TESTIMONY OF WILLIAM P. BARR
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BEFORE
THE HOUSE SELECT COMMITTEE ON INTELLIGENCE
OCTOBER 30, 2003

Mr. Chairman and Members of the Committee, it is a pleasure to provide my views on the adequacy of existing law to protect the Nation from attacks by foreign terrorists; the significance of the PATRIOT Act adopted shortly after the attacks of 9/11; and the organization of our domestic intelligence and counterterrorism activities. By way of background, I served in the Administration of President George H.W. Bush as Assistant Attorney General for the Office of Legal Counsel, as Deputy Attorney General, and ultimately as Attorney General of the United States. During these years I was substantially involved in U.S. counterterrorism efforts and national security matters. Previously, I also served on the White House staff and the Central Intelligence Agency. I am presently Executive Vice President and General Counsel of Verizon Communications. The views I express today are my own and do not reflect the views of any governmental agency or corporation with which I have been or am presently associated.

I. Constitutional Framework

Let me start by making some general observations about the legal framework governing our efforts to defend the nation against attack by foreign terrorists.

One of the questions the Committee has asked is whether existing law is adequate to provide for fighting terrorists. I think the answer ultimately must be "Yes." But that is

because I believe that the critical legal powers are granted directly by the Constitution itself, not by Congressional enactments. When the Nation itself is under attack by a foreign enemy, the Constitution vests the broadest possible defense powers in the President. As the Supreme Court has observed, the Constitution is not a "suicide pact," but rather confers the power to use all means necessary for its own preservation and defense. No foreign threat can arise that the Constitution does not empower the President to meet and defeat.

For decades leading up to 9/11, and to some extent since then, there has been confusion about the proper legal model to apply to our counterterrorism activities here at home. There has been a tendency to view them primarily as law enforcement activities rather than national defense matters. This makes a difference because the scope of governmental power, and the restrictions on that power, varies according to the kind of *function* the government is performing. In this regard, the Constitution distinguishes between two different functional realms:

The first is where the government is acting solely in a *law enforcement* capacity. Here the government's role is disciplinary – sanctioning an errant member of society for transgressing the internal rules set within the body politic. The government is seeking to investigate, detain, and ultimately punish persons because their actions constitute violations of our internal laws. In this realm, the government's actions are subject to the greatest constraints. Indeed, the presumption largely lies against the government; the accused is afforded numerous rights to which the government's interests are

subordinated; courts are interposed as the arbiter; and the government must satisfy strict standards – "probable cause" and ultimate proof "beyond a reasonable doubt." The premise in this realm is that it is better for the government to fail than to make a mistake.

The second situation is fundamentally different. When a foreign enemy threatens the nation, our body politic is not using its domestic disciplinary powers to sanction an errant member but rather is exercising its *national defense powers* to protect against an external threat and preserve the very foundation of all our civil liberties. When there is a state of armed conflict, Presidential war powers are at their apex. The Constitution vests in the President -- both as Commander-in-Chief and as an inherent element of "Executive Power" -- the ultimate responsibility for determining what actions are necessary to defeat the aggressor. Here, the Constitution gives no rights to foreign forces attacking the United States. The rights criminal suspects have under our domestic justice system are inapplicable. The Constitution is concerned with one thing – destruction of the enemy. Having chosen war, the enemy's fate is judged by the rules of war. Within the realm of national defense, the premise must be that the government cannot be permitted to fail.

How do our counterterrorism efforts fall within this structure? There can be no doubt that combating foreign terrorists is a matter of national defense and falls squarely under the war power. The terrorists we face today are well-organized foreign forces that have publicly declared war on the United States; called for the killing of Americans wherever found; built up a global network of facilities and cells geared to make war on the United States; carried out a series of attacks on Americans, including the attacks on a

naval vessel, barracks, embassies, and the highly-coordinated attacks of September 11 in our homeland; actively sought weapons of mass destruction; and vowed to continue these attacks. This goes well beyond any threshold necessary to establish a "state of armed conflict" and mark these organizations and their adherents as "unlawful belligerents" subject to the laws of war.

