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## Fighting Terrorism and Preserving Civil Liberties

James B. Comey

*Former Deputy Attorney General of the United States*

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# ADDRESS

## FIGHTING TERRORISM AND PRESERVING CIVIL LIBERTIES

*James B. Comey* \*

Thank you. It is really great to be here, especially this time of year, when the weather makes this place look all the more special. What I want to do—the most important thing I am going to do tonight—is take your questions. But I want to blather at you first, and talk about my topic, “Fighting terrorism and preserving civil liberties;” and I want to talk about what I think is the state of play in discussing the interaction between our efforts to fight terrorism and to preserve civil liberties, and some of the things I think you should think about as we analyze that balance. Then, I want to hear from you folks about what bothers you, what bothers you about what I say, and what questions you have.

Let me start by saying that I think it has become a part of the drinking water in this country that there has been a tradeoff of liberty for security, particularly in the DOJ’s response to fighting terrorism; that in order to do what we need to do to get the job done, it has become a part of the drinking water that we have had to encroach upon civil liberty and *trade* some of that liberty we cherish for some of that security that we cherish even more. It is so much a part of the drinking water that there are two groups in this country, in my experience. There are those who think that it is okay, and those who do not think it is okay. I would like to ask you to open your mind to the possibility that there is a third

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\* Former Deputy Attorney General of the United States.

These remarks were delivered at the University of Richmond School of Law, April 15, 2005, as part of the Emroch Lecture Series. For the convenience of the reader, these remarks have been slightly edited from the form in which they were delivered as a speech.

group—maybe some of you are here—people who understand that there has *not* been a tradeoff between liberty and security in our response to terrorism in this country and in our efforts to offer security to the people of the United States. Now, it is so much a part of the drinking water that you are thinking that I am out of my mind. But let me take a shot at it. Let me take a shot at asking you to consider my modest proposal, and it is no easy task, because it requires a mastery of detail, and it requires all of us to demand details on these topics.

Let me start by talking about the Patriot Act. Much of what passes for debate in this country about fighting terrorism and civil liberties focuses on the Patriot Act. Much of what passes for debate about the Patriot Act is not a debate at all; it is certainly not an informed debate. I am not saying that to take a shot at anybody on any side of the issue, but to suggest that we need an informed discussion about that tool and about a whole lot of other tools used in this country in the fight against terrorism. What we have is a lot of people who care about public life and public policy standing around at cocktail parties with a crisp chardonnay in their hand, and they talk about the Nationals baseball team, and someone says, "Isn't the Patriot Act awful?," and everyone nods and they move on to something else. We have town councils all across this country passing resolutions condemning the Patriot Act, calling for its repeal in many instances. I do not mean to be a wise-guy, but I do not believe those town councils or those wine-swillers or anybody else who is involved in similar exchanges understand what is in the Patriot Act. Why do I say that? First of all, because you could not understand it and call for its repeal. It is not possible. Even the ACLU does not call for its repeal. Because so much of what is in the Act is so smart, so ordinary, so constitutional, so lawful that nobody would oppose it, and that is not hyperbole.

Portions of it, for example, condemn racial discrimination; portions of it condemn hate crimes against Sikh-Americans, backlash crimes against Arab-Americans; portions offered more money for first responders to terrorism, offered money to the families of those killed responding to terrorism. People do not want to gut those provisions. What has really happened with respect to that particular piece of legislation, the Patriot Act, is two things. First, discussion of it has been bumper-stickered—in fairness, by both sides—by people who say they support it and by people who say

that they do not support it. The second thing that has happened is that the Patriot Act has become a vessel into which a whole lot of people have poured their concerns about a whole lot of things.

What drives you nuts about politicians? I know what drives me nuts about politicians. They tend to speak in generalities, even when there is no campaign going on. What is it that you hear—"I am the 'this' candidate. I am the 'that' candidate. I am for this, he is for that,"—all the slogans and bumper stickers you hear. And if you are anything like me, you look at the television and you say, "Would you knock it off; tell me what you mean, tell me what the details are. Tell me when you say this, what does that mean about this proposal or that proposal." What drives you nuts is the lack of detail, and it should drive you nuts about the debate between the tradeoff, or the non-tradeoff, between civil liberties and security in this country. Let me take a shot at it, at the risk of stretching your patience.

