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A REVIEW OF COUNTER-TERRORISM LEGISLATION AND PROPOSALS, INCLUDING THE USA PATRIOT ACT AND THE SAFE ACT

HEARING

BEFORE THE

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ONE HUNDRED EIGHTH CONGRESS

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A REVIEW OF COUNTER-TERRORISM LEGISLATION AND PROPOSALS, INCLUDING THE USA PATRIOT ACT AND THE SAFE ACT

WEDNESDAY, SEPTEMBER 22, 2004

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 9:35 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch, Kyl, Sessions, Craig, Cornyn, Chambliss, Leahy, Kennedy, Feinstein, Feingold, Schumer and Durbin.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. Good morning, and welcome to today's hearing. This Committee must be vigilant in overseeing the legal tools Congress gives to the Federal Government to protect the American people from acts of terrorism. Senator Leahy, the ranking Democratic member of the Committee, and I, along with all members of the Judiciary Committee, have worked together in a bipartisan fashion to review the adequacy of the legal tools available in the war on terrorism. During the 108th Congress, the Senate Judiciary Committee has remained active in its oversight and evaluation of terrorism issues. We have held over 25 terrorism-related hearings in this Congress.

We have just marked the third anniversary of the September 11 attacks on our country. That somber anniversary and the recently released 9/11 Commission report remind us that the stakes in this war on terror are immense and that the enemy we face is ruthless and evil. We are also reminded that the terrorist threat to our country is as real today as it was back in September of 2001. Failure to grasp this reality would be a dangerous misunderstanding of our enemy's plans.

Only weeks ago, we all witnessed the horror of parents in Beslan, Russia, who rushed to the school, only to learn that their children were being held hostage. Later, watching some of the children, clad only in their underwear, escape death, seeing the covered bodies of the many who could not escape and viewing the stunning videotape of the terrorists who flaunted explosives before their helpless victims, provided an unfiltered view of the inhumane enemy we are facing.

While we cannot be ruled by our fears, events like these must never be far from our minds as we carry out our oversight of the war on terror. We must do all we can to make sure that we do not face another September 11 attack or Beslan-like tragedy in this country.

The USA PATRIOT Act has been one of the key legislative tools in our fight against terrorism. As the 9/11 Commission report noted, quote, "Many of the act's provisions are relatively non-controversial, updating America's surveillance laws to reflect technological developments in a digital age. Some executive actions that have been criticized are unrelated to the PATRIOT Act. The provisions in the act that facilitate the sharing of information among intelligence agencies and between law enforcement and intelligence appear, on balance, to be beneficial. Because of concerns regarding the shifting balance of power to the government, we think that a full and informed debate on the PATRIOT Act would be healthy," unquote.

I hope today's hearing advances this debate in a constructive fashion. As we examine the PATRIOT Act and the proposals to alter it, I frequently look to see if the tools we seek in the war on terror are already available in the narcotics or organized crime context.

For example, the criminal law has long permitted investigators to obtain business records by grand jury subpoena if the records may be relevant to a criminal investigation. The PATRIOT Act adopted a similar relevance standard for investigators who seek records via a FISA, or Foreign Intelligence Surveillance Act, court order in terrorism cases.

One proposal we will hear about today, the SAFE Act, would require a higher standard in terrorism cases. To obtain business records, the SAFE Act would require the Government to show specific and articulable facts to believe that the person to whom the records pertain is a foreign power or agent of a foreign power, a much higher standard than showing the records may be relevant to an investigation.

I am skeptical about efforts to impose a greater burden on the Government in terrorism cases than in less serious, but nevertheless significant criminal cases. It seems to me that we should not make it any harder to go after suspected terrorists than after suspected drug dealers.

Another example that we will hear about today is delayed notification search warrants. Delayed notice warrants have been allowed in criminal cases for at least 15 years. The PATRIOT Act codified this authority, permitting delay if the Government satisfies an Article III judge that delay is necessary in enumerated instances; that is, a Federal district court judge, or it could be under certain circumstances a Federal circuit court judge.

The SAFE Act would forbid delay in some circumstances previously allowed by the courts, including those instances where notice would result in the intimidation of witnesses or would seriously jeopardize an investigation. Again, I have to say I am highly skeptical about the need to limit the use of tools that have been available to criminal investigators for years. If delayed notification warrants are good enough for drug dealers, white-collar criminals

and organized crime syndicates, I will have to be convinced that they should not apply to terrorism investigations.

As we move forward, many issues must be weighed: how best to preserve our traditional civil rights while strengthening our ability to disrupt terrorist plots; whether we should reconcile our mass transportation laws to ensure that terrorists who may attack a train are treated the same as those who may attack a school bus; whether our laws adequately punish those who possess missile systems designed to destroy aircraft; and whether we should update a host of other anti-terrorism laws. In all these areas, we must remain innovative in examining our terrorism laws and stay a step ahead of the terrorists.

Let me be clear. I certainly do not question the motives of anyone who wants to alter the PATRIOT Act. However, I do disagree with the facts cited to support many of the changes that have been advocated to date. I am especially skeptical about changes that would leave our counter-terrorism investigators less well equipped than their criminal investigator counterparts.

I look forward to hearing from our witnesses on how we can continue to move forward to achieve our shared goal of making America safer while retaining our cherished civil liberties. We are pleased today to have two significant members of this Committee to present their views on some of the changes they would like to see in the PATRIOT Act. I respect, naturally, both of these fine gentlemen—Senator Craig, from Idaho, who has worked very, very diligently and in a very, very effective way on this Committee, and Senator Durbin, who is one of the leaders on the Committee on his side of the table, and certainly a very bright man who has a tremendous knowledge of law.

[The prepared statement of Senator Hatch appears as a submission for the record.]

So we are grateful to have both of you here. We will look forward to hearing your testimony. I guess we will start with you, Senator Craig.

STATEMENT OF HON. LARRY CRAIG, A U.S. SENATOR FROM THE STATE OF IDAHO

Senator CRAIG. Well, Mr. Chairman, thank you very much. I am pleased to be at the table with my counsel today, Senator Dick Durbin, from the great State of Illinois. I want to thank you for convening this important hearing on—

Chairman HATCH. That automatically gives me some real pause here that you are with your counsel.

Senator CRAIG. I am here with my counsel, Mr. Chairman. This is the Judiciary Committee and I do want the arguments to be clear and to the point.

I do want to thank you especially today for convening this hearing on the USA PATRIOT Act and the SAFE Act. I welcome the distinguished panelists who are coming after us. I appreciate their being here and look forward to their testimony.

A recent news article described me as a "rock-ribbed" conservative Republican stalwart from Idaho. I liked that. Accordingly, I am a supporter of this President and the PATRIOT Act. However,

that does not mean there is not room for legitimate debate about civil liberties in the war on terror and during an election year.

It is not pandering to hysteria to respond to the legitimate concerns that I and my constituents and the cosponsors of the SAFE Act and their constituents have regarding certain PATRIOT provisions that pose recognized risks to American civil liberties. It is law-making, and my responsibility as a U.S. Senator is just that.

Several provisions in the PATRIOT Act will sunset in 2005. The SAFE Act clarifies and amends in minor ways the PATRIOT Act's most troubling provisions. This bill is my bid to open debate on this important and very present issue so that we are better prepared to deal with the PATRIOT Act a second time around.

But many have distorted this effort, Mr. Chairman. Initially, critics said that any attempt to amend the PATRIOT Act was based on misinformation. It simply is irresponsible to say that anyone who finds imperfections in a 350-page law does so only because they are misinformed.

The Department of Justice itself, in a hearing on the PATRIOT Act's material support statute earlier this year, suggested ways in which the material support statute could be improved. That is the Department of Justice asking for change in the PATRIOT Act.

The President, in a speech in Hershey, Pennsylvania, in April, recommended changes in the PATRIOT authorities in the form of administrative subpoenas and presumptive denial of bail in terrorist cases and allowing the death penalty for terrorist crimes that result in death.

The Department of Justice followed suit with the Tools to Fight Terrorism Act of 2004 and other legislative proposals that would change or add to the law enforcement authorities provided for in the PATRIOT Act. It seems that the PATRIOT Act is not a perfect law, seen through the eyes of the Justice Department.

Critics also said that any attempt to amend the PATRIOT Act are legislative proposals based on fear of potential abuses rather than actual abuses under current law. This is a Government of laws, Mr. Chairman, not men. While I trust the men and women of this administration—and I do trust them—I do not know who comes next or 10 years or 20 years from now.

When I am told that in the case of several powerful provisions of the PATRIOT Act, law enforcement can, but will not use them in a particular way, I grow skeptical, and so do my constituents. When the Department of Justice states on its website that terrorism investigators have no interest in the library habits of ordinary Americans and that we must simply trust that they do not, that is not the way this Government works before, during or after a war on terrorism. I therefore see the need to proceed not with fear but with caution, not with hysteria but with reasonable and sound logic.

More recently, I have heard some say that there has been no informed debate on the PATRIOT Act, no informed debate on the PATRIOT Act. Mr. Comey, a panelist before the Committee today, testified at the April 14 Judiciary hearing entitled "Preventing and Responding to Acts of Terrorism: A Review of the Current Law," that there has been "no real informed public debate on the PATRIOT Act over the last 18 months to 2 years. Instead, we have

found ourselves in a situation where town councils across the country have voted to repeal the PATRIOT Act and where people stand around at dinner parties and nod when someone talks about how awful the PATRIOT Act is". It was also reiterated that it is important that we have the discussion now, and for that I thank you, Mr. Chairman. I do believe this is the beginning of what needs to be a very thorough and open discussion.

Since the passage of the PATRIOT Act in 2001, lawmakers, constituents, interest citizens groups and various associations and organizations on the local, State and national level have met, conducted public forums, attended conference events, written letters, issued statements and drafted legislation on the PATRIOT Act and related issues.

They have said that now is the time to correct some of the provisions of the USA PATRIOT Act by passing the SAFE Act. The American Conservative Union has agreed. The Gun Owners of America have agreed. The Free Congress Foundation has agreed. The ACLU has agreed. The Center for Democracy and Technology has agreed. The League of Women Voters has agreed. The Electronic Frontier Foundation has agreed. The American Booksellers Foundation for Free Expression has agreed. The American Library Association has agreed.

I assure you it has been discussed and continues to be discussed not here in Congress to any great degree, but all over this country. But the Department of Justice is not discussing it. As my colleague, Senator Feinstein, pointed out in last week's hearing, after 3 years we have received no reports on the sunsetted provisions. Instead, what we have received is a veto threat.

Instead, the Department of Justice is requesting additional law enforcement authorities in the form of administrative subpoenas, FISA warrants for lone wolf terrorists, automatic provisions for confidential requests for Classified Information Procedures Act protection, and the list goes on.

Instead, they have said that if people find the space in American life to have an actual informed understanding of the PATRIOT Act, they will realize that it is so smart, and I want to emphasize so ordinary. "Ordinary" with respect to roving wiretaps would be to extend the criminal wiretap authority to intelligence cases rather than creating a John Doe wiretap, which does not require law enforcement to specify the target of the wiretap or the place to be wiretapped.

"Ordinary" with respect to sneak-and-peek warrants would be to reserve their use for a limited set of circumstances in which there is statutorily mandated judicial oversight. "Ordinary" with respect to FISA orders for personal records would be to preserve the requirement that the FBI state specifically articulable facts showing reason to believe that the person to whom the records related was a terrorist or a spy, rather than reducing this to merely requiring the FBI to clarify that the records are sought for an international terrorism or intelligence investigation—a standard even lower than relevance.

"Ordinary" with respect to the national security letters for personal records would be to clarify that a library is not a wire or communications service provider, while still allowing the FBI to obtain

the same information regarding e-mails or other communications that took place at libraries by issuing an NSL to the library's wire or communications service provider.

And, lastly, "ordinary" with respect to sunsetting Sections 213, 216, 219 and 505 of the PATRIOT Act would be to ensure that there is a future discussion about the nature and use of some of the most controversial provisions of the law.

The SAFE Act would restore the ordinary and necessary tools to fight a successful war on terrorism and eliminate those extraordinary PATRIOT powers that pose a threat to American civil liberties.

I want to show you something that is posted on the wall at the Boise, Idaho, library. The sign says, "Notice: Under Section 215 of the Federal U.S. PATRIOT Act, records of your Internet computer use and/or records of the books and other materials you use or borrow from this library may be obtained by Federal agents. The Federal law prohibits library staff from informing you if records about you have been obtained by a Federal agent."