Furthermore, foreign terrorists are subject to the war power whether or not there has been a formal declaration of war. It has long been established that, whenever foreign forces attack the United States, the President is "bound" to use his war powers to resist by force regardless of any declaration: "[I]t is none the less a war, although the declaration of it be 'unilateral.'" *The Prize Cases*, 67 U.S. 635, 668 (1862). And it is equally settled that those who engage in irregular operations against the United States -- "secret participants in hostilities, such as banditti, guerillas, spies, etc." -- are subject to the laws of war. 11 U.S. Op. Atty. Gen. 297, 307 (1865). Moreover, the status of a foreign terrorist as an unlawful belligerent does not change depending whether he is inside or outside the United States. As the Supreme Court noted in the now famous case involving the military trial and execution of Nazi saboteurs, never in the history of our Nation have foreign enemies who infiltrated our territory been accorded the status of civilian defendants with all the rights enjoyed by citizens of the United States. *See Ex Parte Quirin,* 317 U.S. 1, 42 (1942).

What does it mean, as a practical matter, when we choose to deal with terrorists as belligerents under our national defense powers? It means that we confront them as enemy combatants not as criminal suspects; that we can conduct searches against them without meeting the standards of the criminal justice system; that when we seize them we

are capturing them, not arresting them; that we detain them to incapacitate them, not antecedent to bringing criminal charges; and that we can hold them until we deem hostilities at an end, not for a pre-determined sentence.

Significantly, while foreign terrorists clearly fall under the war power and can be responded to accordingly, the government may also choose to treat their actions as violations of law and wield its law enforcement powers against them. Terrorism can constitute both unlawful belligerency *and* a crime. Indeed, over the past 30 years, Congress has passed a series of statutes criminalizing virtually every aspect of international terrorism. This has provided valuable tools to the government. Internationally, it has created a mechanism for sharing evidence, extraditing suspects, and obtaining complementary enforcement actions or investigative cooperation from other governments. Domestically, it has provided an alternative set of tools the government may use to investigate and incapacitate terrorists or to induce their cooperation.

The critical point, however, is that the terrorists' potential status as combatants or criminals are not mutually exclusive categories. The fact that terrorists' actions have been made criminal does not preclude the government from treating them as enemy combatants without any rights under our criminal justice system. Conversely, the fact that terrorists are unlawful belligerents does not preclude the government from wielding its law enforcement arsenal against them. In short, the status of terrorism as both a crime and unlawful belligerency confers two alternative sources of power, and the government is free to use either or both.

II. Adequacy of Current Statutes

Unfortunately, in the wake of Watergate and the Vietnam War, and prompted by several sensational instances of abuse, our county embarked on a 30 year campaign to curtail the powers of our security agencies. A mindset developed during this era that all national security issues could be dealt with within the framework of our criminal justice system or pursuant to carefully-hedged, detailed procedures derived from that system. Many either denied or made light of the notion that the President had Constitutional responsibility for judging what was required to protect the nation's security. Numerous statutes were passed, such as FISA, that purported to supplant Presidential discretion with Congressionally crafted schemes whereby judges became the arbiter of national security decisions.

I believe that many of the statutes enacted in this period were too restrictive and posed significant problems for effective counterterrorism efforts. In the wake of 9/11, however, two steps were taken that have gone far toward redressing the balance. First, the President's order on military tribunals has underscored that terrorism -- in the final analysis -- is a matter of national defense and that, apart from whatever statutory tools are in place, the President has broad powers to protect the nation. Second, the PATRIOT Act fixed many of the problems with FISA and filled a number of other gaps in our surveillance and intelligence collection laws.

FISA, enacted in 1978, is the principle statute controlling the power of the government to gather foreign intelligence information within the United States, including intelligence on international terrorism. To justify a search, it required the government to establish to a special court that there was "probable cause to believe that the target … is a foreign power or an agent of a foreign power." Further, FISA required that an executive branch official certify that "the purpose of the surveillance is to obtain foreign intelligence information."