The confusion about the Patriot Act can be divided into two categories: stuff that is not new, and stuff that is not in it. We do not have time to cover all of that, but I want to talk about some issues that have good people very concerned and a lot of people worried and upset. Let me talk about one issue that is the hot-button issue that has gotten a lot of attention. Libraries. There is no mention of libraries in the Patriot Act. Not in the singular or the plural. It does not appear in the hundreds and hundreds of lines in that piece of legislation. Sometimes when I say that, people say, "That is not right." It is right. There is no mention. The so-called "library provision" of the Patriot Act is Section 215. That gives authority to federal judges who sit on the Foreign Intelligence Surveillance Court, the so-called FISA court, to issue orders for tangible things, items that are listed as "books, records, documents," and so on. If anyone has served process in a civil or criminal case, those are terms of art. It allows a FISA judge to issue an order for particular records, if an FBI agent first makes a written showing that the records are sought for a foreign intelligence investigation or an international terrorism investigation. The statute expressly says that the investigation may not be predicated solely on First Amendment activities.

Before the Patriot Act, and still, a federal prosecutor could obtain books, records, documents, and tangible items by the issuance of a grand jury subpoena. That does not involve a court, does not involve a showing of any kind, and does not involve anyone

signing out and swearing out an affidavit to obtain records. How does this get mixed up with libraries? For the life of me, I do not know. I have challenged a lot of journalists and said, "Look, you want to do something really neat? Find out how this got mixed up with libraries." We have never used it since the Patriot Act was created in connection with a library, or medical records, or fire-arm records—which has become a hot button issue as of late. How did this get hooked up with libraries? I suppose it does not matter, because it did. I think that it is the word "books," as in "books, records, documents, tangible things," which in a prosecutor's mind is completely missed. But to other people, that is where the focus has been.

Let us compare Section 215 and its authority in counterterrorism investigations and international terrorism investigations to obtain records with grand jury practice. As I said, both before and after the Patriot Act, prosecutors could issue subpoenas for books, records, and tangible items to a credit card company, for example, or a bank, or a travel agency, or hotel. Prosecutors could also issue subpoenas to libraries. It has happened from time to time. One example that is known to some people is Ted Kaczynski, the Unabomber, who had sent this wacko manifesto to the *Washington Post* and *New York Times* that claimed credit for the maiming and killing that had been done in the name of the Unabomber. His brother informed the FBI that he thought his brother, Ted Kaczynski, was the Unabomber. In an effort to confirm that identification, the FBI looked at the manifesto and saw some obscure texts that were cited in there, and they went to libraries with grand jury subpoenas that were associated with Ted Kaczynski where he lived and checked the check-out records to see if he had checked these texts out, and it turns out he did. Four of the books checked out by him cited these obscure texts and they were confirmed through the use of ordinary grand jury subpoenas.

The first thing that I worry about when I hear people talk about how outrageous it is that the government has the power under Section 215 to obtain library records is that folks who make this criticism of the Patriot Act want to create some sort of sanctuary around libraries, but people do not. There are too many pedophiles, too many criminals using libraries. Last spring, an al-Qaeda operative named Mohammed Babbar came into the United States and went to New York. He was of such concern to us that

he was being covered—blanket coverage—by the FBI. The Attorney General and I were being briefed on what he was doing every single morning. One of the things he was doing was going from his apartment, where he had a computer, to a New York Public Library, and getting onto a computer. The best that the agents who were looking over his shoulder walking behind him could tell, he was emailing. Long story short, we ended up confronting this guy and arresting him. He pled guilty and he is still in federal prison and cooperating with the government. He explained to us what he had been doing. He said, “I went to the library because I knew that, on a regular basis, they scrubbed the hard drive. They erased what went on that computer and I figured it would make it harder for you to know what I was doing, and that I was emailing other al-Qaeda associates around the world.” We do not really want to create some sort of sanctuary in libraries.

There is a provision in this so-called “library section” that upsets people a great deal. It is the so-called “gag order.” When a federal judge issues an order directing the production of books, records, and tangible items, it comes with a prohibition on telling anyone you received it. I am going to talk about improvements to that section in just a second. Let us focus on the so-called “gag order.” I have two responses to the concern about the gag order.

