CATO INSTITUTE

POLICY FORUM

FIGHTING TERRORISM, PRESERVING CIVIL LIBERTIES

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Moderator:

Roger Pilon, Director, Center for Constitutional Studies,

Cato Institute

Featuring:

Rep. Bob Barr (R-Ga.)

With Commentary By:

Solveig Singleton, Senior Analyst,

Competitive Enterprise Institute;

Stuart Taylor, Senior Writer, National Journal; and

Jonathan Turley, Professor of Law,

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The Cato Institute

F.A. Hayek Auditorium

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P R O C E E D I N G S

MR. PILON: Good afternoon. Welcome to the Cato Institute. My name is Roger Pilon. I'm Director of Cato's Center for Constitutional Studies, which is hosting the forum this afternoon.

Not since Pearl Harbor has America been awakened so forcefully as it was by the terrorist attacks of September 11th. Despite frequent warnings, several coming from the Cato Institute, too many in government seemed all but asleep at the switch when the attacks finally came. Nevertheless, the first response of those officials, predictably, was to ask for more authority, presumably to do what they hadn't done the first time. It's a familiar pattern: crisis, flowing often from government failure, begets only calls for more government, all the while that the basic problem goes unsolved.

When the dust settles, one hopes that we'll have a searching examination of just why it was that such a monumental governmental failure took place on September 11th. The first and most basic business of government, after all, is to protect us from the kinds of attacks we saw that day.

In the meantime, we have to deal with the immediate demands for more power to prevent such attacks and with the

implications for our liberty. For while government's basic business may be to protect us, it cannot do that by any means. It must respect our rights while defending them. There, precisely, is the issue before us today: How can we fight terrorism while preserving our civil liberties?

More generally, how can we stop the all-too-familiar slide from crisis to leviathan? The suspension of habeas corpus during the Civil War, the attacks on free speech during the First World War, the incarceration of Japanese Americans during the Second World War, the seizure of the steel mills during the Korean War, all illustrate this slide.

In our present crisis, Attorney General Ashcroft, understandably, was the first to ask for more power. But he ran into opposition in Congress, no more so than in the person of our principal speaker today, Congressman Bob Barr, from the Seventh District of Georgia. Congressman Barr has been something of a maverick since he came to Washington in 1995, as a freshman in the revolutionary class of the 104th Congress. As he will be the first to tell you, he and the Cato Institute have not always seen eye to eye. But I will say that in the long war to reform the nation's forfeiture law, which Cato, the ACLU, Henry Hyde, and many others waged for years, Congressman Barr was in the lead with us.

In fact, at one crucial juncture he cast the only vote against a compromise bill that came out of the Justice Department. So on that matter and many others, he is clearly on record on the side of civil liberty. It came as no surprise, then, when he called upon the House to take a closer look at Mr. Ashcroft's proposals.

With that very brief overview, let me say just a bit more about our program and our speakers. Because Congressman Barr has to be back on the Hill for votes, he can be with us for only three-quarters of an hour. During that time he will speak to the issue before us; then each of our commentators will put one question to him. After that, our three commentators will themselves address the issue for about 10 minutes each; after which we'll open the discussion to questions from the audience and discussion among the panelists. When we conclude, you're all welcome to join us for a reception upstairs.

Let me now take a moment to introduce our guests. As I already noted, Bob Barr represents the Seventh District of Georgia. He was appointed U.S. Attorney for the Northern District of Georgia by President Reagan in 1986, and served until 1990. He has also served at the CIA, he has run his own law firm, and he headed the Southwestern Legal Foundation, in Atlanta.

He is Assistant Majority Whip. He serves on Judiciary, Financial Services, and Government Reform Committees. He is Chairman of the Judiciary Subcommittee on Commercial and Administrative Law, and Vice Chairman of the full Government Reform Committee. He also led -- noteworthy for today -- the successful effort to rename Washington National Airport in honor of President Ronald Reagan, which will open, we're told, tomorrow.

Our three panelists -- and I'll go in alphabetical order here, which is the order in which they will ask questions of Congressman Barr and then speak themselves -- we begin with Solveig Singleton, whom I want to welcome back to the Cato Institute. She is currently a Senior Policy Analyst, handling financial privacy and technology regulation issues at the Competitive Enterprise Institute. Prior to that she was with us here at Cato as Director of Information Studies.

She served as Vice Chairman of Publications for the Telecommunications and Electronic Media Practice Group of the Federalist Society. She has published widely, including in the Washington Times, the Wall Street Journal, the Philadelphia Enquirer, the Washington Post, and elsewhere. She has appeared on CNN, the McLaughlin Group, and other places. She is a graduate of Reed College and the Cornell Law School.

Stuart Taylor is known here in Washington widely, of course, as something of a media star. He is a weekly columnist for the National Journal and a contributing editor for Newsweek. He appears in Legal Times. He has appeared on all the networks and the Lehrer News Hour. He was Legal Affairs Reporter from 1980 to 1985, and Supreme Court Reporter from 1985 to 1988 for the Washington Bureau of the New York Times. He has been with the Baltimore Sun. He is a graduate of Princeton and the Harvard Law School.

And then, finally, Jonathan Turley is a graduate of the University of Chicago and the Law School of Northwestern University. He brings experience which is directly relevant to our discussion today. He has been with the National Security Agency. He was lead counsel in espionage cases, including the King espionage case. He has litigated cases involving domestic surveillance and a wide variety of constitutional issues; these include his successful representation of four former U.S. attorneys general in opposition to the so-called Secret Service privilege during the Clinton impeachment litigation.

With that, let me conclude with just one comment, which is of no small importance to this audience. We are already seeing attacks on the idea of limited government as a result of the September 11th events. The idea put forth by President

Clinton in his 1996 State of the Union address, that the era of big government is over, seems to be under increasing attack.

In the jurisprudential realm, for example, Linda Greenhouse, the extraordinarily thoughtful Supreme Court reporter for the New York Times, had a piece just last Sunday in the Week in Review Section, saying that the Supreme Court's Federalism revolution may have been overtaken by events. She quotes Walter Dellinger, the former Solicitor General, to the effect that Federalism was a luxury of peaceful times.

So this is something we all need to be conscious of as we think about the kind of litigation before Congress right now. The implications are far reaching even for our fundamental principles such as Federalism.

So, with that, let me invite Congressman Barr to discuss his thoughts on this issue. And let me note, first of all, that with respect to all of the speakers, they are handicapped by the fact that we are dealing here with something of a moving target. Even Congressman Barr, who is as close to the issue as anyone, is facing a moving target. And so they are all, to that extent, handicapped. Nonetheless, would you welcome Congressman Barr to discuss this.

(Applause.)

CONGRESSMAN BOB BARR,

REPUBLICAN, SEVENTH DISTRICT, GEORGIA

CONGRESSMAN BARR: Thank you, Roger. And thank you, all. Thank you very much. I do apologize for not being able to stay for the entire program. I very much would like to hear the distinguished panelists.

I was more than happy when Roger extended the invitation last week to come by in a few days, even not knowing exactly what our schedule was going to be. Out of my respect for Roger and the Cato Institute and the other panelists, and having at least some appreciation for how timely and how important it is to focus on these issues, I wanted to come by to at least share a little bit of time with you.