That is the sign of Big Brother, and, Mr. Chairman, that is the sign that should come down from all of America's library walls. That is why I am here today, that is why my colleague is here today, and that is why the SAFE Act is a part of what must become a new and reauthorized PATRIOT Act.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator.

Senator Durbin, we will turn to you now.

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Thanks, Mr. Chairman, and thank you for keeping your word. You promised us that you would have this hearing and the SAFE Act would be discussed, and we appreciate it very much, and the opportunity to testify.

Chairman HATCH. Let me say I always try to keep my word, and I appreciate that.

Senator Leahy is going to defer a statement until after you finish yours. So I just want people to realize that I am not being discourteous to my counterpart on the Committee.

Senator LEAHY. You never are.

Chairman HATCH. Senator Durbin.

Senator DURBIN. Thank you.

I am sure that anyone who follows C–SPAN is trying to figure out why Senator Durbin would be sitting next to Senator Craig at the same table cosponsoring a piece of legislation.

Chairman HATCH. It is a puzzlement.

Senator DURBIN. This is truly an odd couple on Capitol Hill.

Chairman HATCH. It may be the other way around. People are wondering why in the world is he sitting next to you.

[Laughter.]

Senator DURBIN. Well, it could be.

Senator CRAIG. I have already clarified that, Mr. Chairman.

Chairman Hatch. Yes, I think you did.

Senator CRAIG. He is my counsel.

Senator DURBIN. Senator Sununu, who is a cosponsor of this legislation, when he looked at the lead sponsors said it tells us one of two things, either that this is truly a bipartisan attempt or that one of these Senators hasn't read the bill.

I would tell you that we have read the bill. We understand the SAFE Act and it is a bipartisan effort, and it is amazing what we have brought together in this effort. Whether you are on the left end of the political spectrum or the right end of the political spectrum, you are going to find support for the SAFE Act.

There is one thing that binds us together in the U.S. Senate, only one, and that is our sworn allegiance to the Constitution. I think Senator Craig may view some portions of it a little differently than I do, but we understand the basic responsibility that we face here, and that is why we introduced this bill.

We start with the same premise both from the Democratic and Republican side, and that is that we have basic rights and liberties to privacy, for example, in this country and the government has to make the case when it takes away your rights and liberties. If you start with that premise, as the 9/11 Commission did, then I think you can understand the SAFE Act. It is what we are all about.

I would like today to ask that we call a truce in the war over the PATRIOT Act. Almost since the day that it was passed, supporters and critics have been engaged in trench warfare. Some people have resorted to falsehoods and scare tactics. I know everyone on this Committee rejects those tactics, and I think we should move beyond them.

There are some things that I think we can basically agree on. First, the PATRIOT Act is a deeply misunderstood law. It is a really complicated, highly technical statute, 130 pages long. Most Americans haven't read it; and many Members of Congress may not have had the time to read it.

One critic said trying to read the PATRIOT Act and understand it is like standing outside a library in the middle of the night listening to the mice chewing on the books and trying to figure out what the contents of the books happens to be. That is not a misstatement or an over-statement, I think, when you consider some of the vague references and technical references in the PATRIOT Act.

Many policies people attribute to the PATRIOT Act have nothing to do with it. Let me give you an example: the detention of U.S. citizens an enemy combatants. I have been critical of this policy, but let's be clear. That doesn't have a thing to do with the PATRIOT Act.

Chairman HATCH. Right.

Senator DURBIN. Second, the fact that the PATRIOT Act is misunderstood does not mean that public concerns about civil liberties can be dismissed. As I said earlier, if you start with the premise that we have certain rights and liberties, God-given, and that the government has to justify taking away those rights, this is truly a legitimate inquiry as to whether the PATRIOT Act went too far.

Third, the PATRIOT Act shouldn't be a political football. Let's be clear. The PATRIOT Act sunset clause applies to less than 10 percent of the law, only 15 of the 158 sections. These provisions are scheduled to expire on December 31, 2005, over 15 months from

now. We picked that date, which is not during an election year, for good reason. We wanted to keep the PATRIOT Act out of politics.

Let me at this time salute you, Mr. Chairman, as well as Senator Leahy. I remember how the PATRIOT Act was born. It was a bipartisan effort at a very worrisome time in America's history, and I thought the two of you did your level best to come together and present something to us which was bipartisan, but to provide within the law sunset provisions so if we made a mistake in our fear or in our haste, we could correct it.

Fourth, Congress should debate the PATRIOT Act thoroughly before reauthorizing it. I think that is something that goes without saying.

Fifth, as I said earlier, the burden of proof for retaining the expanded powers of the Government under the PATRIOT Act is on the Government, not on the American people. The American people should not have to prove that they have a right to privacy. The American people should not have to prove that before their Government can search their homes or tap their phones, the American people have the responsibility of establishing why they shouldn't be tapped.

Here is where we disagree, and our debate over the PATRIOT Act is really limited to a small number of controversial provisions. We understand the PATRIOT Act was passed at a time of national crisis. The White House came to Congress and asked us to pass it to give our Government more power to protect us from another 9/11. As I said earlier, members on both sides of the aisle worked to improve it.

I want to at this point really salute one of my colleagues who is here today, and that is Senator Feingold. During the course of the debate on the PATRIOT Act, I thought he offered amendments on the floor of the Senate which were thoughtful amendments which really get to the heart of some of the issues that are addressed in the SAFE Act. It was not an easy time to offer those amendments and to suggest that the Government was going too far in the passage of the PATRIOT Act.

Senator Feingold, thank you for your courage and your leadership. I think, frankly, more of us should have been more carefully attuned to some of your arguments during that particular moment. Mr. Chairman, there is no perfect law, with the possible exception of the Ten Commandments and several laws that you have authored.

[Laughter.]

Chairman HATCH. Well, it is nice to have recognition of that.

Senator DURBIN. Thank you.

Now, with almost 3 years of hindsight, isn't it appropriate that we ask some important questions? I think Senator Craig has really gone to the specific issues and we can point to a broad coalition of groups that ask the very same questions.

When the American Conservative Union and the American Civil Liberties Union are standing together asking these questions, I think it points to the legitimacy of what we are about with the SAFE Act.

Unfortunately, the SAFE Act has been caught up in the war over the PATRIOT Act. I can't remember a time in over 20 years that

I have been on Capitol Hill when any administration has announced in advance when a bill was introduced that they were going to veto it, but they did on the SAFE Act. Before there was a single hearing, before there was a single amendment offered, the administration announced the President will veto this bill. I think that is a singular distinction. I don't know if it is a singular honor, but I can't recall this ever having occurred.

The administration said this bill would eliminate some PATRIOT Act powers and, quote, "make it even more difficult to mount an effective anti-terror campaign than it was before the PATRIOT Act was passed." These objections from the administration are just not accurate.

The SAFE Act does not repeal one provision in the PATRIOT Act. It doesn't amend pre-PATRIOT Act law. It retains the expanded powers created by the PATRIOT Act, but it places important limitations. Senator Craig has spelled them out.

When it comes to roving wiretaps, it would eliminate the John Doe roving wiretap. It would say to the Government, specify the person or the phone that you are going to tap. That is all.

On sneak-and-peek searches, it would say that after a period of time, 7 days, the Government would notify you that your home has been searched. And we put provisions in there for exceptions. For example, if someone's life is at stake; evidence is about to be destroyed. There are exceptions to that notification.

When it comes to the library issue, if you had been home and met with librarians to discuss this issue, you understand why the Boise Public Library has put this notice up and why many libraries across America are warning Americans that what they do in a public library may be compromised by the PATRIOT Act. That is an indication to me that we need to sit and take a look at this.

These are not wild-eyed people. These are folks in libraries who are committed to some of the most basic principles and freedoms of America—the right to privacy. When they are this concerned, as has been expressed by Senator Craig and many others, we owe it to them to step back and take notice.

Mr. Chairman, I am not suggesting our SAFE Act is perfect. Senator Craig and I are open to suggestions. I hope this Committee will be willing to work with us in a good-faith, bipartisan effort to really come up with a modification of the PATRIOT Act which does not compromise national security, but preserves and protects the rights and liberties of the people of this country.

Thank you, Mr. Chairman.

Chairman HATCH. Well, thank you, and I am convinced that both of you are very sincere in this effort and we will certainly work with you to see if there is some way we can resolve the differences that we have over this.

I would like to get to General Comey, so why don't you folks come up on our dais and we will turn to Senator Leahy, our Democrat leader on the Committee.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman, and I will try not to hold up the Deputy Attorney General.

After all, he is one of the few people in Government who is taller than I am and I wouldn't want to do that.

I want to just open by stating my respect and admiration for both Senator Durbin and Senator Craig. I remember different times I have worked with Senator Durbin. He has so carefully and consistently gone through each piece of legislation here and worked on it.

Sometimes we have agreed, sometimes we have disagreed. I have always been influenced, though, by his reasoning and his work on that.

Senator Craig and I worked together when I was the Democratic leader of the investigation that happened on Ruby Ridge. I couldn't help but think, in speaking with Senator Craig at that time and with many of his constituents, of some of the concerns that they expressed about the Government's involvement in their life, or even more specifically the Government's involvement in their privacy. It would be easily interchangeable with the people in Vermont, a State which greatly, greatly holds to its privacy.

About the only article ever written about me that I actually saved and framed was a sidebar to a major New York newspaper that sent somebody up to do a profile of me. The sidebar talks about the little town I live in. I live on a dirt road, in an old farmhouse, with a farm family that has known me since I was a child next door. They hay the fields and what not.

The article went almost exactly like this. On Saturday morning, a New York reporter pulls up in a New York-licensed car. An old farmer is sitting on the porch, and he says does Senator Leahy live up this road? The farmer looked up and said are you a relative of his? He said no. He said, well, are you a friend of his?

Well, not really. Is he expecting you? No. The farmer looks him right in the eye and says never heard of him. That is our sense of privacy.

Senators Durbin and Craig have been vocal proponents for a thoughtful change in the PATRIOT Act. They have identified sections in the law that deserve vigorous debate; specifically, with regard to Section 215 of the PATRIOT Act, the national security letters. I think that is important.

I wish—and this is nothing against Mr. Comey, who is very well-respected, but I wish the Attorney General would be here, not least because of his oversight obligation to his former colleagues on this Committee. We see him appearing at press conferences, announcements of indictments. We read about his travel to Bellagio and Lake Como, near that beautiful portion of northern Italy from which my Italian grandparents emigrated. He seems to have time for everything but appearing before the oversight Committee. As members of the Committee know, this chronic scarcity touches also on the question of 9/11.

So I do look forward to hearing Mr. Comey's views on the SAFE Act, but I am also interested to hear his response to rising public concern over the fact that the Bush administration continually calls for more Government power, while leaving many available authorities under-utilized. There is the matter of establishing a real civil liberties protection board to serve as a watchdog to the agencies of the executive branch. So today's hearing is an important.

The Durbin-Craig SAFE Act is a substantive bill that merits our attention. But this hearing is also significant because it is the first hearing in this Committee on these matters since the release of the 9/11 Commission report, which wrote that the burden of proof for retaining a particular governmental power should be on the executive. It said that the executive must explain how the powers of the PATRIOT Act actually materially enhance security, whether there is adequate supervision of the executive's use of those powers to ensure protection of civil liberties, that there are adequate guidelines and oversight to confine its use. So there should be answers to questions on this topic.

The hard truth is, even as we mark the third anniversary of the terrible, terrible September 11 attacks, we have not seen basic accountability for these tragic acts. Vice President Cheney recently spoke about a number of things, but he recently spoke of the likelihood that terrorist attacks would occur if a Democrat were elected President. That is outrageous. He told supporters that terrorists will strike again if we make the wrong choices on election day. I was a youngster during the McCarthy era, but I still remember some of the slurs that came out at that time. This remark is not only irresponsible and outrageous, but it shows fear-mongering.

It is also incredibly ironic that it was given by the top administration official who was on watch on September 11 when the first attack happened, and we have yet to see any acceptance of responsibility for that attack or the missteps leading up to it or the failure to capture Osama bin Laden. We seem to think that the administration could squander the unity of the American people and our international allies by deviating from the fight against terrorism by choosing instead to topple the regime of Saddam Hussein, a horrible man. But I am far more interested in getting the people who struck at us.

I really worry. I have seen the Republican Speaker of the House and the Republican candidate for the Senate in South Dakota follow these charges. After all, everybody here, Republican and Democrat, are patriotic. There is not a single one of us who wants to see us get attacked again, and these outrageous statements really do go back to a dark time in our history of Joseph McCarthy. I mention this because it was a Senator from my State, Ralph Flanders, who had the courage to stand up and submit the articles of censure against Mr. McCarthy.