First, it reveals a lack of understanding about the way regular investigations proceed every day around the country—here in Richmond and all around the country. I will bet there are people who are in this room who have issued hundreds of regular subpoenas in the course of legitimate criminal investigations to financial institutions. Every single one of those subpoenas, for years, has carried with it a statutory gag order that prohibits the financial institution from telling the account holder that the records had been subpoenaed. Why did Congress do that? They did it for two reasons. One, we do not want the bad guys to know that we are coming for them; and two, we do not want good people smeared. A lot of times people report things or people to us that they say are criminal; we investigate it, and it turns out there was nothing criminal at all. Gag orders are a regular feature of regular criminal process. It only makes sense that when Congress was giving the authority for FBI agents to obtain records, bank records for, example, in the most important of all investigations, that they would carry with that order a gag order.

I have discussed this with a number of libraries all across the country. I have put it to them in a way that I hope they do not think I am being a wise-guy. I say, "Look, anybody who cares about privacy—and I know that people in this room and librarians do—would never want an FBI agent investigating an individual to tell the credit card company, the bank, the hotel, or the library: 'Look, this is what we are doing. We have been told—it is a rumor, but we have been told—that he is hooked up with al-Qaeda. We are checking it out. That is what we are doing.'" Nobody wants that. Anybody who cares about privacy does not want a word said about what is being investigated. So by definition, the recipient of that Section 215 request, or a grand jury subpoena, does not know the facts. Why then would it be their business to make the decision to tell this guy that the FBI had come for his records?

Now, there is fair criticism of this provision. As drafted, it does not say that the recipient can speak to a lawyer and challenge it in court. That is a fair criticism. The Attorney General testified and the Department of Justice agrees that this omission is a flaw, and that it should be changed. People should be able to receive that process, and it ought to come with a gag order; but if they think it is unlawful or inappropriate, they ought to be able to challenge it in court and talk to a lawyer, just as you can with a non-disclosure order on a grand jury subpoena. Librarians, in my experience, do a tremendous amount of good in this world. I am not just saying that because the wife of the President is one. There are some changes in order for that provision, and I have mentioned two of them. People should be able to talk to a lawyer and challenge it in court. I think there should be a third. The provision says that you are seeking the records "for" an international terrorism investigation. We think it should say the "records sought are relevant to" an international terrorism investigation. That is the way we have always understood it. Those are changes you are going to see in that provision of the Patriot Act. That is the issue with libraries.

Much of the confusion about that provision, as I hope I have started to show you, reflects some misunderstanding about the way we do criminal investigations in this country. I saw a press release criticizing a phrase in the Patriot Act that threw me. It said the Patriot Act "allows the *secret* accessing of a person's records." That is what we do in criminal investigations in this coun-

try. Bank records, phone records, credit card records are accessed in secret for the reasons I told you—so the guilty do not get away, and so the innocent do not get ruined. We have obtained records in that way thousands and thousands of times to prosecute mob bosses, credit card cheats, drug dealers, corporate crooks—all the people that are routinely investigated and prosecuted. The fact of the matter is that, before the Patriot Act gave this authority to counter-terrorism and counter-intelligence investigators, the rules for obtaining documents were tighter for them than for federal prosecutors investigating credit card fraud, or mafia crime, or corporate fraud.

I saw another press release that struck me because it was way off the mark. It said the Patriot Act “allows the government to investigate citizens without probable cause and without their consent.” That, when you first hear it, has a certain ring to it; it kind of strikes you in the gut. But if you take the time to drill down in that, your response is, “Gee, if the government needed probable cause to investigate, or someone’s permission to start an investigation, that is the end of our criminal justice system,” especially for complex crimes. When someone tells us that this guy is a terrorist, or there has been a fraud committed, we investigate *to see* if that is true. We investigate to see if there is probable cause to arrest, to search, or to take any Fourth Amendment action. That is where we go into the federal and state criminal justice system. If we had to start there in ordinary state or federal investigations, or, heaven forbid, in terrorism investigations, we would be in a bad place.