Roger mentioned that during times of crisis, or when there is a crisis, or when there is a significant event, those who favor government power sort of come out of the woodwork and feel emboldened to come forward and propose solutions that otherwise, even for Republicans believing in smaller government, would be quite anathema. If you think back, though, sometimes it doesn't even take a crisis.

I forget exactly what day it was when the TWA Flight 800 unfortunately crashed off of Long Island, but it was just within a matter of days, if not hours, that after that tragedy,

which turned out apparently not to have been related to terrorists or other criminal activity but a result of some poor wiring or whatever in the wing structure of the airplane, within just a very short time after that plane went down there were already cries by many in Congress, including leadership, for additional measures over and above what we had I think recently passed as part of the anti-terrorism legislation last time around that arose out of the Oklahoma City tragedy. So sometimes it doesn't even take a real crisis; it takes a perceived crisis. And then that perceived crisis becomes the vehicle for efforts to secure additional powers for government that in quieter times probably a majority of the people, or at least a larger group of people in the Congress, would not be a party to.

I noticed in the latest draft of the legislation -- and it is changing a lot -- it is, to be sure, a much better piece of legislation today than it was last week. I have gone through it, and some of the more objectionable, or most objectionable, provisions have been taken out. There remain a number of objectionable provisions. And the sort of philosophy underlying the legislation is still problematic in that it does not seek to address with a great deal of specificity specific gaps in our Federal criminal laws and procedures that relate specifically to crimes of terrorism, but has a tendency to sweep much more broadly.

But one of the changes -- and you all can determine how significant this is -- is the title of the bill. When I left last week, it was the Anti-Terrorism Act of 2001, I think -- a title with which I have no particular objection. Now it is the PATRIOT Act, "PATRIOT" standing for -- and I don't know how long it took them to come up with this, but -- the Provide Appropriate Tools Required to Intercept and Obstruct Terrorism Act. That's the "PATRIOT." That's where that acronym comes from.

So, of course, anybody that has an objection to it I suppose is going to be labeled unpatriotic, which is obviously not the case. I certainly hope they didn't take a lot of time to worry about the title of it but instead chose to focus on the substance of it, which is what we ought to be doing. And it is very timely to do this.

Let me follow up on what I mentioned a moment ago, that some of the most objectionable provisions of this with which I think even those who would be supportive of a broader approach to this problem than I, or many probably in this room, would find objectionable. For example, as you all recall, we faced last year in the Methamphetamine Anti-Proliferation Act, I think it was, of 2000, the now infamous -- and even then infamous -- sneak-and-peek provisions, that would have allowed had it gone into effect -- which it would have if the Senate had its way; it passed the Senate I think under unanimous consent as part of the

bill -- the sneak-and-peek provisions which would allow the government, as a matter of routine, as a matter of course, to conduct a search of a dwelling or business or whatever structure it is, whatever, without providing contemporaneous notice.

Now, certainly there are circumstances even under current Federal law that allow for that in exigent circumstances. But as a general rule, the law still prevails that in order for the government to execute a lawfully acquired search warrant -- actually, to execute even an unlawfully obtained search warrant -- the government has to provide contemporaneous notice. Otherwise there is no remedy there. You have no way of contesting the constitutionality of the factual correctness of the search warrant. That sneak-and-peek provision that had been contained in the methamphetamine bill from last year was stopped in the House. And, I daresay, many of you all in this room remember that and played a role in keeping that very bad piece of legislation off of the House agenda in the waning days of the last Congress.

That provision, or at least parts of it, were put into this draft, but that has been taken out. And hopefully it will stay out. But that is something that I think would clearly, under no circumstances -- even these circumstances -- not be a justified amendment to current criminal procedure.

There have been a number of other provisions that have been taken out, but another one that would have dramatically changed the landscape of criminal jurisprudence in this country would have allowed for the U.S. Government to use evidence against U.S. citizens in this country, evidence acquired in foreign countries, in violation of our Constitution, so long as they were acquired in that foreign country consistent with the laws of that country. I don't know about you all, but that wouldn't leave me with much of a feeling of comfort if I were on the receiving end of that evidence, simply that it was acquired consistent with the laws of the country in which it was acquired, even notwithstanding that it was acquired in violation of our Constitution.

This would have been a very significant erosion of constitutional liberties in this country. That provision also, in this latest draft, has been removed. But there are a number of troubling provisions in this latest draft. And there are changes to criminal procedure, and there are ambiguities that are problematic.

Let me just mention one. You all probably remember Project Carnivore, which surfaced last year in the form of some hearings that we held in the Judiciary Committee. We actually passed legislation that would have addressed the problems presented by Project Carnivore. We were not able, in the rush of

legislative events, to get this through the House in the last weeks of the prior Congress, but it's back.

Carnivore is the project -- which has since been renamed, but I like "Carnivore" so that's why I keep using it, and it's very appropriate -- Project Carnivore is the project of the FBI that allows for the FBI to take, in essence, a black box and attach it to the Internet service provider's operation and then sift through whatever e-mail traffic comes through that Internet service provider, to pull out that identifying information that the FBI believes it has a right to obtain. And it does this under the pretense that what it is pulling out is only the same information sent over the Internet that is the same as or the equivalent of a phone number. That is, an incoming phone number that is trapped by a trap-and-trace device or simply the outgoing number that is taken with a pen register -- just the identifying information.

Well, that's problematic because the information that you can secure from the bundle of identifying information for an Internet or an e-mail transmission goes far beyond simply what you get from taking a phone number. A phone number gives you nothing more than a phone number. If you capture the identifying information from an Internet transmission or an e-mail transmission, you necessarily get much more than simply the name

of the person that it's going to or the Internet name of the person that it's going to.

This was the essence of the hearing that we had last year on some legislation that essentially would have, for purposes of obtaining a court order, such as a pen register or a trap-and-trace, would have at least put people's Internet and e-mail transmissions on par with the privacy that they have with a telephone communication. So the government would not be able to get that information without a full-fledged Title III court order. Well, this is also back.

There are provisions at the very beginning of this legislation that codify the position of the FBI, that it ought to be able to get that information with a minimal showing that you have to make now to get the phone number information for a pen register or a trap-and-trace device. And even though in discussions that we've had we are assured that the government has tightened the provisions in this bill to not authorize it to obtain more than you get from a phone number if you tap into that Internet or e-mail transmission, the problem is the legislation, if you look at it, leaves that up entirely to the government essentially to determine what is or is not the contents of such communications.

If you look and you see, it says "but not including the contents of such communication." Well, you get into a debate

because there is so much technical information about what does or does not constitute the contents of the communication, how much of that is just the identifying information.

When you have a URL or one of these other packets of information off of the Internet, which is basically the "www" information, and you can secure that, well, then you know where that person has visited. And that, I believe, ought to certainly constitute information which ought to have a higher degree of privacy, and therefore require a greater burden on the part of government to secure it than simply a telephone number.