The facts are that the Bush administration resisted this Committee's efforts to examine what led to the tragedy. They resisted creation of the Department of Homeland Security. They resisted the formation of the 9/11 Commission. They resisted the efforts of the 9/11 Commission while carrying out its task, and they continue to resist important recommendations of the 9/11 Commission.

Regarding the topic of today's hearing, the administration has done little but resist oversight of the PATRIOT Act's implementation, despite bipartisan concerns. After all, I remember what Governor Kean said that there is probably no substitute for the oversight of the Congressional committees. He said vigorous oversight is needed to make sure the public can be assured the PATRIOT Act is being used properly. We have been trying to get updated infor-

mation from the Department on implementation issues of the PATRIOT Act, including the use of national security letters.

We recognize that some of the most controversial provisions of the PATRIOT Act will sunset at the end of 2005. Because of that, the 9/11 Commission said we should have a healthy debate over the extension of those provisions next year.

In case anybody wonders how that sunset provision came about, then-Republican Leader Dick Armey and I put that in. Now, that is an interesting ideological line-up, but the two of us joined to put this in. We did it so that there would be oversight.

The Attorney General has said that no one has challenged the Government's use of authority and no court had found the Government had overreached. Perhaps he chose not to be with us today because the list of reversal of the Government's policies and practices has become so extensive over the last couple months and years. From the Department's involvement in rewriting our country's adherence to the Geneva Convention and the Convention Against Torture which contributed to the breakdown at Abu Ghraib prison and elsewhere, to the Supreme Court's rejection of the administration's Guantanamo practices, there is a lot that needs attention.

In fact, the Justice Department has accumulated one loss after another in terrorism cases. We have seen just recently the unraveling of the Department's first post-September 11 prosecution of a terrorist sleeper cell in Detroit. That followed on the heels of a growing list of losses in questionable cases.

The wrongful arrest of a Portland attorney based on a fingerprint mismatch—great fanfare announcing this arrest. Whoops, sorry, got the wrong guy. The acquittal of a Saudi college student who was charged with providing material support to terrorists. The release on bail of two defendants in Albany, New York, after the Government admitted having mis-translated a key piece of evidence. The evidence referred to one defendant as "brother," not "commander," as originally represented. The Supreme Court's repudiation of the administration's claim that it can hold citizens indefinitely as unlawful combatants without access to counsel or family.

There have been really very few victories in cases that brought terrorism charges since September 11, and those seem to have been foreshadowed by seemingly half-hearted prosecutions. Justice Department officials say their record since the 2001 attacks reflect a successful strategy of catching suspected terrorists, even if that involves charging them with lesser crimes.

I am not going to contest that lesser crimes are being charged. I can't think of a greater crime than what happened to us on September 11. If we look at the TRAC record of the approximately 184 cases that we are told were international terrorism matters, 171 of them got sentences of less than a year. In my State, you can get sentences like that for drunk driving, not for terrorism.

What happens to a suspected terrorist that spends 6 months in prison and then is deported to his country of origin in the midst of a war that has no end in sight?

Does it really squelch deadly plots?

The administration has yet to answer questions about the deportation of Nabil Al-Marabh to Syria, a nation that is a state sponsor

of terrorism. He was at one time number 27 on the FBI's list of most wanted terrorists. Experienced prosecutors wanted to indict him, but instead he was released. He shared an address with defendants in the Detroit case. Now, what are they facing? Document fraud charges. The Twin Towers were hit, the Pentagon was hit; a plane came down in Pennsylvania. We are going to get somebody on document fraud charges and send number 27 on our list of most wanted out of the country.

I am waiting to see what the Government does with the Hamdi case. Will the Justice Department release and send to Saudi Arabia someone they said was so dangerous that he had to be held for years in a military stockade and couldn't be allowed to consult with a lawyer?

I would like to have asked the Attorney General about the frightening announcement from Moscow that they arrested Jose Padilla, as if the Government had miraculously averted a nuclear device from being detonated in our heartland. The Attorney General had to go immediately on television in Moscow to tell us about this.

Mr. Comey represented in the Federal courts a few months ago that the Government no longer even contends that Mr. Padilla was engaged in a dirty bomb plot.

We have yet to see any criminal charges against him, but I do remember all the programs on television here being stopped immediately so we could hear about the nuclear attack that was diverted when the Attorney General announced it from Moscow. We see a lot of these press conferences. I would like to find out what happens when it turns out that the charges weren't backed up.

The reason I mention all these things is that if we are going to give the Government more powers to add to the Federal arsenal, let's find out what has been happening so far, not just the press conferences announcing some spectacular arrest, but what happened later on when somebody got a charge that is similar to a drunk driving charge, or the charges are dropped or we say, whoops, forget those major headlines that went on for day after day after day; we made a mistake.

I want to know what tools are actually being used and how they are working, and which are subject to abuse and which need to be modified. As I have said before, I am a former prosecutor and I want to give prosecutors a lot of tools, but I don't want them to go into the privacy and independence of Americans without knowing what we are getting in return.

Thank you, Mr. Chairman. I will put my full statement in the record.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman HATCH. Thank you, Senator. I am going to put you down as being against the Vice President and the Attorney General, and I will—

Senator LEAHY. No. I am against anybody who would go up and say one of the most outrageous statements, and every Republican should condemn what the Vice President said to say if we elect a Democrat, we are going to have a terrorism attack similar to what happened during this Republican administration.

Chairman HATCH. I don't think he said that.

Senator KYL. Mr. Chairman?

Chairman HATCH. You know he didn't say that, and I think that is a misrepresentation of what the Vice President said and I would direct you to read the record and read what he said. And what he said is true, and frankly I don't think there should be distortions like that.

But be that as it may, we—

Senator KYL. Mr. Chairman.

Chairman HATCH. Yes?

Senator KYL. I am sorry. Could I just ask unanimous consent that the Vice President's actual words be inserted in the record at this point?

Chairman HATCH. Without objection.

Senator LEAHY. I am all in favor of that.

Chairman HATCH. Well, so am I.

Now, we are pleased to have Mr. Comey. Mr. Comey runs the Department on a day-to-day basis under the direction of the Attorney General.

There is nobody who has better knowledge or better information or a better ability to understand the PATRIOT Act than Mr. Comey. So we welcome you as the Deputy Attorney General to this hearing. We are fortunate to have you.

Mr. Comey has experience ranging from line prosecutor to terrorism prosecutor, U.S. Attorney for the Southern District of New York, one of the most prestigious positions in the whole Justice Department, to now the second highest ranking official in the Department of Justice and the person who runs the day-to-day Department of Justice.

So we are pleased to have you here. We are pleased to have your opening statement and we look forward to allowing both sides to ask any questions they desire of you, and we will go from there.

STATEMENT OF JAMES B. COMEY, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. COMEY. Thank you, Mr. Chairman, Senator Leahy, members of this Committee. Mr. Chairman,

I would ask that my full statement be made part of the record.

Chairman HATCH. Without objection, we will put your full statement in the record.

Mr. COMEY. Thank you, Mr. Chairman for holding this hearing. I traveled to the beautiful State of Utah for the first time ever not long ago to attend another hearing of this Committee devoted to the PATRIOT Act, and I did that because I care so much about the discussion about the PATRIOT Act and about how the Government is using its powers.

I was honored to follow Senator Craig and Senator Durbin and listen to their remarks. I respect them. I hear in their remarks what I otherwise know, which is their passion for the rule of law and for a close inspection of how we are using our Government powers.

Senator Craig quoted me accurately at the Utah hearing. I think I did say there has been no informed discussion. I should have said there has been little informed discussion, because I have been part

of some of that discussion about the PATRIOT Act over the last 18 months, as have my colleagues.

This is hard stuff. As Senator Durbin said, the PATRIOT Act is long and complicated, and affects many, many provisions of the criminal law and many of our tools to fight terrorism and foreign intelligence efforts in the United States.

There are folks, though, around this country who I believe don't know enough about the PATRIOT Act. I believe those are the folks who call for its repeal. No one who has read the PATRIOT Act and who understands what is in it calls for its repeal, because people who have read it know that it provides additional money for the families left behind by first responders killed responding to terrorism. It does something earth-shattering and ground-breaking, and that is it lowers the wall between intelligence and criminal investigations so that we can work together to attack terrorism.

I believe very strongly that both sides in this debate need to engage in this debate in a careful, respectful manner that gets beyond bumper stickers. I think too often we have shouted past each other in this debate, and folks on both sides have questioned the motives of people who disagree with them.

I am somebody who believes it is right to question government power. Our country was founded by people who had major concerns about how the government would use its power, and 200 years and more later it is filled with people who care about how the government exercises its power and I am one of them.

I believe that the government should explain what it is doing to the extent it can in an open forum, and if it can't in an open forum, then in a closed forum that respects intelligence sources and methods, and defend ourselves and explain how we are using powers because sunshine is the greatest disinfectant in the world. I should not be doing something as Deputy Attorney General that I can't explain and I can't defend, and I pledge to you that I have not and I will not.

As Senator Craig quoted me, I do believe that if we have an informed debate about the PATRIOT Act people will take the time at a cocktail party before they nod reflexively about how evil the Act is, if people take the time to say what do you mean specifically, what are the details there, or folks at conferences or folks in courtrooms or folks at hearings demand those details, they will see that the Act is, as I have said, smart, ordinary and constitutional, and that we need it.

What I would like to do is just touch briefly on a couple of areas that have people very concerned and that people ask me about quite frequently.

Sneak-and-peek search warrants. We in law enforcement—I spent my career as a prosecutor—we don't call them sneak-and-peek search warrants. We call them delayed notification search warrants. Just the label "sneak-and-peek," I think, connotes the government going through your sock drawer late at night and then sneaking off not to tell you about it, and obscures the fact that we never obtain a search warrant, whether it is a delayed notification search warrant or a regular search warrant, without a sworn showing of probable cause to a Federal judge, who then issues a warrant and has jurisdiction over that matter.

Chairman HATCH. You never do?

Mr. COMEY. Never.

Chairman HATCH. That is important.

Mr. COMEY. There are circumstances in which searches are done under exigent circumstances, emergency.

Someone is rushing into a building and they are chased before they can flush drugs down the drain. But the warrant requirement of the Fourth Amendment is part of our being; it is part of the fabric of the Department of Justice and every prosecutor and investigator in the United States.

Delayed notification search warrants aren't used a lot, but they have been used for decades and only when it matters most. I have used them myself as a practicing prosecutor before I became a bureaucrat. I was Assistant U.S. Attorney in Richmond, Virginia, and there was a drug gang moving into Richmond from New York, where before I was U.S. Attorney I used to say all bad things come.

The drug gang moved into Richmond, dealing lots and lots of crack. We didn't know much about them, except they were big, they were bad, they were dangerous and they were new. We had a single informant who told us about them and told the DEA that they had just delivered five kilos of cocaine to an apartment in the west end of Richmond. We didn't know much more about it. We had a reliable informant. We could make out probable cause based on his track record and the specificity of what he said.

So we had a choice to make. Do we get a search warrant and go in and seize those drugs, alert this organization that we are on to them, jeopardize the informant and blow the investigation, or do we let five kilos of cocaine walk onto the streets of Richmond? We didn't have to make that choice, though, because we had a judicially-created rule that has been in effect since before I was a lawyer and that has been upheld by the Supreme Court that allows a court to delay notice.

So we went to a Federal judge. The DEA laid all that out that I just told you in a sworn affidavit, and the judge gave the Drug Enforcement Administration permission to search and to make it look like a burglary, to delay notice. So the DEA went in, they found the five kilos where the informant said it was. They took the TV, they took the stereo, they broke a window. And in a theatrical flourish, they took three beers and poured them down the sink and set them around, and then they waited.

The two leaders of this organization came to the apartment and they called the cops, and we sent a black-and-white unit, a marked unit, with a briefed police officer and went there and answered the call for service and said what is the problem? And they said, well, there has been a burglary. Who are you? I am so-and-so, and can I see your driver's license? He got full identifiers on these two characters. Whose apartment is this? It is ours. What was taken? Stereo, TV, and these people even drank our beers; the nerve of these burglars. Anything else taken? No, sir, nothing else taken.

Sixty days later, we had identified the full extent of this drug organization and we locked them all up. More than 30, as I recall, were locked up. That delayed notification search warrant allowed us to take the drugs off the street, to protect the informant's life and to identify all the bad guys.