I have spent the last few weeks meeting with lawmakers to help engage in this debate—it has been a robust debate about the Patriot Act, as it should be. People have suggested, and even a senator has suggested, “Shouldn’t we raise the standard for this ability to obtain documents or grand jury subpoenas to probable cause?” My response is: Mohammed Atta’s roommate. Mohammed Atta piloted one of the planes that crashed into the World Trade Center. Let’s imagine that he had a roommate and we had this Section 215 provision on September 12, 2001. If I am running that investigation, like many of you who have run criminal investigations, what do I do when I encounter Mohammed Atta’s roommate? I want to see his bank records; I want to see his phone records, his credit card receipts, his rental card slips, his travel documents. If I found out he went to Las Vegas, I want his hotel

records; I want to see every tape from that casino; I want to see who he met, where he went, and what he is doing. If I need to make probable cause to get those documents, I am out. I do not have probable cause to believe that his roommate is up to no good. I have got a bad feeling. I have got reasonable grounds for concern. But I do not have probable cause. When we hear that in this debate, I think that reflects a lack of understanding for the way that government investigators do their work and the way that we want them to do their work.

Another hot button issue is sneak and peek search warrants. We in law enforcement do not call them that because it conveys this image that we are looking through your sock drawer while you are taking a nap. We have had in law enforcement, long before anybody in this room was born, something called delayed notice search warrants. They were created by judges around the country, including in this circuit, and interpreted by those judges as “reasonable” under the Fourth Amendment to allow, in certain circumstances, the government to obtain, based on a written showing of probable cause, a search warrant, and to delay notice—not abandon notice—that a search had been conducted. A lot of circuits expressly upheld that; the Supreme Court, in a case that addressed electronic searches and seizures, said that any challenge to a delay in notice was “frivolous.” Each standard was different all around the country: how long the delay could be; different standards for how you could get them; how you had to show the emergency; etc. Enshrined now in the Patriot Act is a single nationwide standard for how, in terrorism cases and regular criminal cases, a judge can go about deciding whether to grant delayed notification in a search warrant. Like I said, this delayed notification was around long before I was born, and not used very often around the country. Since this issue has come up, we have looked at the numbers and we have found that we do it about fifty times a year in this country—about once for each state. We do it when it really, really matters. I have done it as a federal prosecutor.

Now that I am here, I will give you an example that comes from right here in Richmond. When I was a federal prosecutor in Richmond, we had a situation where a drug gang was coming into town from New York, where all bad things come from. This drug gang—we did not know much about them—was slinging a lot of crack into the area. The DEA had an informant, and he told us,

“Look, the two guys who run this operation have an apartment, and they just delivered five kilos of cocaine to that apartment.” This information was reliable, we had other information to corroborate it, and we had probable cause to seize those drugs. The question was, what do we do? Do we seize the drugs, heat up the two guys, endanger the informant, and never find out exactly who these guys are involved with, or do we let five kilos of coke walk out on the streets of Richmond? Tough choice. We did not have to make it, though. Why? Because we had in the Eastern District of Virginia, in the Fourth Circuit, like everywhere else in this country, a judicially created doctrine of delayed notice search.

We went to a federal magistrate judge in Richmond, we laid out what we knew, the DEA agent swore to it, and we obtained permission to conduct a search of the apartment and to make it look like a burglary. The DEA went there, found the drugs where the informant said they were, took the five kilos, took the television, took the stereo, and, because all agents in my experience are frustrated thespians, took three cans of beer out of the fridge, dumped them down the sink and scattered them about. Oh yeah, and because we watch “Matlock,” we broke the window from *outside* in. Then we waited; and what did the two leaders of this organization do? They called the cops! We had a marked unit who had been briefed and he responded. He walked in, and when he saw these two knuckleheads, he said, “You are, sir? Can I see your license? And this is your apartment? Yes it is. And you live here, too? And what is your social security number? Okay, gentlemen, what was taken?” “Well,” they said, “The stereo, the television, and the bastards drank our beer.” “Anything else taken?” the officer asked. “No, no, nothing else.” “Okay,” the officer said, “I’ll get back to you.” To make a long story short, I do not know if it was thirty days later or forty-five days later, after we had figured out the twenty-five to thirty people involved in this organization, we locked them up. Then we unsealed the search warrant, offered to return the TV and the stereo, which nobody wanted, and we paid to fix the window, and made a very successful and important criminal case.

