharing Procedures issued in March 2002, the DOJ concluded that the Patriot Act required a fundamental re-appraisal of the then-existing FISA apparatus.83 The 2002 procedures explicitly pegged

question. Section 905 itself allows the Attorney General to hoard foreign intelligence information where its disclosure "would jeopardize an ongoing law enforcement investigation or impair other significant law enforcement interests." Id.

80 2002 Patriot Act Hearings, supra note 73.
81 See 50 U.S.C. §§ 1801(h), 1824(4).
82 Six months after the passage of the Patriot Act, in June 2002, members of Congress floated several further amendments to the FISA. Senate Bill 2586 would amend 50 U.S.C. § 1801(a)(4) to permit FISA surveillance of a "lone wolf" terrorist—that is, is the person without any connection to a foreign government or a known terrorist group. More controversially, Senate Bill 2659 would lower the evidentiary predicate required to initiate FISA surveillance: It would amend 50 U.S.C. §§ 1805(a)(3) and 1824(a)(3) to change the standard required for surveillance from "probable cause" to "reasonable suspicion." Curiously, in hearings held in July 2002, the Department of Justice, although expressing approval for S. 2586, declined to support S. 2659. See James A. Baker, Counsel for Intelligence Policy, Statement Before the Senate Select Comm. on Intelligence, (July 21, 2002), available at http://www.fas.org/irp/congress/2002_hr/073102baker.html ("The Department's Office of Legal Counsel is analyzing relevant Supreme Court precedent to determine whether a 'reasonable suspicion' standard for electronic surveillance and physical searches would, in a FISA context, pass constitutional muster... [T]he Administration at this time is not prepared to support [S. 2659].").
83 Memorandum from John Ashcroft, Attorney General, to the Director of the FBI, the Assistant Attorney General, Criminal Division, the Counsel for Intelligence Policy, and the United States Attorneys (Mar. 6, 2002) (regarding Intelligence Sharing Procedures for Foreign Intelligence and Foreign Counterintelligence Investigations Conducted by the FBI), available at http://www.fas.org/irp/agency/doj/fisa/ag030602.html.
this interpretation of the Patriot Act to two provisions—Section 218 (amending the certification requirement to “a significant purpose”) and Section 504 (urging enhanced coordination between intelligence and law enforcement personnel).\textsuperscript{84} According to the 2002 procedures, the altered certification requirement in the Patriot Act meant that FISA surveillance and searches could now be conducted “primarily for a law enforcement purpose, as long as a significant foreign intelligence purpose remains.”\textsuperscript{85} Furthermore, the 2002 procedures provided that intelligence and law enforcement personnel could now exchange information on a “full range of information and advice” concerning national security issues, and that such coordination would not preclude the Attorney General from certifying that a significant purpose was the gathering of foreign intelligence.\textsuperscript{86}

Soon thereafter, the Attorney General petitioned the FISC to vacate all of the minimization procedures then in effect in FISA investigations and to adopt the proposed 2002 Information Sharing Procedures. In an opinion and order on May 17, 2002, however, a unanimous FISC court rejected major portions of those procedures.\textsuperscript{87} Although the FISC condoned consultations between intelligence officers and prosecutors in FISA investigations with respect to some matters, the court held that “law enforcement officials shall not make recommendations to intelligence officials concerning the initiation, operation, continuation or expansion of FISA searches or surveillance.”\textsuperscript{88} The FISC, in addition, ruled that “the FBI and the Criminal Division . . . ensure that law enforcement officials do not direct or control the use of the FISA procedures to enhance criminal prosecution.”\textsuperscript{89}

The opinion accompanying the order is puzzling on many levels. inexplicably, the FISC hardly acknowledged the Patriot Act and the changes to the FISA implemented by that law. Instead, it emphasized that the minimization procedures that limit the dissemination of information acquired in the course of FISA investigation were unchanged by the Patriot Act; it was


\textsuperscript{85} Memorandum from John Ashcroft, supra note 84, at 1-2 (emphasis in original).

\textsuperscript{86} Id. at 2. With respect to information-sharing, the 2002 procedures provide that prosecutors and law enforcement officers have largely unfettered access to materials developed in the course of FISA surveillance and searches. With respect to advice-giving, the 2002 procedures allow prosecutors to provide intelligence officers with advice about “the initiation, operation, continuation, or expansion of FISA searches or surveillance.” Id.

\textsuperscript{87} The decision to hear the case en banc was plainly outside the statutory authority of the FISC. The FISA required each FISA application to be considered by a single judge. There was no mechanism for appeal to an en banc court; the FISA makes clear that the only relief permitted is an appeal to the Foreign Intelligence Surveillance Court of Review. 50 U.S.C. §§ 1803(a), 1822(c).

\textsuperscript{88} See In re All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 626 (Foreign Int.. Surv. Ct. 2002) (reprinting order).