Those are the sorts of problems that we're faced with in this legislation, both in terms of specific changes to Federal law and criminal procedure that go beyond those that are, strictly speaking, even reasonably necessary to address gaps in current Federal law and procedure to tackle problems of terrorism. And almost all of these provisions, such as those that provide for nationwide service of electronic surveillance orders or nationwide service of search warrants, also are not limited to acts of terrorism or acts of international terrorism; they would apply generally to the criminal law.

And with that, Roger, I'm just sort of identifying some of the type of problems that we are trying to come to grips with. Let me say that we probably will have a markup beginning as early as tomorrow afternoon I believe. And I suspect that it will be

on very much a fast track, even though we have, as I say, bought a little bit of time -- a week or so -- over the last week. And even though there have been important changes made to it which are for the better, it still has a number of very, very problematic provisions and implications in the legislation.

MR. PILON: Thank you very much.

Now we're going to have a question from each of our panelists to Congressman Barr and he will respond, and then he is going to have to leave at about quarter-of. Solveig, why don't you ask your question.

MS. SOLVEIG: My concern is that one thing that's noticeably missing from the PATRIOT proposals and the earlier proposals is an attempt at anything referring to sort of serious CIA or FBI reform that might improve the intelligence capabilities and the basic competence of those organizations. What I see in the proposals instead is more expanded legal powers for those agencies and no question of their basic competency.

To what extent have people on the Hill, congressmen and staffers, actually been presented with evidence that some of these expanded legal powers that they're asking for would actually have been helpful in preventing the types of attacks that took place on the World Trade Center? For example, in the case of some of the abandonment of the warrant requirement, to what extent have law enforcement actually been able to show that

a delay of hours or days because a warrant is required would have been instrumental in preventing the attacks?

CONGRESSMAN BARR: That's an excellent question, and it goes to the heart of a problem that many of us have with the whole approach by the administration in this instance. And the Attorney General was I think very straightforward and very honest, and I give him credit for this. He responded specifically to that question when we had our hearing with him last week before the House Judiciary Committee. He said: I'm not here to tell you that had any or all of these powers been available to us prior to September 11th that we could have prevented the acts of September 11th. And I give him credit for being very honest about that.

What we see here is an exercise in looking at a problem and failing to come to grips with what I believe is the real problem. And that is not the lack of government power to prevent or deal with the attacks that occurred on September 11th but a lack of proper execution of powers that the government already has. And that of course is much harder to deal with and much more embarrassing perhaps than just asking for more power.

For example, the Federal Government has essentially plenary authority already to secure airports subject to Federal jurisdiction. The government can already stop people from going into whatever areas it believes need to be secured from

unfettered access. We obviously didn't do that. The government already has plenary authority, in an international context, to gather foreign intelligence. The government has unfettered authority right now to coordinate as it sees fit that intelligence that it gathers. It has absolute authority to decide how to disseminate that intelligence information once it has been acquired and gathered and coordinated.

It doesn't need any new authorities to do a better job of any of those things, yet there is nothing in this legislation that addresses those things; it is absolutely silent. And hopefully, at a minimum -- even if this passes or something similar passes that remains problematic -- hopefully we will have some very serious and continuing oversight to address what I think are patently obvious very serious problems with the exercise of existing authorities by the Federal Government, including in the intelligence area.

MR. PILON: Stuart?

MR. TAYLOR: Congressman Barr, I have a 14-part question with several subparts, but I think Roger is going to limit me to the first.

(Laughter.)

MR. TAYLOR: It goes to the detention provision, which I think has been quite controversial. The administration's original proposal has narrowed considerably; we're not quite sure

what it's going to end up being. But my question is a hypothetical one, going to what it should be, and hopefully representing the kind of new nature of the dangers we face. Here is my hypothetical:

A Pakistani chemistry major, with a student visa, no immigration problem, at a university in Chicago, is picked up. And what the FBI knows about him is this: he had downloaded articles about how terrorists might use small planes to start an anthrax epidemic and had shown an intense but unexplained interest in crop dusters. That's all they know. Should they be able to arrest him? How long should they be able to detain him, either under current law or under whatever the law should be?

CONGRESSMAN BARR: Under the bill as originally proposed, they essentially I think could have detained him indefinitely. Under this latest permutation, they probably would be limited to seven days detention. I have not been able to determine exactly the parameters of that and what showing would have to be made after the seven days, but I think they would at least seem to have limited it to seven days' detention, and then they would have to go into court.

My view is I have no problem, if the government has probable cause to believe that a person is engaged in activity in furtherance of terrorist activity or terrorist activity itself or conspiracy to commit terrorist activity, I have no problem at all

with the government being able to pick that person up, if that person is an alien, and detaining him for a reasonable -- certainly not more than seven days -- but a reasonable period of time so that it can gather the evidence and seek to have that person permanently removed from U.S. jurisdiction.

This proposal that we're dealing with here goes much further. And there are a lot of other aspects of the hypothetical that are dealt with here. It's not simply just the length of detention, but the type of material that would provide a predicate for the government to detain you in the first place is very vague and very, very broad I think in this legislation. And that is something else that we ought to look at.

MR. PILON: Jonathan?

MR. TURLEY: Congressman, my question actually deals with a different aspect, which is Section 153 of the Act, which deals with FISA. Judging from the phone calls coming into my office, I think about 300 Americans just found out there was such a court as FISA, and certainly everybody who is a reporter. This is the Foreign Intelligence Surveillance Act court. And it obviously has alarmed a number of people. You're very familiar with it, I know, in your past work.

Section 153 takes out the word "the" and puts in "a significant" purpose as a critical change. It hasn't gotten a lot of attention, but originally foreign intelligence had to be

"the purpose" of a FISA investigation. I guess my question is sort of twofold; it's not multifold but let's say twofold. One is, how do you stand on that change? And the second question is, as we talk about the sunset provision, there is obviously going to be some review. And one of the concerns of the academics and the public, I think, about the FISA court is the extent of that review. That is, whether Congress, and a significant number of members like yourself, will have a chance to look at really the targets that have fallen under the new expanded language.

I've been in front of the FISA court, and I thought that, frankly, NSA and other agencies exercise some discipline, but I think a lot of citizens are concerned about how extensive the review will be to look at the real nature of the targets under FISA.

CONGRESSMAN BARR: Jonathan has put his finger on a very important part of this that, he is right, has not received a great deal of public scrutiny, primarily I suppose because this animal, the Foreign Intelligence Surveillance Act, and the special panel of the Federal court that reviews it, does not purposefully receive a lot of public attention. It's not supposed to receive public attention, and of course it doesn't.

The problem is -- and let's take electronic surveillance -- under a normal electronic surveillance scenario, in the context of a person alleged to be violating Federal

criminal law, the government is required to go to Title III, the so-called Title III wiretaps in the criminal code, to be able to electronically surveil that person. And Title III has a number of very important restrictions and limitations in it, a lot of hoops the government has to jump through. Almost all Title III applications are approved, notwithstanding that. And the reason for that is, by and large, because the government is forced to do this, they do a much better job than they otherwise would of making sure that they do comply with the law, because the law is very strict in Title III. So it takes a lot of work and a lot of paperwork for the government to get a Title III wiretap.