One of the chief problems that arose under FISA was that this latter "purpose" provision became construed as requiring that the primary purpose of the surveillance had to be for foreign intelligence. This resulted in the notion that a "wall of separation" had to be maintained between intelligence and law enforcement activities. This, along with restrictions on the use of grand jury material, critically impaired our counterterrorism efforts by preventing coordination and sharing between law enforcement activities and intelligence activities. The single greatest accomplishment of the PATRIOT Act was to remove this wall of separation by requiring that a FISA surveillance only have collection of foreign intelligence as "significant" purpose. This now opens the way for the kind of closely integrated effort between law enforcement investigations and intelligence gathering that is essential.

While the PATRIOT Act was a major step forward and remedied FISA's most severe problems, I believe FISA remains too restrictive in a fundamental respect. It still requires that the government establish "probable cause" that an individual is either "a

foreign power" or an "agent of a foreign power." Where a foreign individual is concerned, the government must still show he is acting "on behalf of a foreign power." I believe that this makes the standard too high and too inflexible. The Moussaoui case shows how potentially catastrophic this standard could be. After Moussaoui was detained, FBI officials felt they could not establish an adequate basis under FISA to search his computer. They had little to establish a nexus to a foreign power. While apologists for FISA have advanced tortuous arguments that the "probable cause" standard could have been satisfied in that case, the truth is that it was quite problematic. As a result, the FBI was unable to get access to the computer until it was too late. Had there been information in the computer that led to exposure of the 9/11 plot, timely access could have saved 3,000 lives. It is easy to see that this same problem will repeat itself in the future.

I question this standard in two respects. First, there is no reason why it should not apply to foreign *individuals* instead of requiring a nexus with a foreign "power." In this regard, it should be borne in mind that Fourth Amendment rights only extend to "*the people*." Thus, where the government sees an *individual* foreign person apparently acting as a terrorist, that should be a sufficient basis to conclude that the individual is not part of "the people" and thus not protected by the Fourth Amendment. In an era of shadowy terrorist groups, it is frequently impossible to determine an organizational nexus at the initial stages of detecting potential terrorist activity, and for that reason extending coverage to individuals is important.

Second, the Fourth Amendment only protects against "*unreasonable*" searches. This is a relative standard. What is reasonable depends on the situation. It seems obvious to me that reasonableness can depend on the magnitude of the danger that the government is trying to deal with. Thus, the standard of reasonableness when the government is acting in purely a law enforcement mode may be different than when it is acting to defend the nation against foreign attack, and especially against foreign terrorist attacks designed to erode the very foundation of our freedoms. The standard for searching for a marijuana joint in the back seat of a car may be different than the standard for searching for a nuclear device that could obliterate Washington, D.C.

Most of law fleshing out the "probable cause" standard developed in the criminal law enforcement arena where it might be logical to insist on a higher evidentiary standard. However, when this standard is imported into the national security realm, it calls for a greater degree of assurance than is appropriate given the magnitude of the potential threat. It also puts judges in the position of making the ultimate judgment about the magnitude of the risk to national security -- assessments judges are not competent to make or responsible for making under the Constitution. Given the exigencies that exist in the area of terrorism, and the ultimate judgments that have to be made about national security, searches should be allowed when the government has a reasonable belief that persons are engaged in foreign terrorist activity and that a search is important to protect the public safety.

Another area under FISA that remains too restrictive relates to the government's ability to obtain third-party business records. When terrorists are on the move, they leave an evidentiary tracks – motel records, ATM records, car-rental records, and so forth. When government agents are hot on their trail, time is of the essence. Delay in gaining access to these records can spell the difference between successful apprehension and mass slaughter.

The law is clear that a person has no Fourth Amendment rights in these records left in the hands of third parties. Having willingly entered into transactions with other people, one loses any legitimate expectation of privacy in the records that reflect those transactions. Thus, the government is free to obtain such records from third parties without any showing of probable cause; it is enough that the records are relevant to an investigation.

In most other law enforcement and administrative contexts, government agencies are authorized to obtain such records expeditiously when they are relevant to an investigation by directly issuing "administrative" subpoenas. There is no requirement for prior judicial review. Indeed, there are over 335 such authorizations on the statute books. The FEC, for example, can issue such subpoenas when it is looking into possible election law violations. The Justice Department can issue such subpoenas when it is looking into false claims against the government.