\textsuperscript{89} Id. at 625.
almost entirely on the basis of those minimization procedures that the FISC based its decision. In a bizarre footnote, the FISC purported to "leave . . . for another day" the question of whether the Patriot Act’s amendment to the certification requirement in fact made any difference in interpreting the restrictions on permissible consultation between law enforcement and intelligence personnel.90 Self-equipped with narrow blinders, focused exclusively on the unchanged minimization procedures, the FISC succeeded in generating a 27-page opinion that left for another day the precise question that had to be answered that day. Among myriad difficulties, the exclusive focus on one provision of the FISA to the neglect of all other provisions and, more pointedly, to Congress’s recent amendment of several of those other provisions, is inconsistent with the elementary notion that statutes be read as a whole.91

The DOJ appealed the May 17 opinion and order to the Foreign Intelligence Surveillance Court of Review ("FISCR").92 The FISCR consists of three federal judges appointed by the Chief Justice of the United States Supreme Court, and it is authorized to hear appeals from any denial of an FISA application.93 Service on the FISCR has hardly been an onerous responsibility for judges selected for the duty: This was the first recorded appeal ever taken to the FISCR in its 24-year history.94

In its brief to the FISCR, the DOJ made two principal arguments. The DOJ’s first and more radical argument consisted of a direct challenge to the sharp distinction between a foreign intelligence purpose and a criminal law enforcement purpose that has been the basis of all judicial interpretations of the FISA certification requirement for the past two decades.95 Although the

---

90 Id. at 615 n.2.
91 See, e.g., United States v. Morton, 467 U.S. 822, 828 (1984) ("We do not, however, construe statutory phrases in isolation; we read statutes as a whole.").
92 The Department of Justice did not appeal the May 17 Order immediately. In July, in the context of an ongoing intelligence and law enforcement investigation, it sought permission to conduct FISA surveillance order consistent with its own March 2002 Information Sharing Procedures. Judge Baker of the FISC Court rejected the request, requiring the government to comply with the procedures it had crafted in the May 17 Order. The Department then took an appeal. See Brief for the United States at 1, 13, In re Sealed Case, 310 F.3d 717 (Foreign Int.. Surv. Ct. Rev. 2002) (No. 002-001), redacted copy available at http://www.fas.org/irp/agency/doj/fisa/082102appeal.html. Although the government was the only party to the appeal, amicus briefs were filed by the American Civil Liberties Union, available at http://www.fas.org/irp/agency/doj/fisa/091902FISCRbrief.pdf, and by the National Association of Criminal Defense Lawyers, available at http://www.epic.org/privacy/terrorism/fisa/nacdl_fisa_brief.pdf.
93 50 U.S.C. § 1803(b).
94 Ironically, one of the judges on the Court of Review, Laurence H. Silberman, testified 24 years ago that the FISA was unconstitutional, because the responsibilities of a FISA judge are inconsistent with Article III case and controversy requirements. See Foreign Intelligence Electronic Surveillance: Hearings on H.R. 5794, 9745, 7308, and 5632 Before the Subcomm. on Legislation of the Permanent Select Comm. on Intelligence, 95th Cong. 221 (1978) (statement of Laurence Silberman).
95 Brief for the United States at 30-49, In re Sealed Case (No. 002-001).
DOJ conceded that, at some point in the 1980s, it had come to accept this dichotomy, it nonetheless maintained that it has no basis in the text of the FISA or in its legislative history. The DOJ argued that investigations of foreign powers and their agents typically have dual purposes (to advance national security and to prosecute those persons for violations of the criminal law), and the Congress that enacted the FISA never intended to force prosecutors or the FBI into an impossible choice. Second, and more modestly, the DOJ accepted the prevailing dichotomous reading of the FISA, but nonetheless maintained that the Patriot Act's amendments permit FISA investigations even where their primary purpose is to enforce the criminal law, and not to gather foreign intelligence.

On November 18, 2002, the FISCR issued an opinion, reversing the lower court, in a decision touted as a "clear legal triumph for [Attorney General] Ashcroft." The FISCR on several occasions in its opinion lashed the FISA's May 17 opinion as a flawed reading of the statute and an unconstitutional arrogation of power. Canvassing the text of the FISA and its capacious legislative history, the FISCR agreed with the DOJ's more radical argument that the dichotomy between foreign intelligence and criminal law enforcement was a false one, and that, therefore, 24 years of precedents were misguided. As the FISCR noted, the statute defines "agent of a foreign power" to include those plotting "acts dangerous to human life that are a violation of the criminal laws of the United States or of any State." In light of these and other definitional provisions, the FISCR concluded that "it is virtually impossible to read the 1978 FISA to exclude from its purpose the prosecution of foreign intelligence crimes."

---

96 Id. at 45-49.
97 Id.
98 Id. at 49-57.
99 In re Sealed Case, 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002) ("November 18, 2002 FISCR Opinion"). The American Civil Liberties Union filed a motion to intervene in order to file a writ of certiorari. The Supreme Court denied the motion. ACLU v. United States, 123 S. Ct. 1615 (2003).
101 See, e.g., In re Sealed Case, 310 F.3d at 721 (stating "the May 17 opinion of the FISA court does not clearly set forth the basis for its decision.... [T]he opinion does not support [an] assumption with any relevant language in the text."); id. at 730 ([The FISA] did not provide any constitutional basis for its action—we think there is none—and misconstrued the statutory provision on which it relied."); id. ("The FISA Court's decision and order not only misinterpreted and misapplied minimization procedures it was entitled to impose, but... the FISA court may well have exceeded the constitutional bounds that restrict an Article III court."); id. ("We also think the refusal of the FISA court to consider the legal significance of the Patriot Act's crucial amendments was error.").
102 Id. at 723.
103 Id. (quoting 50 U.S.C. § 1801(c)(1) (emphasis added)).
104 Id. The legislative history bolstered the court's reading of the statute. The House Report made clear that "foreign intelligence information... can include evidence of certain crimes." H.R. REP. NO. 95-1283, at 49 (1978). Furthermore, according to the House Report, how foreign intelligence informa-
After tracing the development of the "false dichotomy" between foreign intelligence information and criminal law enforcement in the courts, the FISCR then explored the difficulties that had arisen within the FBI and DOJ in their efforts to comply with FISA's certification requirement. The patent inability of the FBI and DOJ to maintain walls separating inextricably intertwined investigations might have alerted the FISA to the wrongheadedness of the prevailing interpretation. Instead, the FISA court hewed ever more fixedly, and quixotically, to an interpretation that was revealed as unworkable.