Switch over a for a moment into not a criminal setting but a foreign intelligence setting. If the government seeks to gather electronic communications or if they seek to electronically surveil a person that they believe is the agent of a foreign power and they want to tap that person's phone in order to get foreign intelligence information as opposed to criminal violation information, evidence, the burden is much lower. They don't have to jump through all of the hoops. They don't have to establish all of the predicates, and they are not bound by all the limitations that they would be in a Title III criminal law setting.

There has never been a FISA application that has been disproved. So, it isn't as if the government has difficulty

securing either one of these in practice. And if in fact a purpose of a electronic surveillance request of the court is criminal, then the government currently has to go through the Title III. What the government is trying to do here is to say that if a purpose of it, if any purpose of it -- and I don't know how they would quantify this and this is a problem if there are 10 purposes for which it seeks this electronic surveillance -- if a purpose is to gather foreign intelligence, then they can use the more lenient FISA route and not have to go the Title III route.

That has been changed to some extent in this latest draft so that it says, I think, "a significant purpose." But the primary purpose could still be gathering evidence sought to be used in a criminal setting as long as a significant additional purpose is gathering foreign intelligence. Then the government still, according to I suspect its interpretation of this law if it becomes law, would be that they would not have to go the Title III route; they could go the more lenient FISA route.

I disagree with that. I think that, as a minimum, if the primary purpose is criminal, to gather evidence of criminal wrongdoing, such as espionage, violation of our terrorist laws, or whatever, any of our criminal laws, if that is the primary purpose, then regardless of whether there is a secondary or significant or important purpose to gather foreign intelligence,

they still ought to have to go the more rigorous route of complying with the Bill of Rights and all of the case law that applies to gathering evidence against somebody in a criminal setting through electronic surveillance means currently.

So I think this still has a ways to go in order to be an appropriate loosening in any respect of FISA.

MR. PILON: Congressman Barr, thank you for taking the time this afternoon to come over to be with us. I know you have to leave now, so we will resume our program.

CONGRESSMAN BARR: Thank you. And if there are materials that you all come up with or that you all have to get over to us, I would certainly be glad to use them. I know you all have done a great deal of work already, but the next couple of days are going to be crucial.

MR. PILON: Thank you very much.

CONGRESSMAN BARR: Thank you all very much. Thank you, Roger.

(Applause.)

MR. PILON: We are going to resume our program now. The speakers will come to the podium now for 10 minutes each.

Solveig.

SOLVEIG SINGLETON,

SENIOR ANALYST, COMPETITIVE ENTERPRISE INSTITUTE

MS. SINGLETON: Thanks, Roger.

I would like to start by saying, as a general matter, that I don't think the civil liberties debate in the U.S. is going to look the same for a long time, after the events of September 11th. I know, after waiting for two days to make sure that the people who I knew in the World Trade Center had come out safely, I did not even want to hear the word "privacy." And I think that civil libertarians will have to be very, very careful that what they are saying about these measures does not begin to sound like empty rhetoric.

Having said that, we're still alive. The Constitution is still a worthwhile experiment that has been going on successfully for 200 years. And the Congress is still supposed to be a deliberative body; not the executive branch, which launches immediately into furious action.

What I would like to do today is go over my understanding of what some of the newest proposals that have just come out this morning in the PATRIOT Act. I would like to just go over my system for ranking those proposals in order of what I see as their threat to our tradition of limited government. So I have given the proposals that I think do not pose a fundamental

threat a green light; proposals that represent a significant change from current investigative practices a yellow light; and then proposals that do represent a fundamental threat to our property and our personal rights a red light. A green light does not necessarily mean we support the proposals or that they should pass them without reading them; it just means that they could be passed without posing a fundamental threat to our most important liberties.

To give you an example of something that I have given a green light, several provisions, Section 103, 154, and Sections 206 of the PATRIOT Act, would allow increased information sharing between agencies, such as criminal law enforcement, foreign intelligence agents and the sorts of agencies that are involved with regulating who comes and goes in and out of the country, related to border patrol issues. I think this provision is basically a fairly sensible one. In addition, it's going to sunset on December 31st of 2001.

Another proposal which formerly had rated a red light has, under the new provision, in my view, switched to green light status because of the substantial improvements that have been made to it in the last few days. And this was the provision, now in Section 302 and Section 309, that would redefine some ordinary crimes as terrorism. And people were particularly concerned that

ordinary crimes like gun possession or computer crimes would suddenly be considered terrorist acts.

Well, the new amendment specifies that these will be considered terrorist acts only if "calculated to influence or affect the conduct of government by intimidation or coercion or to retaliate against government conduct," and also if they're going to cause some sort of serious harm. So, basically, I think that the danger of those expansive provisions has been largely resolved by the amendment.

Now, I'll move on to proposals to which I've given a yellow light. One would allow tracing of Internet traffic without a warrant. That's Section 101 of the PATRIOT Act. And this is some of the things that Bob Barr talked about when he was talking about Carnivore. Essentially, the new proposal represents a significant departure from the current standard, which is probable cause. And I think the courts are going to take a very, very close look at that.

I think ultimately that if the agencies can provide some meaningful assurance that they can intercept the tracing information only, without seeing the content of the message, that this measure might be helpful to them, and also the civil liberties problem would be confined. But that, for now, gets a yellow light, until further amendments have been made to it. The

current amendments do provide that it will sunset on December 31st, 2003.

Another yellow light provision is the nationwide search warrants. That's Section 108 and Section 351 of the PATRIOT Act. And the problem there is, on the surface, they're looking for a consolidation, they're looking for an administrative change, so that they can get one warrant from one Federal court instead of having to go to all 50 States, if an e-mail is passing through many States, in order to get their search warrant. So it may in fact help them save a lot of time in initiating an investigation, which could be very important.

However, the courts must, and I think rightly, take a very close look at the idea that a single Federal court should be allowed to issue a warrant when the property subject to the search may be outside of their jurisdiction. I don't see any way of getting around some serious problems with judicial review here.

Now, as far as the types of proposals I've given a red light, those relate to law enforcement's desire to have expanded forfeiture powers. The forfeiture powers that have already been given to law enforcement in non-terrorist cases, particularly in connection with the drug war, have already been substantially abused. And the argument that they have used to say that they need these powers in terrorism cases is, well, suppose we have a

suspect, we haven't detained him yet, it's pretrial, he can use his money to flee the country essentially; we want to be able to stop that. However, a judicial asset freeze, which provides no temptation of corruption to law enforcement agencies the way an asset seizure does, is an effective way of doing exactly the same thing.

There is absolutely no reason they need to be able to seize the assets, as opposed to freeze the assets, to prevent somebody from leaving the jurisdiction before trial. And I think what we have seen with forfeiture has been the police essentially tempted to plant evidence over and over and over again because they want somebody's yacht or their house or their car, and this is just simply unacceptable.

And with that, I will close. And I look forward to hearing what my fellow panelists have to say.

(Applause.)

MR. PILON: Stuart.

STUART TAYLOR,

SENIOR WRITER, NATIONAL JOURNAL

MR. TAYLOR: Thanks. At the risk of restating the obvious, I am going to paint with a fairly broad brush in what I address, at least at first.

