Remarks of Rachel L. Brand
Principal Deputy Assistant Attorney General
Office of Legal Policy, U. S. Department of Justice
Holmes Debates
Coolidge Auditorium, Jefferson Building
Library of Congress, Washington, D.C.
June 14, 2004

Thank you. It is a pleasure to be here. I will wait to respond to the points made in Professor Cole's opening until the response period and give my own opening statement now.

I appreciate the Foundation's and the Library's interest in this topic. Having said that, however, I am not sure that the general topic is one that inspires much honest disagreement.

The written materials I received from the Foundation framed the topic of the debate as follows: "Must Americans accept limitations on their First Amendment rights to be successful in the battle against terrorism?" Professor Cole clearly thinks not.

It should not surprise anyone that neither do I.

Instead, I believe that America would clearly have *failed* in its battle against terrorism if the people were willing to accept limitations on our First Amendment rights – or any of our other civil liberties, for that matter.

There is no use in having the right to assemble or travel freely if you live in a country where it is too dangerous to do so, and there is no enjoyment in being safe in a country where you cannot live freely.

Of course, the fact that Professor Cole and I agree on this basic premise does not mean we agree on everything. Reasonable people can differ on whether particular governmental actions violate the First Amendment or come close to the line.

For example, I do not believe the First Amendment guarantees the right to provide material support to a Foreign Terrorist Organization, even if that group engages in charitable activities in addition to terrorism. I understand that Professor Cole disagrees to some extent.

Where such disagreements about the scope of the First Amendment arise, they are often resolved by the federal courts. But the judiciary is not the only branch of government responsible for interpreting the Constitution. Congress and the executive branch have their own duty to interpret the Constitution. In fact, the political branches of government are the *first* constitutional check – our duty arises long before the judiciary gets involved, if it ever does.

Every time Congress considers a bill or the executive considers a regulation or policy, its constitutionality must – and will – be considered by officers sworn to uphold the Constitution.

This is not to diminish the role of the courts – they are the check on the executive and legislature – but to point out that we in the Department do not act will-nilly and assume the courts will sort it out later. We take seriously our responsibility to ensure that our actions are constitutional in the first place.

The skeptics among you might ask: if I and others in similar positions in government do not believe in sacrificing constitutional liberties in the name of security, where does the public perception that liberty is being sacrificed come from?

To the extent that such a perception exists, it is at least partly based on misunderstandings about the government's anti-terrorism policies. I do not have time to canvass all of these, so I will focus on some of the myths surrounding section 215 of the USA PATRIOT Act. I focus on section 215 in this forum because its critics have claimed both that it stifles speech in the abstract and that it would infringe the First Amendment in application.

I will start with the hyperbole. One prominent organization claims on its website that "[t]he PATRIOT Act gives law enforcement *unprecedented* powers of surveillance." Another goes even further, alleging that section 215 gives rise to "*unchecked* government power *to rifle through* individuals' …records."

Section 215's detractors argue that the mere fact that Section 215 exists has chilled some Americans from exercising their First Amendment rights. I have no reason to doubt that those individuals sincerely hold these fears, but if they knew the real facts about Section 215, I have to wonder if these fears would persist.

Now the facts about Section 215:

In a nutshell, section 215 allows investigators in international terrorism and espionage investigations to seek a court order requesting records relevant to those investigations. The section says nothing about libraries, but it has become known as the "library" provision. Theoretically it could be used to request documents from a library if those documents were relevant to an international terrorism or espionage investigation, just as it could be used to request records from a chemical manufacturing plant if it had records relevant to the investigation.

Section 215 simply gives national security investigators a tool similar to ones that ordinary criminal investigators – and even the government's civil litigators – have always had.

In garden-variety criminal cases, prosecutors have always been able to use grand jury subpoenas to request records relevant to the investigation from whoever might possess them – including libraries. The pre-section 215 state of affairs, in which it was much more difficult to request records in a FISA investigation than in a Medicare fraud investigation, was ludicrous.

Because section 215 applies only in the limited context of international terrorism and espionage cases, the recipient of an order must keep the order confidential.

Critics have complained about this "secrecy" provision. However, because of this limitation, it remains considerably more difficult to use section 215 than it is for prosecutors to issue a grand-jury subpoena.

1) The scope of cases in which section 215 may be used is limited to international terrorism and espionage.

2) Unlike a grand jury subpoena, which an Assistant U.S. Attorney can issue with no involvement by a judge whatsoever, a section 215 order can only be issued by a federal judge.

3) Congress provides an additional check. The Department is required to report to Congress twice a year on the use of section 215 and other FISA authorities.

In addition, section 215 contains an explicit First Amendment protection – a 215 order application may not be based on First Amendment protected activities.

This is all a long way of saying that allegations that section 215 gives the FBI unprecedented powers or unfettered discretion to rifle through your library records whenever they like or trample on First Amendment rights are unfounded.

I see I am out of time, so I will end with that and save my response to Professor Cole's points on the material support statutes for the next round.