The FISCR further held that the lower court's failure to acknowledge the Patriot Act's amendments to the FISA was "error." The FISCR wrote that "[a]s a matter of straightforward logic, if an FISA application can be granted even if 'foreign intelligence' is only a significant—not a primary—purpose, another purpose can be primary. One other purpose that could exist is to prosecute a target for a foreign intelligence crime." And yet the paradox, noted by the FISCR, is that the Patriot Act, and the members of Congress that enacted it, recognized the distinction between a foreign intelligence purpose and a criminal law enforcement purpose that had been absent from the FISA, at least as enacted in 1978. Thus, the FISA, as amended by the Patriot Act, seems to invite the FISC to conduct precisely the inquiry into the purpose of an investigation that the FISA, as originally enacted, did not contemplate. As a practical matter, however, the inquiry is,
thanks to the Patriot Act’s amendment to the certification requirement, an easily satisfied one because virtually any investigation into an agent of a foreign power includes, as a significant purpose, the gathering of foreign intelligence.\textsuperscript{112}

The final section of the FISCR’s opinion upheld the constitutionality of the FISA, as amended by the Patriot Act. The FISCR noted that an FISA order is, in many respects, akin to a warrant issued by a magistrate and provides many of the same, and even in some respects additional protections.\textsuperscript{113} More fundamentally, the FISCR held that the President has an “inherent authority to conduct warrantless searches to obtain foreign intelligence information.”\textsuperscript{114} Although civil libertarians are certain to take issue with this particular judgment and the opinion as a whole, it is worth recalling that the recognition that an executive power exists does tell us how (or whether) such a power will be used (or abused). The real issue is who should regulate this power. The FISCR rejected the extraordinary claim to authority that was implicit in the FISC’s actions in the 1990’s, as it micromanaged, and perhaps undermined, many of the most sensitive and important terrorism and national security investigations of that decade: “The FISA court asserted authority to govern the internal organization and investigative procedures of the DOJ which are the province of the Executive Branch (Article II) and the Congress (Article I).”\textsuperscript{115} Leaving aside the doubtful constitutionality of such an enterprise,\textsuperscript{116} the resolution of such fundamental policy issues in a secret chamber of unelected judges themselves appointed by an unelected judge\textsuperscript{117} is not easily reconciled with our republic’s overarching commitment to the public ventilation and democratic resolution of political questions.\textsuperscript{118}

\textsuperscript{112} There may, therefore, be little difference between the FISA, as originally enacted (which did not recognize the distinction between a foreign intelligence and criminal law enforcement purpose), and the FISA as amended by the Patriot Act (which permits FISA investigations whenever “foreign intelligence” is “a significant purpose”): “Because, as the government points out, when it commences an electronic surveillance of a foreign agent, typically it will not have decided whether to prosecute the agent (whatever may be the subjective intent of the investigators or lawyers who initiate an investigation). So long as the government retains a realistic option of dealing with the agent other than through criminal prosecution, it satisfies the significant purpose test.” Id. at 735 (emphasis added).

\textsuperscript{113} Id. at 740. For example, Title III wiretap order last for 30 days, 18 U.S.C. § 2518(5), and FISA orders last for 90 days, 50 U.S.C. § 1805(e)(1).

\textsuperscript{114} In re Sealed Case, 310 F.3d at 738-41.

\textsuperscript{115} Id. at 731.

\textsuperscript{116} Cf. Morrison v. Olson, 487 U.S. 654, 684 (1988) (“The gradual expansion of the authority of the Special Division [that oversees Independent Counsels] might in another context be a bureaucratic success story, but it would be one that would have serious constitutional ramifications.”).

\textsuperscript{117} Recall that the FISA judges are themselves appointed by the Chief Justice of the United States Supreme Court. See 50 U.S.C. § 1803(b).

\textsuperscript{118} There is, of course, a vast literature that struggles to reconcile judicial review with democratic principles. See, e.g., Alexander M. Bickel, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT
FISCR is thus in no sense the definitive answer to vital questions about national security and privacy rights; instead, it returns such questions to our elected branches. Let the debate begin.

II. GRAND JURY SECRECY RULES

The Patriot Act’s amendments to FISA enhanced the authority of intelligence officers conducting foreign intelligence investigations to share information with prosecutors and law enforcement agents. The Patriot Act’s amendments to grand jury secrecy rules, which are the subject of this section, chipped away at the walls hindering the flow of information in the opposite direction—from prosecutors and law enforcement agents to intelligence officers. As described below, Section 203(a) of the Patriot Act changed the rules that had restricted prosecutors from disclosing evidence uncovered in the course of a grand jury investigation with persons in the intelligence community.

A. Background on Grand Jury Secrecy Rules

The grand jury is among the most criticized institutions in the American criminal justice system. Abandoned by England, it perseveres in the federal system and a dwindling minority of the states as a classic case of an institution in search of a rationale. Touted as “a bulwark of our liberties, a
protector of the innocent," there is wealth of data to suggest that it does not, and cannot, function in such a capacity any longer. Its investigative powers are vast—to subpoena witnesses and documents—and judicial supervision virtually non-existent. The grand jury is further empowered to initiate the criminal process against an individual, and its invariable willingness to do so whenever the prosecutor presents an indictment is the stuff of comedy (or at least what passes for comedy in a judicial opinion or law review article).

Significantly, the grand jury operates in secret. Attendance is restricted to the jurors, the prosecutors, a court reporter, and a witness. Excluded from the grand jury room are the press, defense counsel, and even the supervising judge. All of those present, with the exception of the witness himself, are sworn to secrecy, and the disclosure of grand jury materials can form the basis of criminal contempt charges. Traditionally, two basic rationales have been offered for the grand jury secrecy rules. One focuses on the interests of the investigation, which could be compromised if the target of the probe were fully informed of its progress or if witnesses did not feel free to testify without reprisal. A second rationale for the secrecy rules focuses on the reputational interests of those under investigation.