That was a delayed notice search. It took me four minutes to explain that to you, and the challenge we face is finding that space in American life to tell that story, or another story like it. We had another case a few months ago involving a huge ecstasy ring. We had a member of this ring coming across the border from

Canada days before we were about to arrest 170 members of the ecstasy ring in Canada and the United States. The informant says, "Yeah, he's coming and he's got a huge load of ecstasy in a false compartment of a gas tank." So what do we do? The Second Circuit had created delayed notification search warrant long ago, but we had a standard with the Patriot Act. We went to a federal judge in northern New York, got a search warrant for the car and permission to "steal" it. So this guy comes across the border, and he stops to use a rest area. While he was in the bathroom, the DEA took the car and then sprinkled broken glass in the parking lot. Thirty thousand hits of ecstasy were in the car. Three days later, when he was arrested along with 169 others, we unsealed the search warrant and told him that this had been done. Why do I tell you this? I hope it helps you understand why this tool matters to law enforcement and how ordinary it is and how lawful it is, and how it takes a demand for the details and how it takes the space in American life to demand those details.

There is another one I get a lot of questions about, and that is the issue of roving wiretaps. That is something else that sounds awful. Who would want to rove anywhere? What is this about? It is "Big Brother;" there is this satellite "up there." Those of you who watch the show "24" on Fox know there is always a satellite up there, looking down on me, checking my vitals. People hear about roving wiretaps and they get concerned. Here is the deal. In 1986, Congress gave us the authority to conduct roving wiretaps in criminal cases, drug cases in particular, because what we saw happening in the 1980s was that drug dealers were using cell phones—they were the big ones at the time—and then they would dump them. They would use the phone for a while, dump it, and get a new one. Congress, in bi-partisan legislation, gave us the ability to get a warrant on the *person*, and not the instrument, if we could make a showing that the person was switching phones to elude law enforcement. We have the ability, if we make that showing, to follow the suspect—no matter what phone he is on. That has saved law enforcement precious hours; sometimes it is only hours, but they are precious hours. We do not have to go back to the court, back to the phone company, and get paperwork for that facility. Instead, we can go to the phone company once we find out the new number and show it to them and say, "We can intercept this guy's calls." What did the Patriot Act do? It took that authority that we have been using for almost twenty years and gave it to foreign counter-intelligence and counter-terrorism

investigators. It gave them the ability to go to the FISA court, again a court made up of federal district judges, and make a probable cause showing—a showing that we have probable cause to believe that the suspect is the agent of a foreign power—and that he is trying to thwart surveillance by changing phones. That is how we get a roving wiretap order. Again, that took three minutes to explain. Our challenge is avoiding losing these authorities because we lack the time to explain how these things work.

Overall the Patriot Act is smart stuff that came from the criminal side that has been updated for a technical age, and I submit to you that it has *not* caused a tradeoff of liberty for security.

But what's *not* in it? People's concern about immigration largely has nothing to do with the Patriot Act. People's concern about Guantanamo Bay has nothing to do with the Patriot Act. People's concern about data mining, which I think should be focused more broadly than it is, is a legitimate issue and an important issue, but it is not in the Patriot Act.

There is one thing I want to mention that people talk about but is *not* in the Patriot Act. That is the issue of people detained in the continental United States by virtue of Presidential authority as "enemy combatants." Jose Padilla. He is detained in the brig in South Carolina. He is not the only person detained. Another is Ali al-Mari. He is a Saudi national who was detained in Illinois. He is not a citizen, so there has not been a huge focus on him from a lot of the people. Another was Yasser al-Hamdi. His case was here in the Eastern District of Virginia, but he was captured on the battlefield in Afghanistan, so it is sort of easier to get your arms around his case. But Padilla is a guy who came into the United States, landed in Chicago and was arrested, then held as a material witness and in my custody when I was United States Attorney. There came a day—it was a Sunday as I recall—that I got a phone call. It was someone telling me that the President was directing me to turn him over to the United States military. It took my breath away when I first heard it. I thought, "Wait a minute, the President is ordering me to turn over someone who is in my custody over to the military? He is an American citizen; what is up with that?"