But for some inexplicable reason, FISA still requires the government to go to a judge to obtain an order when it seeks these records in a counterterrorism investigation. This makes absolutely no sense since it is precisely in the terrorism context that the need for speed is most acute and the consequences can be most catastrophic. Foreign terrorists should not get rights that no one else in the country has. The President has called for giving the FBI administrative subpoena authority for third-party records relevant to counterterrorism investigations, and Congress should quickly enact his proposal.

Finally, there has been another development in the law over the past 30 years that, I believe, threatens the vigor of our counterterrorism efforts. A series of court decisions has watered down the doctrine of immunity so that it is now easier for a person to sue governmental officials in their *personal* capacity when it is alleged that they have violated that person's constitutional rights. These suits are punitive, since the aggrieved person can otherwise obtain compensation from the government rather than the individual. The theory is that the danger of personal liability will make government agents more observant of the rights of those with whom they deal. The prospect of having one's personal finances and career destroyed has had the predictable effect -- officers have tended to become more risk averse.

Whatever the merits of this approach in general, I question whether this should be applied in cases involving counterterrorism actions. Counterterrorism is a realm rife with unprecedented circumstances and gray zones. It is an area in which the stakes are high and yet judgments frequently have to be made with less than perfect information and

under tremendous time pressure. It seems to me that we do not want these officials to be making decisions based on worries over their own personal liability.

A somewhat dramatic example makes the point. I have never heard anyone suggest that the President does not have the power to order the shoot down of a high-jacked passenger plane if he believes that is going to be used for an attack. I have heard no objection to the combat air patrols over our cities or to the positioning of surface-to-air missiles around Washington. And yet this would mean taking the lives of a hundred innocent Americans, even though the Constitution prohibits the taking of life without "due process." Suppose a plane is high-jacked and minutes from Washington. Based on confused and imperfect information the President makes his best judgment to shoot down the plane. But he turns out to wrong – it was a "traditional" high-jacking after all. No one would deny that the government should pay compensation. But should we allow the President to be sued personally?

Of course, the principle reaches down to officials at every level. How about the TSA officer who strongly suspects that a passenger on a flight about to take off is a terrorist? He has troubling indications but not "probable cause." The passenger threatens to sue him if he is removed from the plane for further questioning? Does the officer play it safe for the passengers or play it safe for himself.

I believe Congress should consider strengthening immunity protection for officers involved in domestic security. If mistake are made and rights are invaded, the

government should pay compensation. But if the government certifies that an individual official was acting within the scope of his duties and in a good faith belief that his actions were reasonable to protect the public safety, I question whether it makes sense to allow punitive litigation against the individual to proceed.

III. The Organization of Domestic Counterterrorism Activities

An idea making the rounds these days is the notion of severing "domestic intelligence" from the FBI and creating a new domestic spy agency akin to Britain's MI-5. I think this is preposterous and goes in exactly the wrong direction. Artificial stove-piping *hurts* our counterterrorism efforts. What we need to do now is meld intelligence and law enforcement more closely together, not tear them apart. We already have too many agencies and creating still another simply adds more bureaucracy, spawns intractable and debilitating turf wars, and creates further barriers to the kind of seamless integration that is needed in this area.

Since 9/11, the criticism of the FBI as a counter-terrorism organization has focused on three related shortcomings. First, it is said that the Bureau focused on investigating terrorism solely as a criminal justice matter and sacrificed the need to gather intelligence to the exigencies of building particular cases for prosecution. Second, the FBI failed to exchange information with other elements of the Intelligence Community. And finally, because of its dispersed approach to building individual criminal cases, the Bureau never developed the capacity to fuse and analyze all available intelligence.

But these shortcomings are inherently fixable, and both Attorney General Ashcroft and FBI Director Mueller have moved vigorously and comprehensively to address them. Unfortunately, some say these reforms are doomed because the law enforcement and national security functions cannot co-exist in the same organization. They claim that the subordination of the national security function was the result of a deep institutional law enforcement bias within the FBI and this "mindset" will always mean national security objectives are sacrificed to law enforcement goals.

But the FBI has never been solely a law enforcement agency. It has always combined two functions, serving as the nation's criminal investigative arm, as well as its domestic security agency responsible for defending against foreign threats ranging from espionage to terrorism. Contrary to the critics' suggestions, the main impediment to the FBI's carrying out both roles was not any incapacity inherent in the agency itself. Rather, the root cause of the difficulty lies in the vast web of external legal constraints placed on the FBI by policymakers, including Congress and the Courts, over the past 30 years.