The secrecy rules, which were never absolute, have been relaxed considerably over the years. Rule 6(e) of the Federal Rules of Criminal Procedure has long carved out six exceptions to the secrecy rules, which are divided into two broad categories: disclosures of grand jury materials for

122 See In re Grand Jury Subpoena of Stewart, 545 N.Y.S.2d 974, 977 n.1 (Sup. Ct.), aff'd as modified sub nom. In re Stewart, 548 N.Y.S.2d 679 (App. Div. 1989) ("[M]any lawyers and judges have expressed skepticism concerning the power of the Grand Jury. This skepticism was best summarized by the Chief Judge of this state in 1985 when he publicly stated that a Grand Jury would indict a 'ham sandwich.'").
123 See FED. R. CRIM. P. 6(e). See also Costello v. United States, 350 U.S. 359, 362 (1956); United States v. Johnson, 319 U.S. 503, 513 (1943) (referring to the "long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts").
124 See FED. R. CRIM. P. 6(e)(7) ("A knowing violation of Rule 6 may be punished as a contempt of court.").
125 Douglas Oil Co. v. Petrol Stops NW., 441 U.S. 211, 219 (1979) ("[I]f preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment.").
126 Id. ("by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule").
which judicial authorization was required and those for which no prior judicial approval was needed. The first category consists of disclosures to parties in other judicial proceeding, at the request of a defendant, and to state officials investigating violations of state law. The judge supervising the grand jury can order the disclosure of the grand jury materials upon some showing of "need," although the standard varies in application depending on the intended recipient of the grand jury information. The second category of disclosures, for which no judicial authorization is required, is limited to government attorneys, government personnel as necessary to assist those attorneys, and other federal grand juries. This category of disclosures is, in a broad sense, to other members of the federal government, yet an important caveat is that such disclosures are appropriate only for the purposes of enforcing the federal criminal law.

This latter point was hammered home in a 1981 Supreme Court case, United States v. Sells Engineering. In Sells Engineering, the Court considered whether disclosures of grand jury materials to civil government lawyers should be automatically granted, or whether judicial authorization was required and appropriate only upon a showing of "particularized need." The Court held that judicial approval was required: "If prosecutors in a given case knew that their colleagues would be free to use the materials generated by the grand jury for a civil case, they might be tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the civil suit, or even to start or continue a grand jury inquiry where no criminal prosecution seemed likely." Sells Engineering thus suggests yet another important rationale for grand jury secrecy, focusing on the possibility of grand jury abuse. If grand jury information could be freely shared among government attorneys and personnel,
there would be the danger that the grand jury's vast investigative powers would be deployed for purposes other than enforcing the criminal law.

_Sells Engineering_ was not well received at the DOJ, which immediately proposed amendments to Rule 6(e) to facilitate the ability of prosecutors to share grand jury information with civil government attorneys and state prosecutors. Critics of the _Sells Engineering_ decision could point to the following anomaly: If a witness in a grand jury gave evidence revealing violations of civil laws, prosecutors would be powerless to bring the information to the attention of the government attorneys charged with enforcing those laws. Yet if the witness himself chose to alert civil government attorneys, he could do so, as Rule 6(e)'s grand jury secrecy rules have never been held to apply to the witness himself. After some initial reluctance in Congress, the DOJ's efforts to chip away at the _Sells Engineering_ decision were finally rewarded with the 1989 enactment of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA), which loosened the disclosure rules for evidence of banking violations uncovered in the course of a grand jury investigation. Although a judicial order was still generally required for a disclosure of such evidence to civil government attorneys, the showing needed was relaxed from a "particularized need" to a "substantial need." Subsequent DOJ efforts to relax the grand jury secrecy rules for evidence of securities law violations and Medicare fraud violations achieved some success in Congress. In addition, a 1994 law expanded the ability of prosecutors to share evidence of antitrust violations to foreign government officials.

Many of the states that have preserved the grand jury system have, like the federal government, liberalized the secrecy rules in recent years. Dis-
tinguished commentators have noted that "courts and legislatures have been moving in the direction of relaxing the rigid rules of secrecy." One way that legislatures, including Congress, have effectively circumvented grand jury secrecy rules is through the expansion of the power of government attorneys to issue "administrative subpoenas." As Senator Patrick Leahy has observed, such subpoenas "refer to a demand for documents by an investigative entity or regulatory agency that is empowered to issue a subpoena independently and without the approval of any grand jury, court or other judicial entity." Administrative subpoenas may raise concerns because they "avoid the strict grand jury secrecy rules and the documents provided in response to such subpoenas are, therefore, subject to broader dissemination" within the government.

B. September 11

The state of the law, as of September 10, 2001, was that prosecutors overseeing a grand jury investigation could share, with virtually no restrictions, any evidence with other federal prosecutors. In addition, prosecutors could, with a court order, share grand jury evidence with state prosecutors, civil government attorneys and even some foreign government officials. There was, however, no clear mechanism for the sharing of grand jury materials with intelligence officials. As one observer noted a few weeks after the September 11 attacks, "[g]rand jury secrecy and prosecutorial fiat could limit what FBI agents could say to others about current cases."