I have been asked that question many times. It is a profound exercise of presidential power. It raises legitimate questions; but before people, when they talk about Padilla, get too upset, I ask

them to help me answer a question—it is a hard one: What would you do? You are the President of the United States and you have concluded that an American citizen had come into the United States bent on an act that transcended the meaning of the word crime—more like an act of war. You found yourself in a situation where you could prove that easily beyond a reasonable doubt, but you could not use the evidence in a court of law because of the sources and methods that generated it, or (again, hypothetically) maybe you concluded that the evidence you could use established beyond the clear and convincing evidence standard, that this individual was bent on those acts that transcended crime. You could use that evidence in court, but maybe not convict the person beyond reasonable doubt. What would you do?

Often, since 9/11, the government has used immigration laws to incapacitate people on a temporary basis. It is sensible, too; it has generated some debate, it is complicated, but it is used on people that are not American citizens. Often the government has used the material witness process. It was used on Padilla when he was first arrested. There is a very limited opportunity to detain someone. It is measured in days, and if there is consent, weeks. But what do you do when someone like that comes into the country? The answer that some people say is, and it is not unreasonable, “I would follow him.” This is where I really am being a wise-guy: I argue that that response is the product of too much television. Nobody—nobody—can be followed twenty-four hours a day, seven days a week. That is the way the world works, you simply cannot follow another human being like that. Now we follow people all the time—people who commit bank robberies, people who sell drugs, and we follow them. We take the risk that we will lose them, but that risk comes with the object of the crime being achieved; that is to say, the drugs will be delivered, the guy goes to the crime scene, or he robs the bank. We run those risks. The question for all of us, and the President of the United States, too, is: When the crime—although you cannot call it a crime—involves the kind of things that this situation involves, do you run that risk? Do you run the risk of losing him on the “El” train or the subway, and that he reappears somewhere and does something that changes the world? That is a hard decision. The President decided that he was going to use his authority to detain that person in military custody. Reasonable people disagree. What is important is that it is making its way through the courts. However that case comes out, whether the Fourth Circuit or the Su-

preme Court agrees with the Government's argument that the President has this power pursuant to the Congressional authorization to use force against those involved in the 9/11 Attacks, whether or not they agree, people in this room need to think about this issue, because there will be more Jose Padillas. There is a guy we call Jaffar al-Tayar—we also call him Adnan Shukrijuma—who is a commercial pilot, fluent English speaker, and he is out there somewhere. Al-Qaeda knows, as much as we know, the value of an American citizen. We have devoted huge resources to tracking aliens who come into and out of this country. Citizens pose a whole different issue, and it limits our ability to track or incapacitate that person, and that's the way it should be. We are an enormously free and open country, especially for our citizens. No one wants to change that. But when the next suspected terrorist comes, what do you do?

I had a fascinating discussion with the Minister of State for Northern Ireland. She said:

Our countries are pointed in different directions. You have devised the greatest criminal justice system in the world, the most sophisticated, and the most complex. You have the ability to deal with all sorts of criminal issues, RICO, continuing criminal enterprise, conspiracy that spans years. We in Northern Ireland need to copy that system. Now that we have relative peace, we need to deal with the arson rings, extortion rings, mobsters, the way you have perfected over the past half-century. We, in Northern Ireland, have devoted thirty years to developing a system for preventative detention. It is something you haven't grappled with in your country.

So I do not have an answer for you, but anybody who cares about security or the rule of law in this country needs to think about these issues and participate. Whether the courts agree or disagree with the Government on this issue, I believe the issue will come up again. Perhaps it will be one that does not fit within the rationale that the court decides on the President's authority to use force. Then what do we do?

I want to say a word about something that was amazing in the Patriot Act—it was amazing and breathtaking, and it changed the world. FISA, or the Foreign Intelligence Surveillance Act, was established in 1978 in the wake of a lot of the abuses that the Church-Pike Commission found. The key term in FISA is "agent of a foreign power." The FISA statute allows a variety of electronic surveillance or physical searches aimed at spies or interna-

tional terrorists. They are people or agents of a foreign power, either classic spies or people who are participants with an international terrorist organization. One of the most common misunderstandings, even with some lawyers, is how we get wire taps, even to search. There is a sense that we do not need probable cause, that there is a lesser standard. That is not right.

To get a criminal wiretap, the Government needs to show, and the court needs to find, that there is probable cause to believe that he is a participant in a predicate offense (drug dealing, for example), and that a particular phone is his phone, and that he is using that phone in furtherance of that predicate offense. We can get the wiretap.