Now, my frustration is that that took me four minutes to explain. Finding the space in American life for folks at cocktail parties, at conferences and at hearings in court to listen to that to understand what that tool is and why it matters so much is our great challenge. That is a burden on me and other members of the Department of Justice and we are going to work very hard at it.

Section 215 that Senator Craig mentioned, the document provision of the PATRIOT Act that allows foreign counter-intelligence and foreign counter-terrorism investigators to obtain records by going to a Federal judge and getting an order for records or tangible things, has caused great controversy.

It has become known as the library provision for reasons that I cannot figure out.

I cannot figure out how 215 got associated with libraries. They are not mentioned in 215. It is not something we lie awake at night thinking about.

When I look at 215, what I think of is what most trained investigators think of—our ability to get credit card records, our ability to get travel records, our ability to get rental car records, hotel records. But folks are absolutely right that under this provision, a Federal agent could, based on a sworn affidavit, get permission from a Federal judge to obtain tangible things, books and records, that might be at a library.

The only thing I would say to folks is that we need to start from the premise that we don't want libraries to be a sanctuary in this country. Nobody does, if they think about it. But I think we have gotten to a point where somehow this debate has become so spun up that people whom I respect tremendously, librarians, which is why their concern causes me such pain, have found themselves in a position where they are calling for sanctuary in libraries.

We recently had an al Qaeda associate that we were tracking in New York and very concerned about who had a computer at home that we were monitoring, and he kept going to a library to use the computer.

We couldn't figure out what was going on. To make a long story short, we found out after we locked this guy up that he was going there because that library's hard drives were scrubbed after each user was done, and he was using that library to e-mail other al Qaeda associates around the world. He knew that that was a sanctuary. When I heard that, my reaction was what are we doing? How has it moved from a debate that should be rational to a place where we are creating a sanctuary?

I am happy to engage with librarians and anyone else about Section 215. What that section simply does is give powers to counter-intelligence investigators and counter-terrorism investigators that criminal investigators have had for decades to obtain records with process, except it does one thing. It makes it harder for them to get the records than for a criminal investigator using a grand jury subpoena.

Chairman HATCH. Would you repeat that again, because I think those are things that a lot of people just don't seem to understand?

Mr. COMEY. I have given grand jury subpoenas—hundreds, probably thousands in my career as a Federal prosecutor—to Federal agents to go and obtain records. I don't think I have ever done it

with a library, but we would if the crime led us there. The showing required is the investigation is open and I think and the agent thinks this might be relevant to the investigation. We don't have to go to a judge; we don't have to involve the court at all.

Section 215 requires that same agent who wants those same records, but for a foreign counter-terrorism or foreign counter-intelligence investigation, to go to a Federal judge who sits on the Foreign Intelligence Surveillance Court, write out an application as to what he wants and representing that it is for a foreign counter-intelligence investigation or a foreign counter-terrorism investigation, and then get a court order for it.

It is a much, much bigger hassle to do that than it is for a grand jury investigator to get the same subpoena which is stroked by an Assistant U.S. Attorney. So I think folks don't realize those details that it allows people conducting, frankly, investigations that are more important than your garden-variety criminal cases access to the records—it simply makes it harder for them.

The one thing it does that concerns a lot of good people is the court order mandates that whoever gets this and provides these books and records—and as I said, I think of rental car agencies, hotels, but let's say it was a library. There is a gag order, a non-disclosure order. I have tried to discuss this at great length with a lot of librarians. Anybody who cares about privacy, as all of us do, would not want an FBI agent going to a rental car place or a library and saying we are investigating Jim Comey and it is a foreign counter-terrorism thing and so we are going to need these records and that is what it is about. Nobody would want that to happen, so everybody would have to recognize that the librarian or the hotel operator is not going to have the facts.

So why should, in our highest-stakes investigations, that person be in a position to make the call whether to tell Jim Comey that his records have been obtained? I mean, it is complicated to think about, but if folks follow the thread through, they will understand that a non-disclosure order is an important part of our foreign counter-intelligence and foreign counter-terrorism investigations.

The SAFE Act does not, as the Senator said better than I ever could, talk about repealing the PATRIOT Act. It actually proposes modest changes to provisions of the PATRIOT Act. My concern about it is this: I approach all of the criminal tools that I use and ask, is something broken? If nothing is broken, then I don't see a reason to change it.

I don't believe that the sneak-and-peek, the delayed notification search warrant provision is broken. I don't believe that the John Doe roving wiretap provision is broken. So many of these other provisions that the Senators have raised and raised, and explained in a very, very—

Chairman HATCH. I don't mean to interrupt you, but what about Senator Craig's concern that he trusts you and this administration, but there might be a subsequent administration that might abuse it?

Mr. COMEY. Well, I guess you could trust me personally, but you should not trust me institutionally because we are a Nation of laws. I have devoted my life to that.

Chairman HATCH. What he is saying is he doesn't trust the institution, or at least—

Mr. COMEY. And I think all of us should have a healthy maybe not distrust, but skepticism of government power. I believe it is addressed in the PATRIOT Act because the PATRIOT Act is chock full of judicial supervision, Congressional supervision and inspector general supervision. I have all three of those watchdogs in my life whenever I want to use the key tools of the PATRIOT Act.

As I said, the document provision, 215, requires Federal agents to go to Federal judges. Grand jury subpoenas don't involve Federal judges. We make reports every 6 months to the Congress how we are using it, and as everyone knows, the last time we declassified that, we had never used Section 215. But we make detailed reports.

Our inspector general, who is a very competent and very aggressive person, scrubs us from head to toe on how we are using the PATRIOT Act and entertains criticisms of how we have used it. To my knowledge, there has been no finding by a court or by our inspector general that there has been an abuse of the PATRIOT Act.

We had one court strike down a provision of the material support statute that was in the PATRIOT Act as vague, and we are still pursuing that.

Our inspector general continues to investigate the Mayfield matter that Senator Leahy referred to.

I don't know exactly how the PATRIOT Act would figure there, but that is one he said he is looking at. But beyond that, there is level after level after level of review and safeguard that is not present in the thousands and thousands of criminal investigations that we conduct everyday.

I don't want to appear rigid or like some sort of maniac, but my approach to it is if something is broken, I will look to fix it. If it is not broken, I don't think we should look to fix it.

What I worry is really broken is people's understanding of delayed notification search warrants or Section 215. I would prefer that rather than change the statute to try to give them comfort that people like the Justice Department engage them and explain what these tools are and how we are using them rather than change the law.

So I thank you so much, Senator, for having this debate. I look forward to it and I look forward to taking your questions.

[The prepared statement of Mr. Comey appears as a submission for the record.]

Chairman HATCH. Well, thank you. These are legitimate questions that have been raised by our colleagues, but many people have expressed concern about Section 213 of the PATRIOT Act which permits courts to issue delayed notification search warrants in certain narrow circumstances. I have two questions about this provision.

First, could law enforcement investigators obtain delayed notification search warrants before the passage of the PATRIOT Act?

Mr. COMEY. Yes, sir. For at least 40 years—

Chairman HATCH. Used all the time?

Mr. COMEY. Yes, and it was 1979—

Chairman HATCH. Used in all types of crimes?

Mr. COMEY. Yes, Senator.

Chairman HATCH. Do you see any reason why it shouldn't be used, delayed notification, in the case of terrorism investigations?

Mr. COMEY. Oh, certainly not. It doesn't get used a lot, but it is used when it matters most.

Chairman HATCH. Do you know of any abuses?

Mr. COMEY. No, sir, and again I would be hard-pressed to see how there could be abuses when each of them requires an application to a court and supervision by a court.

Chairman HATCH. And the court does supervise?

Mr. COMEY. Yes, sir.

Chairman HATCH. When you are talking about the court, you are talking about a Federal court?

Mr. COMEY. Yes, a Federal district court.

Chairman HATCH. The second is could you explain why it is sometimes necessary for delaying notice of search warrants when there is a belief that witnesses may be intimidated or an investigation may be seriously jeopardized?

Mr. COMEY. Yes, Senator, and there are examples. I realize that is one of the areas that the SAFE Act proposes to address to limit it to lives in danger, destruction of evidence, and to eliminate intimidation of witnesses or serious jeopardy to an investigation. Again, that doesn't change the world, but it changes it at the margins where it matters most.

We had a major drug investigation called Candy Box, a huge Ecstasy case. We were about to lock up about 170 drug dealers and one of them came across the Canadian border, I believe, into New Hampshire and our informant said he has a huge load of Ecstasy in a fake gas tank.

We had a choice to make again, as I did in Richmond. If we grab that guy and serve him with notice of the search warrant, we will jeopardize the entire investigation because when we show up the next morning, a lot of these 170 are not going to be in their beds where we need them to be. So what we did was we got, again, a delayed notification search warrant and the agent stole the guy's car.

He stopped at a rest area to go in and get a snack or something. He didn't steal it, but with court permission took the car and then sprinkled broken glass around the parking lot. And then the next day, we locked up all of these drug dealers and then made disclosure to this guy that your car wasn't stolen; the Government has it and you are welcome to make application to have it back.

Chairman HATCH. Well, what I am hearing you say is that this delayed notification, very similar to what you are talking about in the PATRIOT Act, has been used for decades. It has been used in common criminal investigations, in drug investigations, in pornography investigations and in rape investigations, and so forth.

I think if I understand you correctly, you are saying why would we, the Federal Government, be deprived of this same right to not notify the criminals that we are coming after them and thus ruin a whole investigation in the case of anti-terrorism matters. Is that right?

Mr. COMEY. That is absolutely correct, and in counter-terrorism cases you can imagine how it might be even more important than in others where we—

Chairman HATCH. But what is wrong with the SAFE Act? They say that they will give you 7 days.

Mr. COMEY. Well, nothing is intrinsically wrong with that, except I don't know why we would do that. Federal judges now decide what is a reasonable period of time and that is their case.

Chairman HATCH. You are saying why should we bind our hands if it takes 7 1/2 days or 10 days or 11 days?

Mr. COMEY. That is correct, Senator. As I said, I am not saying that is a crazy idea or there is something unreasonable or intrinsically bad about it.

Chairman HATCH. It is not crazy at all.

Mr. COMEY. I don't see anything broken with having Federal judges decide, given each investigation being different, what is a reasonable period of non-disclosure.

Chairman HATCH. Do we put a similar limitation on these other domestic criminal activities?

Mr. COMEY. A similar limitation, Senator?

Chairman HATCH. A similar seven-day limitation.

Mr. COMEY. Not that I am aware of.

Chairman HATCH. In other words, it is up to the courts.

Mr. COMEY. Yes, sir.

Chairman HATCH. And we trust the courts to supervise this and to make sure that it is not abused?

Mr. COMEY. Yes, Senator.

Chairman HATCH. Plus, you are telling me you don't know of one abuse with regard to the use of delayed notification under normal domestic criminal activity, or even under the anti-terrorism investigations.

Mr. COMEY. That is correct, Senator, and something a lot of ordinary folks don't realize is the warrant requirement that requires us to show probable cause to a Federal judge is in the Constitution. The notice requirement is not in the Constitution. It is in a rule, Rule 41 of the Federal Rules of Criminal Procedure. So there is no constitutional issue implicated by the delay for a reasonable period of notice.

These are all warrants that are obtained—again, I have to keep saying it because people don't seem to realize it who are not lawyers or engaged in these issues, that Federal judges issue these warrants based on a showing of probable cause to believe that a crime is being committed and the fruits of the crime will be found at the scene.

Chairman HATCH. I, like you, wonder why would we want to restrict our Federal investigators and prosecutors with regard to anti-terrorism investigations when we don't restrict them, other than getting a court order and the court supervision, with regard to normal domestic anti-crime investigations.

Isn't that a fair summary? Why would we want to do that?

Mr. COMEY. Well, it is a fair statement, Mr. Chairman, and the way we approach this is exactly as you said that the tools ought to be at least as strong on the foreign counter-terrorism and foreign counter-intelligence side as on the criminal side.

Chairman HATCH. Without the

PATRIOT Act, they wouldn't be as strong?

Mr. COMEY. No, sir.

Chairman HATCH. And with the SAFE Act, they would not be as strong?

Mr. COMEY. That is correct. I mean, as I said, they would be modified at the margin, but modified in significant ways.

Chairman HATCH. What you are saying is that the SAFE Act would make it even more difficult for Federal prosecutors and investigators to investigate terrorism matters than they currently have and the difficulties they have investigating normal domestic criminal activity.