This limitation complicated and perhaps undermined the investigation of the 1993 World Trade Center bombing. It is, as an initial matter, worth remembering that the first World Trade Center attack, in its explosive force, far exceeded that of the Oklahoma City bombing. The terrorists in 1993 used sophisticated chemical explosives that created a crater six stories deep into the ground. The only reason that the explosion did not cause co-

---

145 LaFave, supra note 130, at 58-59 (quotation omitted). See also Graham Hughes, Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process, 47 Vand. L. Rev. 573, 656 (1994) (speculating that FIRREA might be the "crack that will eventually cause the collapse of the whole dam of grand jury secrecy").


148 Id.

lossal damage was that the brunt of the force was directed downwards.\textsuperscript{150} According to a recent account by the journalist Laurie Mylorie, soon after the bombing and practically before any of the evidence had been evaluated, the DOJ made clear that it intended to treat the investigation as a matter of domestic law enforcement, and not a national security or foreign intelligence issue.\textsuperscript{151} The perpetrators were therefore viewed as a small and loose-knit group of terrorists with no connection to any foreign power or to a known international terrorist organization. The tone was set by President Clinton in an interview on MTV, in which he warned Americans against an "overreaction" to the bombing and characterized the attack as the work of people who "did something really stupid."\textsuperscript{152}

Yet, according to Laurie Mylorie, in the course of the ensuing investigation, a federal grand jury heard evidence linking the Trade Center bombers (as well as others who planned to destroy tunnels in the New York area) to Iraq. Some of this information did not become publicly known until after some evidence was presented at the terrorists' trial. Many in the intelligence community were apoplectic that prosecutors had concealed this information.\textsuperscript{153} James Woolsey, the Director of the CIA at the time of the bombing, wrote: "No one other than the prosecutors, the Clinton Justice Department, and the FBI had access to the materials surrounding that case until they were presented in court, because they were virtually all obtained by a federal grand jury and hence kept not only from the public but from the rest of the government."\textsuperscript{154} On a similar note, Stewart Baker, the former general counsel of the National Security Agency, asked: "Is grand jury secrecy so important to our liberty and privacy that the nation has to pay for it crippled intelligence capacity?"\textsuperscript{155}

Of course, when the question is posed in this manner, the answer is obvious. If a grand jury investigation uncovers evidence linking an individual to a foreign terrorist cell, there should plainly be some mechanism for the sharing of this information with the CIA and others in the intelligence community. A harder question is posed in the following hypothetical: Imagine that a college student testifies before a grand jury that his room-

\textsuperscript{150} Laurie Mylorie, War Against America 78-87 (2002).
\textsuperscript{151} Id. at 9. ("By treating the 1993 World Trade Center bombing and subsequent acts of terrorism strictly as criminal issues, Washington left America exposed and vulnerable to more terrorism from Saddam Hussein or any other party that might choose to adopt the audacious winning strategy.").
\textsuperscript{152} See Susan Page, Clinton: "Don't Overreact", NEWSDAY, Mar. 2, 1993, at 96 (quoting President Clinton).
\textsuperscript{153} See Mylorie, supra note 150 at 253-55 (Summarizing "the evidence from the 1993 World Trade Center bombing... point[ing] strongly to Iraq").
\textsuperscript{154} R. James Woolsey, America at War, DAILY TELEGRAPH, Sept. 17, 2001, at 11.
mate has collected various materials about Islam. Should information of this sort be shared with the CIA, "with all the potential consequences for the roommate that the disclosure entails?"

C. Patriot Act

Section 203(a) of the Patriot Act is Congress' somewhat opaque answer to these questions. It provides that prosecutors can share grand jury materials involving "foreign intelligence" and "counterintelligence," as defined in the National Security Act, as well as "foreign intelligence information," a broad term defined in the Patriot Act itself. Disclosure of such grand jury materials is appropriate 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." A related provision in the Patriot Act provides for the similar disclosure of "foreign intelligence information" obtained by law enforcement officials in the course of wiretap surveillance.

Two aspects of Section 203(a) are noteworthy at the outset. First, the definition of "foreign intelligence information" is, some have suggested, so broad that it extends well beyond what might, in the ordinary understanding of things, be understood by the term. The Patriot Act defines the term to include information relating to America's ability to defend itself against terrorism, sabotage, and "clandestine intelligence activities" of foreign powers, as well as information relating to "national defense" or "the conduct of . . . foreign affairs." To return to an earlier hypothetical, could

156 This hypothetical is posed in Jennifer Collins, And the Walls Came Tumbling Down: Sharing Grand Jury Information with the Intelligence Community Under the Patriot Act, 39 AM. CRIM. L. REV. 1261, 1274 (2002).
157 Id.
159 USA Patriot Act § 203(a)(1).
160 Id.
162 USA Patriot Act § 203(a)(1).
163 USA Patriot Act § 203(a)(1)
165 See, e.g., Irvin B. Nathan & Christopher D. Man, The USA Patriot Act Poses A New Threat to Grand Jury Secrecy Rules, 9 BUS. CRIMES BULL 1 (2002) ("In the international context, virtually everything from antitrust concerns to drug trafficking may relate to the 'foreign affairs' of the United States.").
166 The Patriot Act defines "foreign intelligence information" in full as follows:
(1) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against--
prosecutors disclose evidence which was uncovered in the course of a
grand jury’s investigation, of a student’s interest in Islam? One observer
has suggested that under the terms of the Patriot Act, such sharing would be
appropriate.167 Yet this is a doubtful interpretation of Section 203(a). In and
of itself, a student’s interest in Islam cannot plausibly be said to relate to
“national defense” or “the conduct of . . . foreign affairs.” If there were
evidence that the student was interested in Islam and had expressed ap-
proval of Saddam Hussein or Osama bin Laden, such a disclosure might be
appropriate under the terms of the Patriot Act. But a prosecutor, acting in
good faith, could not certify that an individual’s interest in Islam, taken
alone, falls within the terms of the disclosures authorized by Section
203(a).

