

**Statement of**

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**“Securing Freedom and the Nation: Collecting Intelligence Under the Law,  
Constitutional and Public Policy Considerations”**

Chairman Goss, Congresswoman Harman, and other distinguished Members of the Committee, thank you for you inviting me to testify before you this morning. I commend the Committee on holding this hearing — the third in a series examining the constitutional and legal framework that surrounds the conduct of domestic intelligence gathering and related activities. As the Supreme Court has observed, “The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.” So it is true to our highest ideals and in keeping with our best traditions that we should take counsel on what the laws provide in this context, even as we address the gravest of dangers to our security.

I understand that your briefing books include a report I authored for the Center for Strategic and International Studies entitled “U.S Armed Forces and Homeland Defense: The Legal Framework,” which was published in the weeks following the September 11, 2001 terrorist attacks. While my report for CSIS focuses principally on the President’s constitutional authority to use the *armed forces* in response to grave domestic emergencies — such as a major terrorist attack on U.S. soil — much of the discussion there of the President’s authority under Article II of the Constitution applies as well in the *intelligence* field.

The framers of the Constitution clearly recognized, as John Jay argued, that “a wise and free people” should first direct their attention to “providing for their safety.” Another author of the *Federalist Papers*, James Madison, declared that “[s]ecurity against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union.” These principles were of central importance in the drafting of Article II, which has proved sufficient throughout our history to assure that the President is able to respond, decisively when required, in a wide variety of circumstances endangering the security of the nation.

Article II, Section 1 of the Constitution provides that: “The executive Power shall be vested in a President of the United States of America.” It further

prescribes an oath of office by which the president swears to “preserve, protect and defend the Constitution of the United States.” Section 2 states in part that “[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.” Section 2 also entrusts the president with the power, “by and with the Advice and Consent of the Senate,” to make treaties and to appoint ambassadors and other officers of the United States. Section 3 specifies that the President “shall receive Ambassadors and other public Ministers.” It also enjoins the President to “take care that the Laws be faithfully executed.”

The features of the presidency fortify the office to perform unique, multiple roles — as head of state, as our representative in foreign relations, as the commander of our armed forces, and as our chief executive. What we broadly consider intelligence functions — *i.e.*, the collection by various means and the evaluation of information important to the nation’s security — are implied in each of these grants of power. Moreover, from our earliest days, these constitutional grants have been considered not singly but in combination to establish the considerable range of a president’s lawful prerogatives in answering the needs of the nation, most especially in times of grave crisis. As Professor Louis Henkin observed, “[t]he President has more than one hat, he wears them at the same time,

and he can act under one or another or all together.” And, in this regard, it is worth noting that Article II draws no express distinction between threats or crises that arise abroad as opposed to those at home. In Theodore Roosevelt’s words, a President’s responsibilities as “steward of the people” extends to both.

I do not have to emphasize to the Committee the practical importance of good intelligence in either context. Chief Justice Marshall observed of George Washington that “a general must be governed by his intelligence and must regulate his measures by his information. It is his duty to obtain correct information ....” During World War I, Winston Churchill made a similar point, in typically graphic fashion. He observed that “[b]attles are won by slaughter and maneuver. The greater the general the more he contributes in maneuver, the less he demands in slaughter.” Intelligence is an essential part of that war of maneuver — perhaps more important now than ever, given the gravity of the threat posed by international terrorism. The gathering and use of intelligence is one of the most important ways that our President may “contribute in maneuver.”

More generally, the terrorist attacks of September 11, 2001 demonstrate clearly that the defense of the United States itself is just as important as defending U.S. interests abroad. In the immediate aftermath of the September 11 attacks, Attorney General John Ashcroft testified that

terrorism is the activity of expertly organized, highly coordinated and well financed organizations and networks. These organizations operate across borders.... They benefit from the shelter of like-minded regimes. They are undeterred by the threat of criminal sanctions, and they are willing to sacrifice the lives of their members in order to take the lives of innocent citizens of free nations.

Our experience in the interim only confirms the force of this statement.

Under such circumstances, in my judgment, the Executive branch has a compelling legal and moral obligation to investigate and to gather intelligence, both foreign and domestic. But the extent of the President's Article II authority — ample though it is — provides only a point of departure. It is important that these investigative and collection activities be conducted with due regard for principles of separation of powers, and for the core protections of the Fourth and First Amendments. This requires, as Justice Powell observed in the *Keith* case, an examination and balancing of the basic values at stake. This balancing is especially sensitive when intelligence gathering is conducted domestically and in a manner that is highly intrusive, or that is regulatory, prescriptive or compulsory in

nature. It is less so when domestic intelligence gathering focuses on public information or information that is available to, shared and used widely for private sector purposes.

The answer to the question of whether we have been balancing these competing values effectively depends, to a very substantial degree, on how one views the imminence and gravity of the threats we face. Let me be clear about my own view. Given the severity of the terrorist threat, in my judgment, it is highly important that we do everything that is appropriate to equip the intelligence community to help prevent future disasters. This counsels the need for the President to work closely together with Congress, particularly on domestic intelligence arrangements, to ensure that Executive actions have the strongest possible Constitutional sanction.

Congress took a vitally important step in this regard by adopting the USA PATRIOT Act. The Act includes several important measures that break down barriers that once existed between the law enforcement and intelligence communities, and provides the intelligence community with additional surveillance tools to detect and prevent terrorist attacks before they occur. Many of the Act's most important provisions are due to sunset in the coming years, and I fully support their reauthorization.

In conclusion, I want to acknowledge the difficulty that you face in evaluating the sometimes competing values of protecting national security, on the one hand, and protecting civil liberties, on the other. I commend the Committee for examining these issues today and in its previous hearings, and I look forward to answering your questions.