Mr. COMEY. That is a fair statement. I don't want to overstate it, but I do believe that it would make it marginally more difficult. And as I said, I approach that by asking why, if I don't think it is broken, I would change it.

Chairman HATCH. Critics of the PATRIOT Act, and specifically Section 215, have called the Foreign Intelligence Surveillance Court a rubber stamp. Do you agree with that characterization? Why or why not?

Mr. COMEY. Definitely not. The Foreign Intelligence Surveillance Court is made up of Federal judges who, whether they are sitting in district or an appellate court or in the Foreign Intelligence Surveillance Court, are never rubber stamps, no matter how long they have been on the bench or where they came from.

I think we have publicly disclosed that last year they rejected four of our applications for Foreign Intelligence Surveillance Act tools, and they modified, substantively changed, 79 of them. So these folks are not just receiving it and saying, okay, Comey's signature is on it or Attorney General Ashcroft's signature is on it, so we are good to go. They are a very, very challenging audience, as they should be.

Chairman HATCH. Now, just so we all understand it, with regard to libraries, before and after the PATRIOT Act—but before the PATRIOT Act, with regard to domestic criminal activities, there was absolutely nothing stopping you, as long as you showed probable cause and got a warrant, from going into a library and investigating domestic criminal activity. Is that right?

Mr. COMEY. It would not even require a warrant, Senator.

Chairman HATCH. You could do it under grand jury subpoena?

Mr. COMEY. That is right, and we have done it in child pornography investigations, for many reasons. People who want to use a computer for illicit purposes are attracting to libraries. We did it in the case of this fellow named Regan, who was a spy for the Navy who was in a library using the computer to do research related to his spying activities. We have approached libraries to try and get records to try and verify that Ted Kaczynski was the Unabomber.

Chairman HATCH. As a matter of fact, that was one of the methodologies you used to catch Ted Kaczynski, the Unabomber, right?

Mr. COMEY. That is my understanding, Senator. He referred in his so-called manifesto to some obscure texts, and after his brother said he thought he was the one, investigators confirmed that Ted Kaczynski had checked out some of these very, very obscure texts. Again, a library is not a sanctuary. Nobody would want it to be.

Chairman HATCH. Did you have a warrant to go into the library to get that material on Ted Kaczynski?

Mr. COMEY. No, certainly not.

Chairman HATCH. You had a grand jury subpoena, right?

Mr. COMEY. Yes, that is my understanding.

Chairman HATCH. In other words, under our domestic anti-crime laws, grand jury subpoenas are sufficient enough to go into a library and obtain information that might possibly convict or be used against a domestic criminal. But before the PATRIOT Act, you could not do the same for a terrorism investigation.

Mr. COMEY. The counter-terrorism investigator would have to try to get a criminal case opened and then try to get a grand jury subpoena because he didn't have the availability of process the other way.

Chairman HATCH. So it was much more difficult, is what I am saying, to do the terrorism investigation than it was to do the normal domestic criminal investigation.

Mr. COMEY. That is fair, Senator.

Chairman HATCH. And what we have done in the PATRIOT Act is require you to do even more than what has to be done in the domestic area, or what is usually done in the domestic anti-crime area, because we require you to go to the Foreign Intelligence Surveillance Act and get a warrant before you can go in and investigate the possible terrorist use of library facilities.

Mr. COMEY. That is correct, Mr. Chairman and we don't require a showing of facts that the person is guilty of something before we can get the records with a grand jury subpoena, or else we would never get off the ground with criminal investigations. And that is one of our concerns with heightening a standard on the foreign counter-intelligence and foreign counter-terrorism side.

Senator FEINGOLD. Mr. Chairman how long are these rounds?

Chairman HATCH. How has the PATRIOT Act worked, in your opinion, with regard to these two provisions, in particular?

Senator FEINGOLD. Twenty-minute rounds?

Mr. COMEY. I think it has worked very, very well.

Senator FEINGOLD. This is a little unreasonable.

Chairman HATCH. I have never talked to you—

Senator FEINGOLD. I get similar time.

Chairman HATCH. You take all the time you want. Go ahead. My gosh, I have never denied the minority one minute.

Senator FEINGOLD. I am just asking.

Chairman HATCH. And I am getting chewed up because I am one minute and 30 seconds over.

Senator FEINGOLD. Mr. Chairman, all I asked you is how long the round was.

Chairman HATCH. Well, that is fine. It is 5 minutes.

Senator FEINGOLD. That is all I said to you, Mr. Chairman, and that is a fact.

Chairman HATCH. I apologize for taking longer, but I think this is a line of questioning that has to be done.

Senator FEINGOLD. I just wanted to know how long the round was. That is all I said, Mr. Chairman.

Chairman HATCH. All right. I know what it was said for. Go ahead.

Mr. COMEY. I think that these tools, particularly the delayed notification search warrant and the Section 215, are very important tools that work very well.

Chairman HATCH. Well, thank you.

I have taken seven minutes, two minutes more than I should, as Chairman of the Committee. I am going to give you eight minutes. How is that?

Senator FEINGOLD. Mr. Chairman, I obviously had no problem with as much time as the Chairman would want.

Chairman HATCH. Well, it obviously irritated me.

Senator FEINGOLD. I just wanted to know how long I would have.

Chairman HATCH. Take whatever time you need.

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you, Mr. Chairman.

Where to begin on this? I respect your comments, Mr. Comey, about the way in which this law has been distorted on both sides across the country, but I would submit to you the reason it has gotten so bad with regard to the critics of the bill is the constant inability of this administration to talk about the actual issues within the provisions. And I regret that you just continued that practice, I am sure not intentionally, but let's take the examples of the provisions that were just discussed.

Chairman Hatch walked you through a number of questions in order to try to determine under Section 213, the sneak-and-peek provisions, that, in fact, delayed notification is something we need. No one disputes that; no one has ever disputed that. This is a technique that is being used on this legislation over and over again in the Attorney General's appearances around the country to take a red herring. Whether it be the unanimity on taking the wall down between the CIA and the FBI or the need for delayed notifications or the need to be able to use roving wiretaps, they say, well, we need this. Well, everyone agrees. That is not the issue here.

You said it took you four minutes to explain it. Well, you didn't get at the heart; you didn't get at the issue that Senator Craig and Senator Durbin carefully explained, which is the problem here is not that we don't believe there are many cases, many of which I support, where we need delayed notification. It is that the notification put in the statute is indefinitely delayed.

There is no time limit. You guys don't have to come back to the judge in 7 days, as many of the circuits prior to this required, and say we need this renewed. There is no limit; a reasonable time, but there is no actual limit. That is the issue.

So when the Chairman tries to raise the rhetoric here by suggesting that somehow there is somebody on this panel, or frankly anybody who believes we shouldn't have delayed notification in some cases, that is not the issue. You are going to continue to have this public relations problem, and you have got a big one unless you guys start talking about what the actual issue is here.

Of course, the other issue with regard to Section 213 is how you get in that window. As I said, some of these exceptions—flight from prosecution, destruction or tampering with evidence—obviously, those are the kinds of provisions I support.

But there is another exception: otherwise seriously jeopardizing an investigation or unduly delaying a trial. I would suggest that that is so broad—and my colleagues, 20 of us, agree on this, includ-

ing many Republicans, as well as members of this panel, that that is so broad that it really does undercut what I think most Americans believe is their Fourth Amendment right not just to a search warrant, but to notice for that search warrant, except for in very limited circumstances. So that is the issue on Section 213 and it has not been addressed this morning.

All we are trying to do here is to fix it. It is actually a very conservative position to try to fix that.

The same thing with Section 215. I am intrigued by your wondering why this could become the library provision. I understand and have always understood that it has much broader implications. The library is a very special place on Main Street America. The sanctity of the library has always been something that all of us grew up to believe in. That is sort of the ultimate place where you feel that your right to privacy and your First Amendment rights exist. So it should come as no surprise to this administration, if they are listening to people, that this is scary to people.

Again, when you talk about the provision and when the Chairman talks about the provision, you ignore the fundamental fact. No, the court is not a rubber stamp. The rubber stamp is written into the statute. There is no standard of proof or even relevance, as there is in a grand jury proceeding. All it requires is the FBI has to say that the information is sought in connection with a terrorism investigation, and the judge has no discretion, Mr. Chairman. The judge has no discretion. The judge must issue the order.

Why is this different than a grand jury proceeding? The Chairman was walking through the whole grand jury issue and it made me wonder when I was going to get a chance to respond. You know much better than I do, but I know enough to know that in a grand jury proceeding the subject of the subpoena knows that the subpoena has come to him or is coming his way. He has a chance to challenge that before the judge; he has a chance to quash it. Under this law, the person isn't even told that this is happening. That is a world of difference between a grand jury proceeding and this secret court proceeding.

So I want everybody to know that what we are trying to deal with here is not stopping the Government's ability to get at library records. I tell people at my town meetings, look, if any one of you had lunch with somebody from al-Qaeda last week, I want the Government to get everything you have got.

But for the FBI to have the ability to walk in to a judge and say, look, you are giving this to me, and have no discretion, is a frightening intrusion, a frightening concession of power that goes against, in my view, the Constitution of this country.

So, Mr. Chairman, I apologize for my eagerness, but this is terribly important stuff.

And I respect every one of my colleagues. You all disagreed with me on whether to vote for the bill or not. I respect that. That was a tough call. We didn't have very much time. I took extra time, because I was Chairman of the Constitution Subcommittee and I thought, well, it is my job, and I didn't like what I saw.

Well, I admire my colleagues here for their willingness to say, look, let's fix it. That is all I ever wanted to do. I thought I was going to be able to vote for the bill. When I saw the good work of

the then-ranking member and Chairman Leahy at the time, I thought these problems would be resolved. Unfortunately, the process melted down.

But, today, some very reasonable Senators are simply asking that you honestly engage in a discussion about how to fix these provisions in a way that does not in any way, shape or form harm your goals with regard to delayed notification or with regard to legitimate opportunities to get at people's business records or library records.

So, Mr. Chairman, I appreciate the additional time and let me move to a question for Mr. Comey.

Last month, in response to a question at the Judiciary Committee hearing on the 9/11 Commission report, Vice Chair Lee Hamilton was discussing the need for a civil liberties oversight board and he commented on powers that Congress had given the FBI, DHS and other agencies after 9/11 and how those powers have been used. He said, quote—and I don't know if people heard this comment by Mr. Hamilton, but I thought it was pretty amazing. He said, "It is highly classified. I can't talk about it except to say it is an astounding intrusion into the lives of ordinary Americans that is routine today in government."

In your testimony for this hearing today, you said the PATRIOT Act provides for ample judicial, Congressional and public oversight to ensure that the civil rights and civil liberties of all Americans are protected. And then you go on to list the various efforts of the Department of Justice to provide oversight.

Now, I am a Member of Congress and I am on this Committee and I don't know what Lee Hamilton was referring to. Almost all the steps you mentioned that are being taken to protect the privacy and civil liberties of Americans involve people already within the administration. It is as if we in Congress have been asked to trust the foxes to guard the hen house.

What is the Department doing to ensure that Congress has the necessary information to make real assessments about whether or not privacy and civil liberties of the American people are protected, and what steps beyond those already required by law do you believe should be taken to ensure that the American people can trust that their rights are being protected?

Mr. COMEY. Thank you, Senator. We care, as the members of this Committee do, passionately about the civil liberties and the freedoms of our fellow Americans.

We are addressing concerns about how we are using our authorities by complying with—one of the ways is by complying with our oversight obligations to make sure that Congress knows how we are using FISA in a classified setting, if necessary; how we are using the PATRIOT Act, how often we are using 215 and things of that sort.

We are cooperating with our inspector general, who is charged with, under Section 1001 of the PATRIOT Act, as I recall, with entertaining, receiving and investigating complaints of abuses under the PATRIOT Act. We are answering to Federal judges and seeking to use these tools the way they are designed, which is through Federal judges and through making showings in writing and under

oath to obtain warrants and process and many of the things that you have mentioned.

With respect to the Civil Liberties board, I Chair that board and I am somebody who takes very, very seriously my commitment to my oath to uphold the Constitution of the United States, and that board is not going to be some sort of Potemkin board. You are absolutely right. It is made up of people inside the Government, but, in my experience, people who care passionately about this and who are, many of them, career people like myself who care so much about the reputation of our great institution, the United States Department of Justice, and our Government as a whole.

I know there have been proposals for a board created of outsiders, and frankly I don't that is necessary to create a board that is outside the structure of our Government, when the executive branch has an obligation and the legislative branch has an obligation to oversee our actions.