For three decades leading up to 9/11, Congress was at the fore of a steady campaign to curtail the Bureau's domestic intelligence activities and impose on all its activities the standards and process of the criminal justice system. These constraints made it extremely difficult for the Bureau to pursue domestic security matters outside the strictures of the criminal justice process. Prohibitions on sharing grand jury information with intelligence agencies and with using intelligence information in criminal

investigations created a "wall of separation." That separation effectively forced the Bureau to proceed largely on the criminal justice track if it wanted to preserve the option of using its law enforcement powers to incapacitate terrorists once they were detected.

The PATRIOT Act has now alleviated these constraints, allowing the closer meshing of law enforcement investigations with intelligence collection activities. Now that this artificial barrier has been removed, it would be a catastrophic mistake to deracinate domestic intelligence from the FBI and create a separate agency to perform this function. If we should have learned one lesson from 9/11 it is that domestic intelligence and criminal investigation are inextricably related and should be integrated to the maximum extent possible. The right thing to do is to fix the problems that occurred at the FBI -- and they are being fixed. Creating a new agency does not fix anything – it just makes the problem of coordination worse than before.

After all, in the FBI we start with the largest, most professional and highly trained "information gatherers" in the country, even in the world. The Bureau has always excelled at collection. Its capacity to conduct large-scale, complex investigations is unparalleled. Having operated within the United States for almost a century, it mastered the kinds of collection techniques and skill sets that are essential in developing information domestically, including questioning witnesses; interrogation; the use of sophisticated technical surveillance; the use of undercover operatives; surreptitious entries; and the most advanced forensics. Through decades it has built up a web of working relationships with 17,000 state and local police agencies, giving it access to

literally hundreds of thousands of eyes and ears on the ground and the ability to reach almost seamlessly into any community in the country. Likewise, through its worldwide network of liaison relationships, it has access to the flow of information not only from foreign intelligence services but from foreign police organizations.

Building on this outstanding base, taking advantage of the new freedoms won in the PATRIOT Act, and learning from the lessons of the past, Attorney General Ashcroft and Director Mueller are well along in transforming the Bureau into the first-class counterterrorism organization it is uniquely situated to be. The Bureau has clearly set as its priority the *prevention* of terrorist attacks before they occur, using all available tools – both intelligence and law enforcement – in close coordination. The Bureau has established an Office of Intelligence, and has otherwise built up substantial intelligence analytical capabilities. It has set up numerous mechanisms, such as its National Joint Terrorism Task Force and its Watch Center, to fuse and disseminate information throughout the Intelligence Community and state and local law enforcement agencies. It is organizing, staffing and training so that intelligence equities are given proper priority and pursued in tandem with law enforcement interests. It has reformed its dispersed case management practices, now providing national coordination of significant cases. It is recruiting the skills, developing the culture, and creating career paths to ensure that its intelligence and law enforcement missions are pursued hand-and-glove.

Its longstanding strengths, coupled with these reforms, now place the FBI in a unique position. It alone can bring to bear both intelligence gathering powers and

criminal investigative powers; ensure the kind of close integration of these efforts so as to maximize the collection and sharing of information; and manage both sets of activities in a way that preserves the fullest range of responsive options once terrorists' plans have been uncovered.

While everyone likes to talk about "coordination," it is important to bear in mind the exceptional degree of coordination that is really essential in domestic counter-terrorism. Trying to identify and catch terrorists after they have infiltrated the country calls for a level of coordination that is intensive and real time. It is not a leisurely business like estimating a rival nation's GDP or assessing its military forces. Coordination in the counterterrorism arena does not mean sending over reports at the end of each month. It calls for a fast-paced and dynamic process whereby leads developed in a criminal investigation may have to be exploited immediately through intelligence assets, and conversely intelligence information may call for immediate law enforcement action. It is absurd to think that creating two separate agencies will permit the kind of integrated effort needed.