Of course, the above statement assumes that a prosecutor will act in
good faith, which brings me to a second noteworthy aspect of Section
203(a): Prosecutors need not obtain any prior approval from a judge before
making a disclosure of grand jury materials, although they are required to
disclose the fact that some disclosure was made.168 Whether prosecutors
should have been compelled to secure judicial authorization before disclos-
ing grand jury materials proved to be a significant point of disagreement
during Congressional deliberations on the Patriot Act. Although the version
of the law ratified by the House Judiciary Committee required court ap-
proval for any disclosure of grand jury information,169 the final version of
the Patriot Act abandoned this requirement. Senator Leahy, who eventually
voted in favor of the measure, nonetheless expressed his misgivings on this
score.170 Although he acknowledged that

---

(aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a
foreign power;
(bb) sabotage or international terrorism by a foreign power or an agent of a foreign power;
or
(cc) clandestine intelligence activities by an intelligence service or network of a foreign
power or by an agent of foreign power; or
(ii) information, whether or not concerning a United States person, with respect to a foreign
power or foreign territory that relates to--
(aa) the national defense or the security of the United States; or
(bb) the conduct of the foreign affairs of the United States.


167 See Collins, supra note 156, at 1274.

168 See USA Patriot Act § 203(a)(1) (amending FED. R. CRIM. P. 6(e)(3)(D)(ii) (“Within a reason-
able time after such disclosure, an attorney for the government shall file under seal a notice with the
court stating the fact that such information was disclosed and the departments, agencies, or entities to
which the disclosure was made.”)).

House of Representatives accompanying H.R. 2975).

few would disagree that information learned in a criminal investigation that is necessary to combating terrorism or protecting the national security ought to be shared with the appropriate intelligence and national security officials. The question is how best to regulate and limit such disclosures so as not to compromise the important policies of secrecy and confidentiality that have long applied to grand jury proceedings.

An evidently perturbed Leahy complained that the administration had "reneged" on an earlier agreement that there would be judicial review of any sharing of grand jury evidence: "I am troubled by this issue and plan to exercise the close oversight of the Judiciary Committee to make sure [that the power to share grand jury materials related to foreign intelligence] is not being abused." Indeed, the more thoughtful criticisms of Section 203(a) have focused on the failure to require judicial authorization for the disclosure of grand jury materials.

D. Controversy

Section 203(a) has proven to be among the most controversial provisions in the Patriot Act. Some criticisms have consisted of little more than paeans to grand jury secrecy and maudlin laments about any violation of this supposedly treasured principle. One oddity of such criticisms, especially when coming from organizations such as the ACLU, is that "the traditional complaint of criminal defendants has been that grand jury proceedings are too secret, not that they are not secret enough." As Justice Brennan, dissenting in a 1959

171 Id.
172 Id.
173 Id.
176 See, e.g., MASSACHUSETTS CHAPTER, ACLU, THE USA PATRIOT ACT: A CIVIL LIBERTIES BRIEFING, at http://www.aclu-mass.org/legal/USApatriotact.html (complaining that information in "formerly secret grand jury hearings" can now be disclosed).
177 See Collins, supra note 156, at 1273.
178 Cf. Fred A. Bernstein, Note, Behind the Grey Door, Williams, Secrecy and the Federal Grand Jury, 69 N.Y.U. L. REV. 563, 596 (1994) (arguing that courts often cite the various justifications for
case, complained "[t]he Court, while making obeisance to 'a long-established policy' of secrecy, ma[de] no showing whatever how denial of . . . grand jury testimony serves any of the purposes justifying secrecy." 179

Grand jury secrecy rules are justified by essentially three policy rationales: (1) The societal interest in a successful criminal investigation; 180 (2) the reputational interests of the accused and the witnesses before the grand jury; and (3) the societal interest in deterring government lawyers and investigators from abusing the grand jury's powers. In the light of these three policy rationales, how does Section 203(a) fare?

The first rationale—society's interest in a successful grand jury investigation—is not implicated. If prosecutors conclude that the disclosure of grand jury evidence will not jeopardize a criminal investigation, or that any speculative damage to law enforcement is offset by a corresponding enhancement of national security through improved foreign intelligence, there is little reason to second-guess this judgment. 181 Indeed, critics of Section 203(a) have seldom pegged their objections to the provision to this rationale.

Some critics of Section 203(a) have referred to the second rationale—the reputational interests of the accused and of the grand jury witnesses. 182 According to this argument, the greater the number of persons within the government who are privy to grand jury information, the greater the risk that information might be leaked to the public at large. In response, Stewart Baker noted that "[u]nder the current grand jury rules, a criminal prosecutor can share information freely with his secretary, with other lawyers in his office, with the FBI, with Justice Department paralegals—indeed, with any other official the prosecutor thinks will help him to enforce the criminal law." 183 Given the already vast potential disclosure of grand jury information, "[d]o we really think that these personnel will do a better job of pro-

---

180 By a "successful" investigation, I mean one that accurately sorts the innocent from the guilty.
181 The damage would be highly speculative. It could be argued that witnesses will be marginally less inclined to be forthcoming to a grand jury if they are aware that prosecutors might share the information with the CIA or other federal agencies in the intelligence community. In this way, the theory runs, the investigation would be compromised. The theory is multiple levels removed from reality because: (a) witnesses generally have little concrete knowledge of the ins and outs of grand jury secrecy rules; and (b) even if they did, it is improbable that witnesses will be less forthcoming if they are aware that the substance of their testimony might be disclosed, not only to other prosecutors, grand juries, and various support personnel (already the case under existing law), but also to specific members of the intelligence community.
183 See Baker, supra note 152, at A14.
tecting a suspect’s privacy than CIA analysts—who, after all, are in the business of keeping far more important secrets than that?”