The Declaration of Independence, I guess, is the first document I'm aware of in our history that kind of lays out our civil liberties in a nice concise way: life, liberty and the pursuit of happiness. And I have to admit that the first of those has always been my favorite. And throughout our history, protecting our lives has always put some pressure on our liberties. We have had any number of laws that are not in the slightest bit controversial that restrict our liberties to protect our lives.

We obviously now have some much more controversial proposals, and I think that the light in which I look at them at least is we face a threat that, as far as I can think of, is totally unprecedented and orders of magnitude higher than anything we have faced before in terms of the threat to our lives. There are mass murderers, or would-be mass murderers, by the hundreds or thousands, who are either in this country or interested in coming here for the purpose of killing as many of us as they possibly can, with biological, nuclear or chemical weapons if they can. We don't really know their capabilities, but September 11th suggested that we've underestimated them so far.

Now, this threat certainly doesn't suggest "throw aside civil liberties, we're in an emergency." It doesn't suggest, for example, that we need to change at all the rules that we have for

forfeitures in ordinary criminal cases, for finding bales of marijuana, for catching burglars or robbers, or even for stopping people from murdering their spouses if we let them out on bail. None of that has changed. But I think it does suggest that the interest in catching the people I'm talking about is a lot higher than the interest in the cases we are used to.

My hypothetical about detention to Congressman Barr was designed to suggest that. We detain people suspected of pushing marijuana if we think they might skip town before trial. But, hypothetically speaking, if the probability is only 30 percent that suspect X, who is on a student visa from some other country, say, if there is only a 30 percent chance in a reasonable judge's eye that this suspect is going to go out and murder a few thousand people the first chance he gets, why, under our law as it exists now, we have to let him go. I'm not proposing to change that, but I'm proposing to rethink some of our assumptions.

And the one I will focus on is the question I'm going to try to write a column on by 4:00 a.m., with any help you all can give me -- not in the form of throwing rocks and bottles. But the question I would raise with diffidence in this crowd is: Is electronic privacy overrated?

We all remember "1984," and I think his name was Winston Smith, and standing there, "Do your exercises, Winston,"

and the camera is watching, and they seem to have enough people to have somebody watching everybody in their room to make sure they do their exercises. We all remember what J. Edgar Hoover did to Martin Luther King. And I'm hoping you all can enlighten me because, since J. Edgar Hoover used wiretap information to commit character assassination on Martin Luther King, I'm not aware of a whole lot of other people who, as a result of government abusing information learned in wiretaps or any form of electronic surveillance, have been killed or defamed or imprisoned or otherwise oppressed. If they're listening to us out there, we don't like it, but I hope they have better things to do than listen to people talking to their extramarital lovers or whatever.

And so what I'm trying to figure out is, if we expand, at least incrementally, government wiretapping powers for the purpose of terrorism cases -- again, I think the provision that would allow them to come in, basically, in say a drug investigation and get a FISA warrant because maybe it will lead us to the Medellin cartel and they've got some terrorists, that's unnecessarily broad -- but when you're dealing with really hardcore terrorism, what can they do, the government, if we give them power? What abuses really threaten us?

Well, it's foreseeable that they would eavesdrop a lot, for example, on Islamic groups. And then the question is, what

would they learn that they would use to oppress those groups? Blackmail you can think of, if people are doing things that are embarrassing but not illegal, leaking stuff to the press to defame people. Those are threats, but I would love to be enlightened by others who may know the history better than I as to whether the threats are really the huge bogeyman, in the face of the dangers on the other side, that we all have in the back of our minds since we read "1984."

Thank you.

(Applause.)

MR. PILON: Jonathan.

JONATHAN TURLEY,

PROFESSOR OF LAW, GEORGE WASHINGTON UNIVERSITY

MR. TURLEY: I think as an academic, being asked to talk on the subject within 10 minutes has to be viewed as an overtly hostile act. I'm not an expert on terrorism, but I do have two children under three, so I can speak with some authority as to the concept of a jihad.

(Laughter.)

MR. TURLEY: At least as of this morning I could have told you a great deal about certainly a fatwah.

I have been doing a fair amount of work on the anti-terrorism legislation. I'm talking to a lot of members who obviously ran out of people to consult with. And I think that we are all naturally uncomfortable, in times of conflict and fear, with how we can respond. We have a long history of doing the wrong thing when we are facing an external, or what we perceive as an internal, enemy. And I'm happy to say that I think we have learned something.

If you look at when we have done our truly most moronic act, like the internment of 110,000 Japanese Americans or the Palmer raids or any of those other things, I think we have learned. And I think one of the reasons we can say that is the atmosphere that we have in this room, that Cato is, as always, I think leading what is an incredibly valuable debate, as are other groups. And Roger has been incredibly influential in this area. And he would be a panel member if he wasn't the person organizing this.

One of the interesting things I have done is I spent a lot of time recently looking at state-sponsored terrorism and our response to it. I was looking at a secret organization that was run through small cells that would kill Westerners, that would destroy any evidence of Western influence, that engaged in absolute terrorism, and often killed world leaders. But it wasn't al-Qaeda; it was actually the Boxers of China in 1900, who

we helped defeat with an international coalition that had many of the members that we have today.

What I thought was sort of interesting is that the Boxers told their followers something very interesting. They assured their followers, in addition to that they would be protected from bullets -- which came as something of a surprise later for many of them -- is that Westerners were physically, anatomically different, in that they had no knees. And that if you hit a Westerner, they would just fall over and they would not be able to get up. They would be immobilized.

Well, obviously the Boxers learned something about anatomy almost 100 years ago this month. But what I think is fascinating is that the Boxers believed that Westerners could be immobilized if they were hit hard enough. And you see some of that, in my view, in some of the fears about making changes to deal with this threat. And I've litigated against the government a lot in national security issues and in privacy issues, and I've been on the other side more than I've been on the government side in some of these national security cases.

But I think that we have to remember that the Madisonian democracy was designed to be nimble and flexible, that there is a habit to treat the system as if it were rigid and static. And that's a mistake. Remember, these Framers designed the system when they had far greater threats than we are facing

from al-Qaeda. They had both external and internal threats, where the very existence of the Republic was somewhat in doubt. And they developed a system that had the flexibility to meet that threat.

And so I think the fears of making changes, particularly in the short term, I can understand, but we shouldn't be afraid to use our system. And I think that if you look at how the executive branch has acted and the legislative branch, it is an incredible testament to that system. The executive branch moved very quickly in stating what it needed. The Congress slowed it down, scrutinized it, made changes and made compromises. It's a remarkably efficient system. And I don't agree that there is a huge amount of reason for alarm, even though I disagree with some aspects of this.

What we have to be afraid of is what Brandeis warned us against, that the greatest threats to liberty are men of zeal, who are well meaning but without understanding. And that's always the greatest threat: ourselves. No one can threaten our nation but us. We're powerful. And it will take us, essentially, to remove the liberties that distinguish us from our enemies. So we have to be very cautious.

But if you look at these changes, I think most of them are largely uncontroversial. I mean, things like removing the statute of limitations for terrorism seems like an awfully good

idea. The only surprise is that we had a statute of limitations for terrorism.