If the Government believes that this man is instead an agent of al-Qaeda and wants to use FISA to intercept phone calls, the Government has to establish probable cause by a typed and sworn affidavit that the suspect is an agent of a foreign power, and that that is his phone. One difference is that we do not have to show that his phone is being used for spy stuff, or terrorism stuff. We simply have to show that he is an agent of a foreign power and that is his phone. People think that is easier. In practice? Not with terrorist groups. It is often much easier to show that a terrorist is involved in other criminal activity than it is to show that they are the agent of a foreign power. You may have seen some of this challenge with the Moussaoui case and some of the discussion with the 9/11 Report.

What happened to us in the FISA world? It is called "the wall." What is the wall? It is a combination of law and lore that led to the separation of two groups of people: FBI agents who are conducting criminal investigations of would-be spies and terrorists, and FBI agents involved in intelligence investigations using FISA authority on those same people. It is a complex story as to how it happened, but on September 11, 2001, we found ourselves with a wall that ran from here to the ceiling. My good friend Pat Fitzgerald, who is the United States Attorney in Chicago, best illustrates this. In the 1990s, he was the leader of a group of prosecutors working with a team of FBI counter-terrorism agents in New York, working on making a criminal case against a guy by the name of Usama Bin Laden who was the leader of al-Qaeda. Most people had not heard of either him or the group yet. They were conducting surveillance; they were doing searches; and they were talking to people. They spoke to a number of people: informants,

witnesses, police officers, foreign police officers, foreign spies, they even spoke to al-Qaeda operatives who came from the dark side to talk to us. We had a number of cooperators who agreed to talk to us. There was only one group they could not talk to under this wall, and that was the FBI intelligence officers conducting an intelligence investigation into al-Qaeda and Usama Bin Laden who were right across the street. They were conducting searches, FISA wiretaps, and physical surveillance; they were up on some of the same instruments. The two best sets of minds we had looking into al-Qaeda, and there was an antiseptic separation between them. The Patriot Act destroyed, in a single stroke, that wall. Pat Fitzgerald has a way of describing it that I have taken to repeating. He says, "You know what? The Patriot Act was not rushed; it came ten years too late."

So this is the debate. I do not want to say there are "sides" because there really are not sides in the Patriot Act debate. The sides sort of wrap themselves around and meet in the back. Many folks who say they are on the right have the same concerns as folks who say they are on the left. The answer is that theirs are concerns that can be—and should be—answered by those of us in the government.

Good people are always going to disagree about important public policy issues, especially when it comes to government power. That disagreement is healthy. Questioning government power is the healthiest thing in our public life. Our country was founded by people who had big problems with government power, which is why they were not done with the Constitution when they wrote it. That is why they wrote the Bill of Rights. All of us should question power. I am in the government and I know that sounds like a strange thing for me to say. My obligation is to answer those questions. My obligation is to explain what I am doing, because if I cannot explain it, I ought not to be doing it. Sunshine is the world's greatest disinfectant. What we are trying to do, as we discuss our response to terrorism and especially with the Patriot Act, is to talk until you are sick of us. Our goal is to get as much stuff out there, to get as much declassified, to push details, to get all of it out there that we can without jeopardizing investigations. (We will share those intelligence details in a classified setting with Congress.) We want an informed discussion of these tools under the Patriot Act. We cannot do that unless we supply the details, and you demand the details.

Both sides, as we do this, need an attitude adjustment. People who are concerned, who are critics, need to take a breath, grab the glass of chardonnay a little tighter, and demand the details. In the end, they may disagree and say, "I still do not like it." And that is fine. That is what is great about this country. But do it with understanding. On the other side, people who are defending the Act should not be impugning people's motives, should not be saying those people are Commies when they question government power. They should question power, and it is a healthy thing to do.

Let me return to my proposal. As we have that discussion, I hope all Americans, or at least those of you in this room, will leave your minds open to the possibility that I am not crazy; that you will leave your minds open to the possibility that there has not been a trade off of liberty for security, and that there need not be. However you come out on the debate, I urge you to participate and demand the details. Understand them and then take a position. If we do that, we will be in a great place. When we look back on this thirty years from now, whether people agree or disagree, I hope they will say, "We looked at it; we thought about it; we chewed on it; and we did the best we could." Thank you for being part of the debate.