Baker’s response, although rhetorically effective, is perhaps not wholly dispositive. Section 203(a) authorizes disclosure to “any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official.” Thus, Section 203(a) authorizes the sharing of grand jury evidence not only with CIA analysts. The “intelligence community,” as defined by the National Security Act, includes: the FBI, the Drug Enforcement Agency (“DEA”), the Secret Service, the Postal Inspection Service, the Internal Revenue Service, and the Bureau of Alcohol, Tobacco and Firearms (“ATF”), all of which the National Security Act includes. Yet as with many theoretical possibilities, the litany of agencies that may, under Section 203(a), receive grand jury information relating to foreign intelligence is likely overwrought. As a practical matter, grand jury information falling within the newly created exception will be shared with intelligence officers in the FBI and CIA; it is, of course, possible that particular agents within agencies such as the DEA and ATF will receive information, but this will likely be the atypical case. Furthermore, it seems odd to impute a lesser respect for secrecy rules to agents in such agencies than to paralegals and secretaries in the DOJ, who frequently have unfettered access to grand jury materials.

The most compelling criticisms of Section 203(a) are drawn from the third rationale for grand jury secrecy—deterring the abuse of the grand jury’s powers. The grand jury secrecy rules, as they existed prior to the passage of the Patriot Act, did much to prevent the entanglement of national security operations and domestic law enforcement. Section 203(a) raises the possibility that intelligence officers will, with the cooperation of prosecutors, use the grand jury’s powers for purposes other than the enforcement of the criminal law. For example, imagine that intelligence officers receive an anonymous tip that certain Muslim immigrants are working on behalf of a foreign power. As long as the only evidence to support this claim is an anonymous tip, it would, of course, be impossible to secure warrants or obtain wiretaps. Yet, if intelligence officers convince prosecutors to initiate a grand jury investigation, the grand jury could then compel the immigrants to testify and subpoena the immigrants’ records and computer files. As permitted by Section 203(a), prosecutors could then, arguably, share the information with intelligence officers. The upshot is that the

184 Id.
186 50 U.S.C. 401(a) (2003). This point is made in Beale & Felman, supra note 174, at 709.
187 Persons receiving information are authorized to use it exclusively “as necessary in the conduct of that person’s official duties.” FED. R. CRIM. P. 6(e)(3)(D)(i).
grand jury would be employed not to investigate violations of the criminal law, but to advance the interests of national security.

Although this spectacle is troubling to some observers, an initial response might be: why is the use of the grand jury's subpoena powers to advance national security necessarily a bad thing? Congress has approved administrative subpoenas to investigate health care fraud, for example, and such subpoenas essentially confer all of the grand jury's powers, without the limitations of grand jury secrecy rules, on criminal and civil government attorneys. Is the governmental interest in enforcing civil and criminal health care fraud laws really greater than the interest in protecting the nation against terrorist threats?

A still more problematic premise of the hypothetical sketched above is that it assumes that prosecutors would be willing to break the law. After all, prosecutors by law can initiate a grand jury investigation only if there is some crime to investigate, and not on a whim or merely at the suggestion of intelligence officers, absent some evidence that a crime has occurred. Thus, the honorable prosecutor, when confronted with an anonymous tip that certain Muslim immigrants were acting on behalf of a foreign power, would refuse to initiate a grand jury investigation, unless some evidence could be adduced that the activities alleged constituted crimes. To be sure, not all prosecutors are honorable, but the question remains whether it is fair to assume that prosecutors will act dishonorably. One can concede that some prosecutors and intelligence officers abused the grand jury's powers in the 1960s and 1970s to spy on American citizens, out of an ill-conceived notion that opposition to the Vietnam War was tantamount to a declared allegiance to a hostile foreign power. Still, the difficult question is whether at the present time and for foreseeable future, international terrorist organizations pose a greater threat to American lives and property than the FBI. In this respect, some observers wondered whether critics of Section 203(a) are, in the classic sense, waging the previous war to the detriment of the present one.

Perhaps, however, this is too cavalier about the dangers of grand jury's abuse and the reality that persons, however well-intentioned, when granted powers, are apt to use them for good and ill. It would seem reasonable to provide some checks to ensure, insofar as parchment barriers can ever pro-

---

188 See supra notes 146-48 and accompanying text.
190 See MacDonald, supra note 1 (“As long as elites continue to act as if America's biggest enemy is not al-Qaeda but the country's own allegedly repressive and bigoted instincts, the nation's defense against terror at home will proceed at half throttle.”).
vide meaningful limits, that prosecutors and others do not abuse the grand jury’s powers. Although defenders of Section 203(a) have suggested that its reporting requirement will provide a sufficient check against abuse, there may be reasons for doubts on this score. First of all, the notice requirement in Rule 6(e)(3)(D)(ii) is exceedingly spare. It simply requires prosecutors to disclose which agencies received the grand jury information, and not which individuals within those agencies did so, nor does it require that the prosecutor provide any explanation of the grounds for the disclosure. Furthermore, the Patriot Act “contains no mechanism for ensuring that this information is collected and transmitted to Congress.” Even assuming the information is compiled and transmitted to Congress, essentially all it will amount to is the number of disclosures.