Also, the idea of roving warrants is something that reflects an ongoing struggle that we have between surveillance laws that is a race between technology and our laws. I have written a lot on Title III. And Title III itself has had to change. And it changes by these great leaps as technology makes previous doctrines unusable. The greatest example of that was in Olmstead, when we had a trespass doctrine that the government could engage in surveillance as long as they didn't trespass. And what that did is it created a huge market for instruments that didn't trespass. And so technology made the trespass doctrine ludicrous. So the doctrine was changed by the Supreme Court in Katz, and went to the reasonable expectation test.

Well, in the same way, not having a roving warrant doesn't make a lot of sense when you've got terrorist suspects that are roving around with cell phones and crossing State lines. I think that shouldn't be that controversial.

We also have to recognize that al-Qaeda is different. It's sort of a Sputnik moment for us, that we face a very different world. And some people I think warned us. But as a nation I think that we woke up and found a different world. Sputnik made us go forward and do positive things. I'm afraid

that this is going to make us go forward and do much more difficult things and make difficult balances.

But al-Qaeda is different because it's a hardwired terrorist groups that moves obviously with speed and has technology to do incredible damage. And that presents different intelligence problems. I mean, a traditional espionage case had some very easy sort points to engage in for the NSA and CIA. Al-Qaeda is designed to avoid those things. It's designed with a knowledge of the law and a knowledge of our capabilities. And so we need to change. We need to upgrade.

We also have the fact that we have a smaller window of time and it's getting smaller. We have to acknowledge that. When we balance national security and individual rights -- and that balance is allowed in the Constitution; the Framers expected that balance -- but when we do that balance we have to recognize that the window is getting smaller in terms of the time we have to react.

It's very interesting that in terms of the al-Qaeda cell that we know of -- and this apparently is lost by those clowns that are beating up Arab Americans -- they seem to forget that none of these people were Americans; that most of them, or all of them, had to be brought in. They couldn't use homegrown people to carry out these attacks. So we have a situation where

we can have people entering the country and very quickly unleashing a devastating blow.

So I think that we need to balance. And we need to acknowledge that the biggest advantage that we have is that we have the most nimble and flexible system in the world. And James Madison didn't create it to inspire; he created it to last. And it's one of our greatest assets.

Now, I think there are dangers. I'm concerned about FISA. I've been on the other side of FISA evidence in espionage cases. I'm more than a little concerned about the change in the language to "a significant purpose." I'm a bit concerned about whether FISA can be allowed to drift. There is not as much oversight and monitoring of FISA. And it is something that we should be concerned with. A secret court sits badly with all of us, so we have to be careful in the powers that we give it.

I wanted to address something that Stuart said. And I rarely disagree with Stuart, because I usually go home and find out that he was right. But I think that it's a mistake to treat electronic privacy as different. And it is not necessarily that you have something to hide. I teach constitutional criminal law. And when I get to surveillance, I have my students do an exercise. And I try to teach them about what Brandeis and other Justices meant by "a chilling effect." And that's what we have to be afraid of. We don't have anything to be afraid of from the

United States Government in this room. They have had abuses. God knows they've had abuses. But, realistically, it's not like getting hit by a car or bitten by a dog. It's relatively remote, but it happens.

But the greatest problem for us is whether surveillance laws can change that change who we are, how we act. So I ask my students, when they go off on their break at midterm, to take a tape recorder when they're at Thanksgiving and just, on one occasion, take the tape out of the tape recorder, and put the tape recorder on a table and tell your friends or your family, "Don't worry, this is just for a school assignment, no one is going to listen to this but me. Do you mind?" And of course they will be very nice and cordial -- it is the holidays -- and say yes. And I tell them, look what happens. And suddenly people start talking in complete sentences. And they start being incredibly profound. They turn into Disraelis, and it changes the way they act.

And that's what we have to be concerned about. We don't want to be a fishbowl society. It's not that we have something to hide. It's how we will change if we believe somebody is watching us or can monitor us. So even though I support this package, I think that we have to be very, very cautious, because there are soft variables, even with electronic privacy, that we need to protect.

I will stop there. I think I've gone over anyway. Thank you.

(Applause.)

MR. PILON: Thank you, Jonathan.

Stuart, I can't resist commenting on your observation that you didn't think, since J. Edgar Hoover abused his intelligence powers to go after Martin Luther King, that we have had any subsequent abuses of intelligence powers. I give you a case called Pilon v. Department of Justice, coming out of the D.C. Circuit in 1996, in which the Department of Justice found, at the end of the day, that it had bitten off more than it could chew. Take a look at that case.

Let's open it up now to questions from the floor. Yes, Tom Brazaitis.

MR. BRAZAITIS: I wonder if one of the panelists could comment on the pros and cons of a national identity card. It's not on the table now but it has been talked about around the fringes. What do you think about it?

MS. SINGLETON: My opinion of the national I.D. card is that the terrorists have shown that they can get access to fake drivers licenses, to fake passports and to other fake documents. And I'm very concerned that having a national I.D. card might create a whole category of not having the correct paperwork offenses that really have nothing to do with fighting terrorism.

And the police, instead of being able to focus on a threat of violence, would instead be going out chasing all these people just because someone might put a typo on their card or something like that. So I really think that is a bit of a distractor.

MR. TAYLOR: I generally agree with that. I would like to hear from the advocates, which I haven't heard, exactly what good they think it would do. For example, if you had an unforgeable national I.D. card that you needed to use only if you were going into certain places, such as on an airplane or the U.S. Capitol, I can imagine something like that. The idea of a card where a policeman could just come up to you on the street because he didn't like your looks, and say "Let's see it," I think would add really no safety whatsoever and be offensive for obvious reasons.

MR. TURLEY: I agree with those sentiments. I actually have not heard what significant difference this would have. I think it would have a significant difference in terms of our social fabric. I mean I certainly would like another chance to lie about my weight and height, but I don't see how it would have a material security effect. But I think it would have a big social effect, and not a good one. It's amazing, as Stuart said, I have not heard any concrete reasons why this has been suggested.

MR. TAYLOR: I can imagine that if the I.D. card had a thumbprint on it and when you went through the checkpoint you had to show your thumbprint, and they had to match, I can see some value in that I guess. But what would worry me I think is having to show it any time somebody demanded that you show it.

MR. TURLEY: I still don't think that this has legs. I see no evidence it has legs, and I think that there would be a very strong reaction probably against it. Although one poll shows that as much as 70 percent of people would support it, I think that's odd. I would be surprised if there wasn't a bigger backlash.

MR. PILON: I wonder if the President of Oracle would take the same view if the contract were awarded to Microsoft to provide the cards.

(Laughter.)

MR. PILON: Would you please identify yourself and wait for the microphone to come. The previous question was Tom Brazaitis, from the Cleveland Plain Dealer.

MS. GRAPPI: Maureen Grappi, with Gannett News Service.

Could you tell me how many of the potential abuses do you think are likely to occur only to Arabs in the U.S., whether they're Arab Americans or aliens? Because I'm wondering if most of the public thinks, well, I'm a white person, I'm a regular American, I'm not going to be affected by this even if there are

abuses. What is the potential there for abuses for not just aliens who are in this country but for people who look like they are terrorists because of what they wear?