Senator FEINGOLD. Mr. Hamilton is not known as somebody that sort of exaggerates in his comments. What can you say in a public setting about his words that there are astounding intrusions on the people's personal liberties? Do you have any idea what that is?

Mr. COMEY. Maybe I missed it in clips, but the first time I have heard the statement was when you quoted it, Senator, and I don't know what he is referring to.

Senator FEINGOLD. Let me ask you quickly, and then again I will wait for another round. We talked about the reports and you were talking about how your agency is coming up with the information with regard to the PATRIOT Act. But the PATRIOT Act requires the Attorney General to provide Congress with semi-annual reports on the use of Section 215, the so-called library or business records provision.

The latest report covering the period July through December 2003 has still not been received by the Committee. It was due at the end of June. The Department already told us last year that it had never used Section 215 as of mid-September 2003. That means we only have three-and-a-half months left in that reporting period.

How could it be so hard to pull together this report and submit it to Congress? I would like to know what the hold-up is, especially in light of the fact that suddenly Mr. Goss, who will undoubtedly be confirmed today as our CIA Director, said the other day suddenly that the provision has been used. Why aren't we getting the reports required by Congress and when will we get them?

Mr. COMEY. Well, Senator, you are exactly right. The report has not come in yet and I have asked that same question myself. The Section 215 report—I am not permitted in this forum to say the number, but would not take long to assemble.

I think what is happening is the Department has an obligation to report on FISA broadly, and so the preparation of the report about FISA searches and FISA electronic interceptions is very complicated. And so they are putting it all together in one package, as is their obligation. I have asked why don't we just sever off 215 and send it? I am told that I am never supposed to commit to any particular dates in a bureaucracy, but I believe by this Friday, that report will be to Congress.

Senator FEINGOLD. Thank you, Mr. Comey. Thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator.

Let me just clarify one thing that I think I didn't make clear in our interchange. The delayed notice was available in criminal cases before the PATRIOT Act. But now that the PATRIOT Act provision on delayed notice—that is, Section 213—governs, it governs both criminal and terrorism cases.

I am right on that, aren't I?

Mr. COMEY. Yes, you are, Mr. Chairman.

Chairman HATCH. So the SAFE Act would make it even more difficult to get delayed notice in criminal and terrorism cases, not just terrorism cases, but in criminal cases as well; in other words, harder than it was to get delayed notice before the PATRIOT Act.

Mr. COMEY. It covers both kinds of cases, yes, Mr. Chairman.

Chairman HATCH. So in other words, it would be even more stringent even on domestic crime, and certainly more stringent than the PATRIOT Act on terrorist—

Mr. COMEY. Yes, Senator. As Senator Feingold noted, it would remove two provisions that allow delayed notice where there is a risk of serious jeopardy to an investigation or undue delay of a trial or intimidation of witnesses, both of which were part of, in different circuits, the judicially-created delayed notification rule.

Chairman HATCH. I just wanted to have that made clear.

Senator FEINGOLD. Mr. Chairman, can I clarify that point?

Chairman HATCH. Sure.

Senator FEINGOLD. It is my understanding that Mr. Comey is right that we do eliminate the provision relating to jeopardizing an investigation or unduly delaying a trial. But intimidation of potential witnesses—all right, fine, all right. Strike that. I stand corrected.

Chairman HATCH. Okay, thank you.

Senator Kyl.

Senator KYL. Thank you, Mr. Chairman. I have got four specific questions. I think I can get them all done.

Chairman HATCH. Excuse me. I think Senator Craig was next.

Senator KYL. Oh, I am sorry.

Chairman HATCH. So, Senator Craig, we will turn to you.

Senator KYL. Go ahead.

Senator CRAIG. Well, I will be very brief because, first and foremost, Mr. Comey, I tremendously respect your experience and your talent. I feel handicapped when talking about these issues because I am not an attorney, and that says therefore I have never had need to study the law or to practice it in detail the way you have.

But I do think I have some understanding of how it works, and on the issue of delayed notice or sneak-and-peek—and I can understand why you choose not to use the words "sneak-and-peek"—I was sitting here applying it to the circumstance that you were giving us of actual practice as it related to that drug crowd moving into Richmond. And I was saying is there anything in the SAFE Act and its provisions that would have stopped you from continuing to do exactly what you did with the way you did it and the successful way you accomplished it. I concluded there was not.

Now, I would suggest this: Our provision does not tie your hands with a heavy cable. It ties your hands with a satin ribbon. There is a slight tug in 7 days. You have go to back to the judge and therefore gain an extension, and another and another. And in the circumstance that you so vividly painted, would you suggest that a judge would not have extended that?

Now, let me add to that. We went to the Justice Department and asked what is the average time that a judge allows, and the word was 7 days. If it takes 8 or 10 days, if that is more practical, I am willing to amend or adjust or change. But to suggest that an uncontrolled extension of time or no time, and to suggest that a judge is going to be dutiful in saying, gee, I think it was about 7 days they came to me, I had better check in on that—that is not going to happen either.

But the question is simply this: Would these provisions—and I think you accurately said they are adjustments around the edge—would it have changed your ability to do what you did in Richmond?

Mr. COMEY. No, I don't believe that it would have, except as you said, Senator, we would have to go back to the judge. Rather than him saying—and I can't remember exactly whether you can extend it for 60 or 30. We would have to go back every seven.

The case that I mentioned with the seizure of the Ecstasy—I think that would be affected. In the Richmond case we could use the "lives in danger." The one with the Ecstasy case where the interest was in making sure that we were able to arrest all the bad guys the next day, I think, although I could make arguments to try and shoe-horn it someplace else, that I would need that "serious jeopardy to an ongoing investigation" prong there.

But you are exactly right. The 7 days is not the end of the world, and I explained in my opening why I approach it, though, from a presumption that it is not appropriate.

Senator CRAIG. I look at it from a different perspective. I don't want your hands to be tied, but I want to make sure that you recognize the importance of the law and the right of a free citizen. So there has to be a little test, a stronger test, a slightly tougher test, not a trip wire, but a tether rope that tugs at you and causes you, the law, to do the right thing.

I have never questioned you not doing the right thing. I am too respectful of you and the work you have done, and I say that both to you individually and collectively. But I know why you are good at what you do, because the law is specific. If it were not, you would do it differently in certain circumstances and certain cases, under certain conditions, because you are human, and so am I.

We want the law to go beyond that and that is what we try to do in making slight adjustments.

Senator Feinstein was right. We don't repeal. I am for the PATRIOT Act, but I am for some slight safeguards along the way.

Now, let me ask this in relation to Section 215. Opponents of the SAFE Act are emphasizing the involvement of FISA judges. However, how much discretion does a judge really have when the threshold standard sought for an international terrorism or intelligence investigation is so low and the possible result of obtaining

sweeping records is so severe? I think Senator Feinstein put it one way and I put it a slightly different way.

Mr. COMEY. I think that Senator Feingold stated it accurately that the judge is not required to make any finding other than that the application meets the requirements of section 215. That is true, though, in a host of provisions under which we obtain information, for example, pen registers to record the numbers dialed from a phone and the numbers received from a phone. All we have to do as criminal investigators is represent that it is relevant to our investigation and the judge has no discretion to deny a pen register.

The reason that I don't think that should concern people is people need to focus on what is being obtained. We are obtaining preexisting records under 215 that can be obtained, frankly, with no showing under a grand jury subpoena. I think folks tend to mix together searches and things of that sort. This involves going to someone who has preexisting records, serving process on them and obtaining that.

On the criminal side, as I said, that requires no involvement of a judge. In 215, it involves a judge reviewing a representation that it is sought in connection with the appropriate investigation.

Senator CRAIG. So you see that the adjustments we have made to 215 in the proposed SAFE Act amendments as tremendously tying your hands, or just causing you a little tougher test?

Mr. COMEY. Well, the express insertion of a relevancy test would not significantly tie our hands, because it is implicit anyway. That is the way we read it already.

What would tie our hands is if there is a requirement than an investigator make a showing of specific and articulable facts to believe that the person is a terrorist.

We are often getting anonymous tips and going out secretly, because we don't want good people to be smeared, to get records in criminal cases and in counter-terrorism cases. If we ever have to make a showing before we can get the records to check out the tip, we have established a very serious hurdle.

That is the part that concerns me most.

Senator CRAIG. I don't dispute that that is a tough call.

That is also what protects a lot of free citizens.

Thank you.

Chairman HATCH. Senator Durbin.

Senator DURBIN. Thank you very much.

Mr. Comey, thank you for being here and thank you for serving our Nation. I have to tell you that though I have many differences with the Department of Justice, I have the highest respect for you. I think you have served our Nation well in many capacities and continue to do so to this day. Thank you for joining us.

Let me also say that I am relieved to hear you say that the SAFE Act, in your words, would result in a modest change to the PATRIOT Act. That is a dramatic change in tone from the statement made by the Attorney General, who described the SAFE Act as, quote, "unilaterally disarming American defenses," "risking American lives," "eliminating some of the PATRIOT Act's most critical new tools."

I think you are right. I think our changes are modest and are specific, and we are prepared to discuss with you and with every member of the Committee the best way to deal with them.

Let me say, as well, that I would like to go through three or four areas that we have talked about here and then leave it open if you would like to make a note or two at the end for your comments on each.

Section 213, delayed notification. You said at one point, keep in mind that we are talking not about a constitutional right to notice, but a right created by Federal rule; I believe you said Rule 21. Yet, if you read one of the circuit decisions in *Freitas*, here is what they said: "The absence of a notice requirement in the warrant presents a much more difficult issue. While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve these doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed 7 days, except upon a strong showing of necessity."

So the court disagrees with you. They argue it is a Fourth Amendment issue, it is a constitutional issue. We all envision a person knocking on the door saying, I have a warrant to search your home. That is notice. Now, we are talking about a situation where agents search your home and you don't know it. You don't know they have been in your files, in your computers, in your closets, that they have looked at everything in your life. The court has said that really is in the area of unreasonable search and seizure, and I think that is important.

Secondly, when it comes to this issue about libraries and whether they are overreacting, I think there is a clear difference, as Senator Feingold pointed out, between grand jury subpoenas. You are given notice of a grand jury subpoena that they are about to take your records. You can go to the court to quash that subpoena and say it should not issue.

Secondly, you clearly aren't dealing with a gag order situation. Finally, the standard in the PATRIOT Act, I hope you will concede, is lower than the standard of relevance that is required when it comes to grand juries. In other words, the Government has to make less of a case to seize library records, a lower standard that they currently do under a grand jury subpoena, which at least requires relevance. As Senator Feingold has said, these records are being sought for a terrorism investigation.

When we asked you how do we know that we can trust the Government, you said, and I think accurately, a lot of people are looking over your shoulder—judicial supervision, Congressional supervision, inspector general supervision. But the point made by Senator Feingold is a relevant point.

The reports that you are supposed to give us so that Congress can look over your shoulder are long overdue. I am glad to hear that Friday they will be coming, and I think that that is important.

There is also an argument made on your side that since we have really had no complaints about the PATRIOT Act, and there have

been no lawsuits filed, why all the stir, why all the furor? Well, a lot of the people who are being investigated under the PATRIOT Act may not know it. They may not know that they are the targets of a roving wiretap or an undisclosed search of your home or an undisclosed search of records at a library or a business.

So I don't know if you made your case very strongly by saying people who are not aware that their rights are being violated haven't filed lawsuits.

The last point I would like to make to you relates to the Civil Liberties Board. I think that the 9/11 Commission got it right. They said, "At this time of increased and consolidated government authority, there should be a board within the executive branch to oversee adherence to the guidelines we recommend and the commitment the government makes to defend our civil liberties." They went on to say, "Our history has shown us that insecurity threatens liberty. Yet, if our liberties are curtailed, we lose the values we are struggling to defend."

The Civil Liberties Board which you have said you support by executive order is a dramatic contrast from the one that is being entertained by the Governmental Affairs Committee upstairs. The difference is this: The Civil Liberties Board that the President has created by Executive order to guard our liberties is a board that is made up of people already in the administration and in the Government. It is as if we are saying to a baseball player, call your own balls and strikes.

Really, what we need is what Governor Kean said when I asked him directly this question, whether the executive order served the purpose stated in the 9/11 Commission report. He said that he believed—and I agree—we need "a disinterested perspective;" we need someone with objectivity, someone with knowledge when it comes to civil liberties to really look long and hard at what is being done by the Government to see if they have gone too far.

I think the executive order creates an in-house operation, chaired by the Department of Justice, which will not bring this objectivity to the question. The Governmental Affairs Committee is going to change that, I hope.