Some say that the advantage of a new American domestic spy agency is that it will bring "focus" to the gathering of intelligence. But after cutting the ribbon on its new headquarters building, just how is this agency going to track down foreign terrorists in the United States. The bottom line is that -- given the sheer scale of our country, its legal system, and its culture – the job of collecting information within the country will necessarily depend on precisely the same people, infrastructure, and resources the FBI

has in place. While analysis of intelligence requires centralization, the collection requires wide dispersion and intensive coverage throughout the country. Tracking terrorists or uncovering a cell may require, for example, rapidly locating and interviewing witnesses around the country; locating and tracking vehicles; checking hotel records in hundreds of establishments around the country within hours; canvassing thousands of stores to determine where a particular item was purchased; simultaneously surveilling scores of sites or individuals throughout the nation; preserving, managing and exploiting hundreds of pieces of physical evidence through advanced forensics. Who does this?

Moreover, collection activities within the United States call for all the techniques and skill sets that the FBI has mastered, ranging from electronic surveillance to witness interviews. MI-5's largely made its mark penetrating Irish extremist groups. But in this country it is the FBI that has had almost a century of experience recruiting and managing undercover agents and informers, and unlike intelligence agencies, it can use both the carrot of money as well as the stick of criminal prosecution to induce cooperation. Further, the criticism that the Bureau has only a narrow law enforcement perspective is plain wrong. As its successes against organized crime and Soviet espionage clearly demonstrate, the Bureau knows well how to defer law enforcement actions in order string out and exploit undercover operations for maximum intelligence value.

The situation faced by MI-5 in combating Irish extremist groups is vastly different from the one we face today in the United States. Britain is much smaller – with 56 local police forces instead of our 17,000 – and has far more flexible laws relating to security

and civil rights. The fact is that, following the East African embassy bombings, the FBI has surpassed MI-5 and other Western security services in its ability to cover Middle Eastern terrorist groups. The FBI has been able to ferret out substantial information about terrorist activities in U.K. that had gone undetected, and MI-5 has drawn on FBI resources and talents in exploiting this information.

More importantly, there is an insurmountable problem in separating domestic intelligence from law enforcement in this country – and that relates to the end game. At the end of the day, the people looking for the terrorists are going to have to take action to incapacitate them. This may have to be done at an instant's notice. What exactly is the new domestic spy agency going to do to stop terrorists? We hear a lot of talk about "prevention," but what does that actually entail? Apart from any legal concerns, it is doubtful we will tolerate regular use of domestic hit squads. The fact is that within the United States the end game will frequently involve using law enforcement powers to take people into custody to prosecute them, if not for terrorism than for some technical offense that will still effectively neutralize them without exposing sensitive information.

But this means that intelligence activities must be conducted at every stage in a manner that preserves law enforcement options. This does not require delaying or diminishing intelligence activities. It does mean that intelligence activities must be carried out with an awareness of law enforcement options and in tandem with efforts to preserve and perfect those options. If law enforcement powers are to be invoked, its standards must be satisfied. As leads are pursued, for example, it may be necessary to

preserve evidence that can used to support future arrest. Or it may be necessary to develop alternative evidence so as to protect sensitive sources and methods. Or it may be necessary to develop potential charges on a technical violation just to have a sound basis to hold a suspect. In some cases, military tribunals might be an option, but even then legal standards must be satisfied. All of this requires full integration of intelligence collection and intelligence activities. Perhaps in Britain the MI-5 can show up at police headquarters at the 11th hour and demand they arrest somebody immediately. That will not cut it here. In short, counterterrorism in this country should *not* have an "exclusive focus" on intelligence if it is to be successful.

Nor can domestic intelligence be so insulated given our legal system. In the United States, domestic intelligence collection is subject to significant legal requirements and legal process. FISA, for example, requires preparing applications, going before judges, and establishing that there is evidence satisfying various legal standards. Even fully authorized intelligence activities can easily lapse into Constitutionally suspect areas. Undercover operations can sometimes result, for example, in government agents participating in serious criminal conduct. The FBI has had almost a century of experience working within Constitutional and legal safeguards. And while there have been lapses, there have also been lessons learned. In my view, the best way to ensure that domestic intelligence is carried out consistent with our civil liberties is to keep those activities in tandem with the law enforcement.