MS. SINGLETON: I'll venture an answer to that. I think that, so far from what we have seen, some of the negative reactions have been basically extended to any person with dark hair and a weird name, such as myself. "Solveig" is not a normal name. It's Norwegian, but I don't look like a Norwegian. So I'm already used to heightened scrutiny and so on, especially when I'm flying into international airports. So I basically think that the potential for abuses could get pretty broad.

MR. TURLEY: I should say that we all suspect the Norwegians, and so I'm thankful that they're giving you a great deal of scrutiny, trying to bring over all of that herring.

MS. SINGLETON: The Vikings return.

(Laughter.)

MR. TURLEY: Actually, a more concrete issue, under 1802 of FISA, the government is allowed to do a warrantless search. Essentially, they are allowed to conduct surveillance for a year, but the Attorney General has to certify two things. One is that the target of the 1802 is a foreign power. And then he also has to certify that it is not likely that they would intercept communications with an American citizen.

What is interesting about the FISA changes is that necessarily will not change. But as FISA broadens in terms of its scope, it's likely that you are going to have greater intercepts of American citizens. And the way that FISA handles that is it has a minimization requirement. Which is, if for example some terrorist calls you as a reporter and they intercept your conversation, they are supposed to minimize it if it's not relevant. But that is under the Attorney General's guidelines. And I expect that with the expansion of FISA, you are going to have more communications with American citizens that are intercepted. And you have to rely then on the minimization requirement to protect those interests.

MS. GRAPPI: In allowing these criminal investigations, expansion doesn't specifically allow the surveillance of American citizens under the FISA rules?

MR. TURLEY: Well, no. If you are an agent of a foreign power, then you can be intercepted, although they have to go and get an FISC warrant, the Foreign Intelligence Surveillance Court warrant. So they make an application essentially saying that you are an agent, that you're either engaging in clandestine operations or sabotage. There are actually four categories under which you can be subject to a FISA search. The fourth one is actually encompassing; that is, if you aid or abet any of the

prior three, you can be the subject. But if you're an American citizen, you get added protections under FISA.

MS. SINGLETON: Also, just to clarify, a lot of the expanded powers expand ordinary criminal powers rather than relating to FISA.

MR. PILON: Yes, this gentleman here?

MR. MCDONALD: Sam McDonald, from Reason Magazine.

A similar question not regarding race but national origin. Would the issue of where you're from, and not necessarily a U.S. citizen, come into play here? Are the same rights extended to U.S. citizens as someone just here on a visa? Should they be? Should maybe we lop off some of the rights that we extend to American citizens than to maybe a student here from Pakistan? And is that something that's on the table right now? And could they do an end run on a lot of these rights issues by saying that this won't apply if you're a U.S. citizen; it's only if you're an immigrant or a student or someone here working on a visa?

MR. TAYLOR: I think they have to some extent. As Jonathan mentioned, I think FISA makes that kind of distinction. The detention provisions proposal of Ashcroft, in whatever form it is now, would only apply to people who are not U.S. citizens.

I think, in practice, when you look at who would be surveilled under wiretap provisions and so forth, Islamic

organizations would probably get a lot of attention, including the U.S. citizens in them, based on whatever evidence there may be that the people who come from abroad get help from people who have been here all along. And I gather there are at least a few people who have been picked up with some evidence suggesting that. But I think we already do that to a large extent, we make that distinction.

MR. PILON: Yes, the gentleman here?

MR. RUBIN: Joe Rubin, with the U.S. Chamber of Commerce.

One question I have is, ironically, on the use of the pen and trap-and-trace stuff for e-mail. Could that actually encourage folks to use the Internet, believing that the Internet may be actually more secure, and that folks who are possibly committing fraud on the Internet, they may be more likely to log on?

MR. TAYLOR: I don't think I understand the question. If you have more power to search Internet communications, why would that make you more eager to communicate on the Internet?

MR. RUBIN: Well, for people, as you pointed out before, who don't worry about their e-mail being traced. There may be less spam, for example. So this may make them more likely to use the Internet than currently.

MS. SINGLETON: I don't think that it would have that effect at all. I mean, who knows, but I don't think it would.

MR. PILON: Bert Ely?

MR. ELY: Bert Ely, a banking consultant.

This is a question for Mr. Taylor and Mr. Turley. Both Roger and Solveig made note of the fact that we've had a major intelligence failure. The CIA seems to be getting a lot of the blame, but it would seem to me that it lies primarily with the FBI, and specifically in its inability to penetrate these terrorist cells. My sense is they weren't even aware that they were out there.

Based on that premise, it's not clear to me how any aspect of this pending legislation in any way whatsoever is going to increase the competence, the ability of the FBI, the INS and whatever other agencies responsible for domestic counterintelligence to become more effective in preventing these incidents. And I'm curious, from your perspective, how will it increase their competency or, in effect, do we have a bunch of GS-15's sitting in front of a computer screen who are looking for a relatively painless, easy way to catch the bad guys?

MR. TAYLOR: I'll take a quick crack at that. I think one reason you don't see it in the legislation is it's not easy to legislate competence. Competence sort of has to come from the executive branch basically. The Congress can try and push them

this way or that way, but I can't think of a bill that would suddenly make the FBI more competent.

I also guess that I think we're never going to have an FBI or a CIA that are as smart as would be ideal in exercising whatever powers and tools they have to stop this kind of terrorism. I don't think that's a reason to say, well, we're not going to give you any more powers or tools until you've shown us that you're making the optimal use of the powers and tools you already have. They will never make the optimal use of it. The real question is whether the tools that they want have some promise of making them more effective than they have been before; and that outweighs whatever the cost of getting them the tools are.

MR. TURLEY: I think your sentiments are correct. My first call from Congress came the day after the attack, to talk about changes in the law. And my first reaction was, isn't this sort of a perverse incentive, that the worse you are at your job, the more authority you will be given?

I think that there was an obvious failure, and it does concern me that the intelligence community is the least able to clean its own shop. And I've seen that in intelligence cases. In the King case, we had a whole list of intelligence people that made my life as a defense attorney unbelievably easy. And they made huge mistakes, violated huge numbers of national security

violations. Some of them just took my breath away. And at the end of that case, I testified in a classified session of the Senate Intelligence Committee, listing all these names of people that just should be removed just for being morons. And it is very, very hard to do that.

And I agree with you, I think that these expanded powers are needed, but you also have to remember that a lot of these increased surveillance powers won't help. Al-Qaeda is interesting in that it seems to be designed with our capabilities and our methods in mind. And there are some things even the NSA or the best code-breaking agency in the world can't help. I mean, you can create an unbreakable code. All you have to do is get two people to agree that when you mention a single word it has a single meaning. So I mention "elephant," it means take out a building. And there is no way to break that code. So there are ways to structure that, no matter what your surveillance capacity is, it won't help.

But I think that one of the biggest problems we have is that we have steadily lost the ability of human intelligence. And we have relied incredibly on signals intelligence because we're good at it, we're the best in the world, and it's easier and it's safer. But human intelligence is tough.