I invite your response to all or any part of that.

Thank you.

Mr. COMEY. Thank you, Senator, and perhaps I could start with the Civil Liberties Board. I think the Department of Justice has earned over centuries a little bit more of a reasonable doubt on this, a little bit of presumption of regularity that we can call balls and strikes in-house, because we do it every single day.

We prosecute political corruption. We investigate employee misconduct. We prosecute civil rights cases all over this country that involve Government officials. We clean our own house very aggressively; we clean the houses of other agencies very, very aggressively. This is what we do.

The only thing I would ask with respect to the Civil Liberties Board is, given that track record, folks would give us a chance.

We created these institutions of Government to be able to address issues about civil liberties and concerns about civil liberties, and I believe that we can and that we have a record that shows that.

Senator DURBIN. If I could just make one comment, I am old enough to remember the era of J. Edgar Hoover. Thank God, it is gone. Thank God, we don't have an FBI Director—instead, we have a wonderful man, a great public servant in Bob Mueller.

But we have to be sensitive, as Senator Craig has said, to the fact that administrations change, directors change. And if we are going to guard basic liberties, don't we want someone on the outside looking in, as opposed to someone on the inside that may have the mind set of a darker era of the Hoover at the FBI?

Mr. COMEY. Senator, if I could just briefly address what I think is some confusion about how criminal investigators obtain documents compared to counter-intelligence investigators using 215, when we issue a grand jury subpoena, we do not give notice to the person whose records we are seeking. In other words, if we go to a rental car agency and seek the records of Jim Comey, we don't tell Jim Comey we are seeking it. The rental car agency knows we have seized the records. We have no obligation to notify the citizen.

Gag orders are major feature of criminal investigations. When we serve a bank with a subpoena for Jim Comey's bank records—and I hate to keep using me, but if they are seeking my records, that bank is required by statute not to tell me. It used to be we had to give them non-disclosure orders, and then it was written into the law they cannot tell me that they have sought my records. That happens literally thousands of times every year in the United States.

The reason is important is that secrecy. We investigate a lot of innocent people and we don't want them smeared. We also investigate a lot of guilty people; we don't want them to know we are coming. I think what we have done with the PATRIOT Act is simply take that concept and put into the world of counter-terrorism and counter-intelligence.

Chairman HATCH. Senator Kyl.

STATEME OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. Thank you, Mr. Chairman, and I want to thank Senator Cornyn for allowing me to go before him.

Just two quick comments, and then I have four specific questions and I think they can all be answered fairly quickly. I now notice that to one degree or another, I think you have addressed all of them in some way.

Let me just make two preliminary comments. Those who served with then-Senator, now Attorney General John Ashcroft know that he is a person very strongly personally committed to privacy rights and civil rights. I know because I had some disagreements with him when we were dealing with the Internet, and he is a tiger when it comes to protecting privacy rights. He worked, I know, with Senator Feingold on racial profiling and the like. I just want to make it clear that I know he has instilled that same strong support for privacy rights in his Department and that nobody can suggest that he is not committed to that.

Secondly, the reason I wanted to put Vice President Cheney's comments in the record is that when the Ranking Member used words like "outrageous" and "dark side," and even invoked the

name of Joe McCarthy to smear the Vice President, I didn't think that he was being accurately quoted.

Chairman HATCH. You mean the Vice President.

Senator KYL. Did I say the Vice President?

Chairman HATCH. No. You didn't think the Vice President—

Senator KYL. The Vice President was accurately quoted. So I think his comments need to be put in the record and I will see that that is done.

Let me just ask four specific questions, since I am not going to be able to be here for Congressman Barr's testimony. But in his written testimony, he says that the PATRIOT Act, and I am quoting now, "is the only criminal statute Congress has ever passed that authorizes law enforcement agents to get a warrant to secretly search a person's home for evidence of a crime."

Now, it is my understanding that it was 36 years ago that the Crime Control and Safe Streets Act was enacted, and in this Congress enacted delayed notice authority when it authorized the use of wiretaps in criminal investigations.

Am I correct or is Congressman Barr correct?

Mr. COMEY. You are correct, Senator, with respect to wiretaps and notice about whether someone was intercepted on a wiretap. He is correct in that the rule about delaying notification of search warrants was judicially created by judges from all political parties because it was needed.

Senator KYL. So it is not a criminal statute, but it has been judicially created. Got it.

Second, at page 8 of his written testimony, he states that the PATRIOT Act's codification of judicial common law allowing delayed notice searches—I guess this is now what he would be referring to there—"is so overly broad that it cannot help but be over-used." Those are his words.

You have noted that it requires periodic reports by the inspector general, the current one, by the way, having been appointed by President Clinton. The PATRIOT Act also allows that any aggrieved individual can bring a civil action in the event of abuses of the PATRIOT Act.

Are you aware of any evidence that the PATRIOT Act's delayed notice provisions have been abused?

Mr. COMEY. No, Senator.

Chairman HATCH. All right. At page 10 of his written testimony, former Congressman Barr states that the PATRIOT Act's extension of roving wiretap authority to terrorism investigations, quote, "allows FBI agents to engage in investigative fishing expeditions against anyone who meets the general physical description in the surveillance order."

It is my understanding that even though the Government may not know the actual name of a target of a PATRIOT Act wiretap that the wiretap can still only apply to a specific person, even if the Government only knows his alias.

Is that correct or is Congressman Barr correct?

Mr. COMEY. That is correct, and we have to provide—as we do when we indict John Does, for example, we have to provide a description, everything we know about the person, because we are fo-

cused on an individual terrorist. I read Congressman Barr's testimony and I don't think he fairly characterized it.

This is a tool that would be very rarely used, but when you need it, you really, really need it because you have got a terrorist. You know who he is, you know his physical description.

You don't know his name and you know he is jumping from phone to phone, and that is the kind of thing that keeps me up at night.

Senator SESSIONS. Senator, people are indicted under the name John Doe. You indicated that. Is that correct?

Mr. COMEY. Yes, Senator. In the Khobar Towers bombing case, I indicted the Lebanese bomb-maker who I know has a tattoo in a particular place. And I can describe him; I know his eye color. I don't know his name, so I indicted him as John Doe and then described him in the indictment.

Senator KYL. Good, thank you. And a final question: at page 11 of former Congressman Barr's testimony, he states that the PATRIOT Act would allow, and I am quoting him again, "randomly wiretapping apartments in an apartment complex because they have a hunch that a single suspect fitting their general description might be in one of them."

Is there any circumstance that you know of under which that could be true?

Mr. COMEY. That is what I meant when I said I don't think he accurately described it. I can't imagine how we would be able to do that using the authorities of the PATRIOT Act.

Senator KYL. Well, I want to thank you for your clear testimony. I know it may take four minutes to describe some of this, but it is very, very important that people with direct experience like you relate that experience to compare what authority you have under existing criminal laws and how that has been used with the in many cases more restrictive authority granted to try to go after terrorists, but which authority is nevertheless very, very important. And it may be rarely used, but when it does need to be used, as you have pointed out, it is critical that that authority exists. I also appreciate your reference in your written testimony to the numerous safeguards that we have embedded in the PATRIOT Act as well.

So thank you for your service, and thank you, Mr. Chairman and Senator Cornyn.

Chairman HATCH. Thank you, Senator Kyl.

Senator Feinstein.

Senator FEINSTEIN. Thanks very much, and thank you, Mr. Comey, for being very straight in your answers. I appreciate it very much. It is also my understanding that DOJ will send a report this Friday that will inform Congress how often Section 215 has been used.

Is that correct?

Mr. COMEY. That is correct, Senator.

Senator FEINSTEIN. I appreciate that.

Mr. COMEY. I said that I have been told you don't ever want to give exact dates, but I have pressed the troops and I am confident we are going to get it up here on Friday.

Senator FEINSTEIN. All right, fine. Section 1001 of the PATRIOT Act requires DOJ to collect and investigate allegations of civil rights and civil liberties abuses by DOJ employees through the office of the IG. The OIG reports many of the allegations and the resolutions on its website for the public to view.

My question is can you tell us how many civil rights complaints under the PATRIOT Act have been referred to OIG, to the Civil Rights Division of DOJ, for criminal prosecution?

Mr. COMEY. I am not aware of any, Senator. I believe that the inspector general has reviewed all of them and found either they are patently ridiculous or relate to something not on the PATRIOT Act. But I am not aware of any that he has found of sufficient credibility to refer for criminal investigation.

Senator FEINSTEIN. That is one of the problems that I have had for a long time, is when you really look into complaints, you find that they are really not related to the PATRIOT Act.

Now, the second question is can you tell us, of the cases referred to the Civil Rights Division, how many cases resulted in criminal prosecution for violation of civil rights under the PATRIOT Act?

Mr. COMEY. Well, there have been none, Senator, as we have discussed, because I am not aware of any referrals to the Civil Rights Division.

Senator FEINSTEIN. Now, Section 412 states that if an alien has been detained solely under that section because he is a threat to national security, but his removal from the United States is unlikely in the foreseeable future, the Attorney General may continue to detain him for an additional period of up to 6 months.

According to a booklet prepared by your Department called "The US PATRIOT Act: Myth Versus Reality," to date the AG has not used Section 412, but believes that this authority should be retained for its use in appropriate situations.

Is that true? What would the appropriate situations be? And since it has not been used thus far, should we keep it?

Mr. COMEY. Senator, I am aware of the report where it hasn't been used. I think that is true as of today that it hasn't been used. I think it is one of these tools, as I mentioned with respect to the John Doe roving wiretap, that you are not going to need much. But when you need it, you really need it.

The situation I envision is where you have a person whose deportation would lead to him harming people overseas or reentry into the United States and you can't use the normal tools of the immigration system to continue to detain him. That would be an extraordinarily unusual situation, as evidenced by the fact that the AG has never had to do it. But to me, that doesn't counsel in favor of taking it off the books.

Senator FEINSTEIN. Now, I want to ask you a question about the SAFE Act. As you know, we had a hearing last week on the SAFE Act, which has been introduced by my friend and colleague, Senator Kyl. We got on the subject of administrative subpoenas, which I know the FBI feels is a need.

The question I would have is, as a kind of check measure, would there be a problem in the case of an administrative subpoena if the law required the sign-off of a United States Attorney? In the event that a grand jury is not meeting, a call would be to a U.S. Attorney

and that U.S. Attorney would be required, day or night, to sign off on an administrative subpoena?

Mr. COMEY. I think it is in the Tools for Fighting Terrorism Act that Senator Kyl has introduced. I don't know that that would be the end of the world, but I think the reason that the FBI—and they articulated it, I think, quite well—believes that they need this administrative subpoena ability is to be agile when they are not able to hook up with an Assistant United States Attorney or a grand jury is not in session.

I think they can make a strong case that we need it for those circumstances where we are in the middle of nowhere and we have to give somebody process to be able to obtain a record that is critical.

Senator FEINSTEIN. Thank you. Let me correct something I said. It wasn't the SAFE Act. It was Tools for Terrorism, which is kind of a compendium of additional measures. At least in my view, it is a bit premature to take those additional measures right now, until we have, I think, our oversight hearing on the PATRIOT Act and make a decision on the 16 sections that expire, with the one possible exception of this administrative subpoena.

I would have a hard time giving the administrative subpoena right without some kind of check. In talking with people about it in law enforcement, they say, well, it is given in other areas such as health care law, and the real need for it is as an aid to, say, a hotelier who may be reluctant to provide a certain record of hotel use without subpoena power.

Yet, if you really think about that subpoena power, it could be used incorrectly, as well. Therefore, I think the sign-off by a U.S. Attorney, particularly because most grand juries are not in session all the time, is warranted.

Senator SCHUMER. You can always reach a U.S. Attorney.

Senator FEINSTEIN. Yes, you can always reach a United States Attorney.

You are raising your eyebrows. You don't think so?

Mr. COMEY. No. I obviously have a bias toward U.S. Attorneys. That is what I do for a living, and I like the FBI to be involved in my life, but there are times—and I don't mean that in a personal way.

Senator SESSIONS. Trust me, there is history here.

Mr. COMEY. Yes, but I think I articulated the argument in favor of it and it is the situation that you alluded to, Senator, that you have got a hotel desk clerk; it is the middle of the night. You need to see that registration book and he is not going to give it to you, and he says I need some sort of process.

Well, the argument for the administrative subpoena is I need to be able to cut that, give it to him, and the risk of over-use would be addressed by a reporting requirement that a list of every time that we have done it be provided to the oversight committees, the circumstances and when.