The Patriot Act’s change to the grand jury secrecy rules are not among those provisions that are set to sunset after five years. One may, however, assume that when Congress, a few years hence, reviews the time-bound provisions in the Patriot Act, it will also consider the success of those provisions unleashed with an indefinite life. A modest suggestion at that time would be to bolster the notice requirement under 6(e)(3)(D)(ii) to make it consistent with the notice requirement in other sections of 6(e)—that is, to include the names all of the individuals who have received the information, as well as a certification that those individuals have been apprised of the secrecy requirements imposed by Section 6(e). A more extreme suggestion, urged by many critics of the Patriot Act, would be to require prosecutors to obtain judicial approval before any disclosure. Under such a regime, prosecutors would need to demonstrate to a judge first that the evidence sought to be disclosed constituted foreign intelligence information, and second that the intelligence community’s need for the information outweighed the competing interests in grand jury secrecy.

Interposing a judicial obstacle to the flow of grand jury information from prosecutors to intelligence officers is not advisable. To be sure, Section 203(a) of the Patriot Act imposes costs, in the form of potential and perhaps concrete infringements on civil liberties, which might be prevented or deterred had prosecutors been required to obtain judicial pre-clearance.

191 See Scheidegger, supra note 175, at 6 (“The notices required by Rule 6(e)(3)(C)(iii) will provide a database for Congress to consider when it reviews [the Patriot Act] four years hence.”).


193 Collins, supra note 156, at 1279.

194 See USA Patriot Act § 224(a) (creating exceptions to the five year sunset for § 203(a) and 10 other sections in Title II of the Patriot Act).

195 See Scheidegger, supra note 175, at 6 (“Although the grand jury provision does not sunset automatically, a review of it may be expected to be on the agenda when Congress considers renewal of the sections that will expire.”).

196 If certain individuals are “undercover,” presumably their names could be redacted before the information is made public or shared with Congress.
for any disclosure of grand jury information. But critics of Section 203(a) fail to acknowledge the costs of the regime they have proposed in its place, which would entangle the judicial branch in national security decisions. Courts, in their proposed amendments to Section 203(a), would be required to assess what is foreign intelligence information and whether the intelligence community has a sufficiently compelling need for it. The experience under the FISA should be a cautionary one in this regard. The bureaucratic apparatus that evolved to comply with the various legal standards created by the FISA should remind us that judicial entanglement in national security decisions is far from costless. Indeed, the experience under the FISA, at least in the 1990s, suggests that such a regime can ultimately over-deter law enforcement officers and intelligence agents, who end up more fearful of individual reprimands from the courts (for being too aggressive) than of failing to act (for such omissions are seldom punished).

An appropriate check on potential abuse therefore needs to strike a balance, and such a balance would be better reflected in a modest amendment to Section 203(a). Congress might consider requiring prosecutors to make a complete notice of disclosure to the judge supervising the grand jury (including a catalog of each of the individuals to receive the evidence), together with a certification that all recipients are advised of the grand jury secrecy requirements. In addition, the DOJ should be instructed to compile all of the notices and to transmit them to Congress on some regular basis. In effect, oversight of 203(a) would be conducted, albeit not by the courts on a case-by-case basis, but in the aggregate by Congress.

CONCLUSION

The September 11 attacks have prompted the inevitable flurry of books and articles whose authors confidently explain what went wrong. One collection of hindsight wizards fix responsibility on the culture (variously characterized as one of inertia, laziness, or plain incompetence) of those within the law enforcement and intelligence communities. Such authors have demonstrated, to their own satisfaction, that the FBI and CIA possessed more than adequate legal powers to prevent the attacks; they

197 See JULY 2001 GAO REPORT, supra note 10.
198 See Stuart Taylor Jr., The FBI and the CIA Are Not the Biggest Problems, NAT'L J., June 8, 2002 ("In addition, a well-regarded FBI supervisor (Michael Resnick) had seen his career blighted in the fall of 2000 when the FISA court had barred him from submitting any more warrant applications and had read the riot act to then-Attorney General Janet Reno about perceived improprieties in Resnick's past submissions. The details are murky. But whatever Resnick did was apparently motivated only by a desire to thwart terrorism. Had you been his successor at FBI headquarters, how eager would you have been to go forward less than a year later with a legally shaky warrant application?").
were simply not up to the job. According to this view, the Patriot Act is fundamentally misguided. It makes no sense to entrust greater powers in persons who have proven themselves incapable of properly exercising the powers already vested in them. What is needed, instead, is a fundamental personnel shake-up.

To be sure, several post-September 11 revelations have thrown an unflattering light on particular persons within the FBI, CIA and other federal agencies. Yet, many other persons have been shown to be enterprising and diligent. For example, Kenneth Williams, an FBI agent in Phoenix, Arizona, wrote a remarkable memo in July 2001, predicting that Middle Eastern terrorists were studying in American aviation schools. And in August 2001, an unnamed FBI agent in New York begged his superiors for permission to launch an aggressive hunt for an individual who would later pilot a plane into the Pentagon. To the extent that these investigations were frustrated, or failed to be coordinated, the fault lies in the higher levels of the FBI bureaucracy.

And yet even among these bureaucrats, who are of course easy prey for those deploying the wisdom of hindsight, the error may not have been that of gross incompetence. Indeed, it is difficult to fault high-level FBI officials for cordonning off law enforcement and intelligence investigations when the FISA court and numerous other courts had interpreted such walls as legally required. Nor can one fairly criticize prosecutors for failing to share foreign intelligence information learned in the course of the grand jury investigation into the 1993 World Trade Center bombing when there was, at the time, no legal mechanism for such disclosures. With respect to the September 11 attacks, there is, in short, more than ample fault to go around, and some of it must be borne by Congress for failing to amend the laws that were perceived as preventing a coordinated response to the nation's terrorist threats. The Patriot Act's amendments to the FISA and the grand jury secrecy rules were belated efforts to remedy these problems. Now Congress has the burden of ensuring that the powers vested in the law enforcement and intelligence communities are not abused.