Take the FBI. I come from Chicago. And I remember one of the biggest stories of the Hoover period was that whenever the

FBI wanted to nail a drug operation, they would all know because the FBI had a single contract with a rental car company. Hoover wanted everything uniform. So you would look down the street and there would be 50 white sedans and guys in lumberjack shirts. I often think back on that story, because I wonder who we're sending into al-Qaeda, whether we've got a guy in a white sedan and a lumberjack shirt.

MR. TAYLOR: Maybe we need to give all new FBI agents stock options in Microsoft.

(Laughter.)

MR. PILON: Stuart, I want to pick up on Bert's point here and something that you said, that there is no way to legislate competence. There is no question about the incompetence that Jonathan has pointed to. I saw it in my own case, just monumental incompetence, and you wonder how these people continue on the payroll. But of course we all know how difficult it is to fire a government employee, and that helps to explain why. And you want to look to the personnel rules, in part, to see why there is so much incompetence in government.

But I don't know that we want so much legislative attention at this point. It strikes me that the media has been singularly -- and members of the media here -- singularly silent on this issue. They have focused on the call for new legislation, the need for more government, and not on why it was

that we had such a monumental failure here. Look at how quickly this information has been put together. Within days, we had huge amounts of information about this al-Qaeda group. That information wasn't gotten out on the street in those few days; that was all in files. They've had these files for months and years. And yet nobody in these agencies put it together into a mosaic that would give us any clear indication of what was going on.

When a person goes to flight school and asks to learn how to fly a plane, not how to land or how to takeoff but just how to fly it, bells should go off. And apparently bells did go off and that information was in the files somewhere. But not one put it all together.

So why is it that we aren't seeing more attention from the media on this issue of this monumental failure? Stuart, as a member of the estate, you may want to address that issue.

MR. TAYLOR: I think you will see more attention to it. I think it's understandable that it has not been the major theme of the coverage so far. Because if you start right up with recriminations about who screwed up, the national unity that we would like to project instantly dissolves. Andrew Sullivan, for example, a conservative columnist, recently wrote a piece I think in one of the London papers, blaming a lot of this on the Clinton administration screwing up. Well, he was instantly deluged with

hate mail, you know, "There you go again; you wanted to impeach him."

We're going to have to get to that sort of stuff, but I think the media has properly been saying that's not the first thing we need to do.

MR. PILON: Fair enough.

Solveig?

MS. SINGLETON: I don't know. I think I share Burt's concern, that some of the discussion could serve as a distraction from some of the real issues at these agencies that need to be addressed very quickly, such as the lack of Arabic speakers at the agencies.

MR. PILON: They couldn't translate some of the material they had. You could go out and get a cab driver; he can translate this material.

(Laughter.)

MS. SINGLETON: There was apparently a terrorist arrested in New York I believe in the late 1980's, after he had murdered somebody there, and found in his apartment were stacks and stacks and stacks of documents in Arabic. No one ever translated them until after the first attack on the World Trade Center, when they were discovered to contain lots and lots of very interesting plans for blowing up buildings.

In addition, in France several years ago, some terrorists hijacked an airplane and attempted to fly it into the Eiffel Tower. They were foiled only by the fact that none of them could fly the plane, and so the pilot was able to land at Marseilles. But that's the kind of information that when the FBI got the tip from these flight instructors, something should have clicked. And again, it is hopeless to do these recriminations, and all this hindsight is not of much value, but still I think clearly something has to happen. And these proposals that have been put forward are only a very small part of what needs to happen for things to improve.

MR. TURLEY: Roger, can I just say one thing that I think is interesting about one thing that you said.

MR. PILON: Sure.

MR. TURLEY: I think the reason we have so much information suddenly, in my view, is that the FBI is unbelievably good as an investigatory organization when it has to act; that is, when it has a concrete foundation, the FBI is unbelievably good at gathering a huge amount of information very quickly, assembling linkages, daisy-chaining information. They're incredible at that. What they're not good at is finding something that hasn't already occurred. That takes human intelligence.

But the thing that I'm worried about is that as we expand all this intelligence stuff, we're going to have an avalanche of information going into the FBI. And I really wonder how we are going to process the amount of information that we are looking at. The Ottoman Empire had the biggest intelligence organization in history. It had spies in virtually every neighborhood throughout the Empire. And what historians have found is that the vast majority of that intelligence went into an office and was never opened up. And so we have to avoid the Ottoman Empire problem.

MR. TAYLOR: I would like to add something. It's easy in hindsight to beat up on the people who didn't stop this. I mean, how many of us should have put 2 and 2 together and said, gee, they blow up buildings, they want to blow up the World Trade Center, they hijack planes, and they do suicide bombings, put it together?

Well, I didn't put it together, and I don't know how many other people did. Somebody in the bureaucracy should have put it together. But Louis Freeh is not an idiot. His replacement, Bob Mueller, is not an idiot. You may not think they're ideal. And George Tenet, although he's getting a lot of heat, is not an idiot. The people who work for them are what you would expect to get from people who are paid what they're paid and who are generally given low status in our society and

basically dissed a lot more than they're praised. They are all we have, unless somebody has somebody they want to replace Bob Mueller with now.

So I think really the evasion of the major point is not why aren't they better -- yes, let's make them better -- but given what they are, let's give them whatever tools make sense for them to have. Also, okay, are they stupid enough to pile up lots and lots of tapes of wiretaps that they don't have anybody to translate? Maybe they are that stupid. That's what congressional appropriations committees are for, to ask them: Why do you need so much money for wiretaps and so little for translators?

I think it is a little bit dilettantish of those of us who know as little as I, for example, to suddenly say, oh, there is no point giving new powers to them, they'll just mess it up again anyway.

MS. SINGLETON: I don't think anyone is saying that, though.

MR. TAYLOR: Oh, good.

MR. PILON: We're going to have to draw this to a close. We are going to take just one more question. Bill Niskanen, Chairman of the Cato Institute, whose question I cannot refuse to take.

DR. NISKANEN: In most other countries, police have rather more powers than they do in the United States. Is there any empirical evidence that bears on the issue of whether they are more effective as a result?

MR. PILON: Who is the empiricist here?

MR. TAYLOR: El Al's last hijacking was in 1968.

MR. PILON: And they grill passengers.

MR. TAYLOR: Well, they would be the number one target in the world among airlines if people thought they could succeed.

MR. TURLEY: I guess the only cautionary note I would have is that I can name a lot of repressive countries that are not very effective either in terms of survival or in finding dissidents. What they do is they just basically take a broad net and they hope that they get a few people that are guilty, but they're not very stable. And what we've got to be careful about is not to sacrifice stability for security. It's not just privacy. The thing that makes us stable is that we're a free country.

FISA and laws like that are enormously powerful. We're not talking about a teetotaler statute. We have enormous powers in this country to fight terrorism. And sometimes the impression left is that we are somehow fair-weather sailors when it comes to intelligence work. We're not. Now, it's true that we don't go

around and put bullets in people's heads, but that's about the limit of it.

Obviously the Mossad is unbelievably good in creating intelligence networks, but it's a vastly different context and I'm not so sure we'd want the environment.

MR. PILON: We're going to draw this to a close. Please join us upstairs for a reception. And please give a warm round of applause of our guests.

(Applause.)

(Whereupon, the Cato Institute Policy Forum concluded.)