Senator FEINSTEIN. Thank you. My time is up. Thanks, Mr. Chairman. Thank you, Mr. Comey.

Chairman HATCH. Thank you, Senator.

I forgot to put Senator Durbin's remarks into the record immediately following his question period.

Senator Cornyn.

Senator CORNYN. Mr. Comey, if that hotel desk clerk doesn't give you the registry, what happens next in response to an administrative subpoena? You have to go to a judge, right?

Mr. COMEY. And seek enforcement of it, yes.

Senator CORNYN. So there is judicial review both under this delayed notification search warrant that we have heard called sneak-and-peek, and under the administrative subpoena. We have always got a judge in the picture providing judicial review. Would you agree?

Mr. COMEY. Yes, Senator. Judges are all over my life, and that is also a good thing.

Senator CORNYN. Mr. Comey, if I truly believed that the USA PATRIOT Act had deprived Americans of their civil liberties, I would be outraged, and I and my colleagues here would be all over you and everybody else whom we thought perhaps was aiding and abetting the abuse of the civil liberties of the American people. But I don't believe it based on what the evidence is.

But I do think it is good for us to have a debate, a discussion of the SAFE Act, even though I am not for it, and a discussion of the USA PATRIOT Act, for the very reason that you said earlier, because people just flat are misinformed about what the PATRIOT Act contains and what it has done and how it is responsible for making the American people safer. So I think responsible debate is good, and discussion, to help educate everybody, including us.

But I think irresponsible suggestions—you know, I don't know why we got into, when the Ranking Member started speaking, talking about enemy combatants and the Vice President's statement. I am not asking you to comment on any of that, but let me just ask you this. The 9/11 Commission 3 years after 9/11 said America is safer but not yet safe.

Do you recall that phrase?

Mr. COMEY. Yes, Senator.

Senator CORNYN. And I would submit to you, Mr. Comey, the reason why America is safer is because Congress and the administration did not wait 3 years to begin to respond to the deficiencies we saw that allowed 9/11 to occur; for example, creation of the Department of Homeland Security, creation of the Terrorism Threat Integration Center, passage of the PATRIOT Act, which, as we heard during some rather famous bits of testimony before the 9/11 Commission, tore down the wall that prevented the sharing of information between intelligence agencies and law enforcement.

Indeed, the one thing that sunk in the most to me was we no longer regard terrorism as strictly a criminal act. We are out to stop the bad guys before they hit us. Indeed, I believe that the 9/11 Commission said it quite eloquently, and indeed we are safer as a result of these actions. That doesn't mean there is not more that we can do, but indeed I think the SAFE Act, with all due respect—and I certainly do respect the suggestions, but I just disagree with them.

I don't think that the SAFE Act would make us any safer.

Indeed, I think it is a solution in search of a problem in many respects because I am reminded of something that Senator Feinstein said during a previous hearing. She said she had gotten tens

of thousands of complaints from constituents and others about the PATRIOT Act. But being the diligent Senator that she is, she did an investigation to see whether there had been any actual abuses of the PATRIOT Act, and indeed came up with a big goose egg, that there had been no demonstrated abuses of the civil liberties or the rights of the American people as a result of the USA PATRIOT Act.

So I worry in this area that what we are not left with is rational debate and discussion which helps elevate the level of understanding of the American people and the U.S. Congress, but unfortunately some despicable tactics used by groups, frankly, to raise money and to engage in ideological attacks.

Indeed, I have received at my residence at least two mailings from the

American Civil Liberties Union demonizing the PATRIOT Act and the Attorney General of the United States. So I am struck by what a wide gulf there appears to be between the facts and rational discussion, as we should have, and the kind of hysteria and accusations without foundation that we see in this area.

So I do applaud you and the Department of Justice for the work you are doing. I think the work you are doing and have done has helped to prevent another attack on our own soil, and for that I applaud you and everyone who is working so diligently throughout the U.S. Government to make us safe.

I think what we ought to do is look at issues. There was some reference to the Tools to Fight Terrorism Act, which would enhance the criminal penalties for possession and trafficking in weapons of mass destruction, the use and trafficking of man-held surface-to-air missiles that could endanger civil aviation.

I know we are not talking necessarily about the Tools to Fight Terrorism Act here, but I know you are familiar with it. Could you just comment generally, please, on how you believe, if you do, that that Act would help make us even safer today?

Mr. COMEY. I think in a number of smart and fairly ordinary ways, such as creating a presumption against release for someone charged with a terrorism offense. As I explained earlier, the administrative subpoena tool is one that wouldn't be used a lot, but that might matter very, very much in an important investigation. So I see those as important supplements to the work that we are doing.

Senator CORNYN. Thank you. I see my time has expired.

Senator SESSIONS [PRESIDING.] Senator Schumer.

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Thank you, Mr. Chairman.

I want to thank you, Deputy Attorney General, for doing the excellent job that you are doing. Many of us have some disagreements with your boss, not so much within the confines of the PATRIOT Act. I think most of the complaints are outside the confines of the PATRIOT Act and they get lumped together.

I think the argument that we heard from my good friend, whom I don't agree with on this issue all the time, is—and I hear it all the time—how can they subpoena your records and not let you know? Well, that has been done in criminal justice forever. In fact,

if you are a potential criminal and they let you know, you are going to cover your tracks. So why should it be different for terrorists than for anybody else?

There are all these hues and cries that are way beyond what has actually happened.

That is not to say the PATRIOT Act probably doesn't need some changes. I think you can find an Assistant U.S. Attorney any time, anywhere. Your experience with criminal justice is much greater than mine, but I know enough that at three in the morning when a police officer or a detective needs something, they find somebody.

We ought to try to have procedural safeguards, not change the way we criminally investigate, but procedural safeguards to make sure that things aren't abused. I think we can find a happy-medium common ground here that keeps the basis of the PATRIOT Act and modifies it where there are some excesses.

But I do have to say as somebody on the left side, some of the hues and cries on the left remind me of some of the hues and cries on the right from the NRA and others; you know, nose under the camel's tent; well, doing this isn't bad, but it might lead to something way down the road. That is not the way we should govern. That is not the way we should legislate.

I was against when our Chairman wanted to renew the PATRIOT Act. We said let it sunset because there is a very delicate balance between liberty and security in this terrorist age. We should go over it, but we should go over it carefully with the facts. I find myself in some agreement with my colleague from California here. So I am not going to get into the SAFE Act now. I think we should do a comprehensive review when the time comes, although I appreciate the hearing.

I would just like to do two things. One, at the request of Senator Leahy, I would like to verify that this transcript of Vice President Cheney's remarks he has referred to earlier be put in the record, because there was some dispute as to what he said.

Senator SESSIONS. I believe Senator Kyl indicated he will offer it and we will put it in the record.

Senator SCHUMER. Well, I am offering it right now. I ask unanimous consent that it be put in the record.

Senator SESSIONS. So ordered.

Senator SCHUMER. I am going to read the operative clause because Senator Leahy was right in what he said. Here is what the Vice President said, not that it is relevant to this hearing: "We're now at that point where we're making the kind of decision for the next 30 or 40 years, and it's absolutely essential that 8 weeks from today, on November 2nd, we make the right choice, because if we make the wrong choice, then the danger is that we'll get hit again, that we'll be hit in a way that will be devastating from the standpoint of the United States, and that we'll fall back into the pre-9/11 mind set, if you will, that, in fact, these terrorist attacks are just criminal acts and we're not really at war. I think that would be a terrible mistake for us."

Senator SESSIONS. Do you want to make that a part of the record?

Senator SCHUMER. Yes.

Senator SESSIONS. I think how we handle the war on terrorism could well increase the risk to the people of the United States.

Senator SCHUMER. Well, no one would dispute that. That is not what was the point of contention about what the Vice President said, as we all know. I have a few other questions.

Since we get you here so infrequently and your boss even less frequently, I am going to go a little bit afield and ask you. As you know, I have been really concerned about our relationship with Saudi Arabia, and I think there were are close to not tough enough. We are talking about the PATRIOT Act here, but I think we let a lot of things just go undone.

One of the areas that has troubled me greatly is the way we handle the investigation of possible Saudis who are in this country. Last month, the GAO reported that U.S. law enforcement and intelligence agencies failed to review thousands of Saudi visa applications submitted and approved during the 2 years prior to the 9/11 attacks for possible connection to terrorism. In other words, there still may be Saudi terrorists in the U.S., but there is no way we would know because we have made no effort to track them down. That, to me, is unconscionable, unacceptable, and frankly unbelievable.

Three years after these families lost their loved ones, 3 years after the PATRIOT Act, 3 years after we structured law enforcement's counter-terrorism unit to be more proactive, thousands of Saudi visa applications remain unexamined for any possible connection to terrorism.

I wanted to ask you how did this happen and what is being done to fix it.

Mr. COMEY. Senator, I do know something about that. I don't believe I can discuss it in this forum, but I would be happy to find a way.

Senator SCHUMER. Okay. If we could, if we have to meet up in 407, you know, the cone of silence room or whatever, I would like a commitment from you to come and give me an explanation of that, if that is okay.

Senator FEINSTEIN. I would like to hear it, too.

Senator SCHUMER. And invite any of my colleagues who wish to come. The Senator from California indicates that she would like to be part of that.

Let me give you another one. Last month, the GAO reported that nine of the ten officers who have staffed or are staffing the U.S. visa security office in Saudi Arabia don't speak or read

Arabic. The GAO commented that this illiteracy in Arabic limits their effectiveness and reduces their contribution to the security of the visa process. That seems like an understatement to me, so I want to know why are we sending Americans who can't speak or read Arabic to run the Saudi visa office.

Mr. COMEY. That one I don't know anything about, Senator. I assume from the visa office it is a State Department function. I can make inquiry and—

Senator SCHUMER. But it relates to the Justice Department and who comes into this country and who doesn't. If you could get me an answer to that, I would appreciate it.

Mr. COMEY. I will follow up on that, Senator.

Senator SCHUMER. Thank you, Mr. Chairman. My time is up.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. I believe it is my time, and then I believe Senator Kennedy is next.

Mr. Comey, I want to first say to you I think you are one of the finest witnesses that has appeared before this panel in many years. You understand law enforcement, you understand the history of it. You understand the PATRIOT Act. You understand its practical implications. If people would just listen to what you have said, their blood pressure is going down.

This is, as I have always said, mainly an incremental act, mainly giving to FBI investigators and terrorist investigations powers that already existed throughout the Government by all kinds of investigators, but not available in terrorist cases. If we had to have enhanced law enforcement powers for any one single case, it would be terrorism cases, I think all of us would agree.

But we haven't gone beyond, as I can see, any principle of law in terrorism cases. We just have made sure that those judicially approved, historically approved, Supreme Court-approved procedures are available in terrorism cases. Is that basically the case?

Mr. COMEY. Yes, Senator.

Senator SESSIONS. Now, on delayed notice, you talked about in this Candy Box example how there were Ecstasy tablets of large numbers and you didn't want them to go on and be put on the streets, but you weren't prepared to break the investigation wide open. Everybody that was involved would scatter and you would never find them. I have been a prosecutor. I know exactly what that means.

In fact, one of the key decisions, is it not, in any major investigation is when to make the arrest, when to have the take-down? And don't you always want to do it at a time when the leaders are most available for arrest?

Mr. COMEY. Absolutely, Senator.

Senator SESSIONS. Now, let me just say this. Based on your experience, could there not be absolutely critical points in an investigation in which 3,000 or more American lives are at stake and you would need to be able to delay notification in a terrorist case, a delayed notification procedure that is available right now in drug cases?

Mr. COMEY. You are absolutely right, Senator. It is a tool that is not used much, but when it is used, it very much matters. And I described the changes proposed by the SAFE Act I think as modest change, and that is fair, except that it would have a potentially devastating effect in some very, very important cases. But as I said to Senator Craig, not a huge number of cases, but in a number of cases it would have a very significant effect if it had not that catch-all for serious jeopardy to an investigation, for example.

Senator SESSIONS. Well, I think you have been perfectly honest with this panel, and if you had a 7-day limit of time or 14 days or whatever, this could be a burden and a complexity in the investigation. But maybe you could live with that.

But let me ask you this. The other parts of the SAFE Act to me appear to be even more critical, far more dangerous. It eliminates the basis for a delayed notification search warrant based on the question of whether or not it would jeopardize an ongoing investigation. So that can be a very critical matter, could it not, for an investigator that you would like to do this—first of all, you have to have probable cause to do the search warrant. Is that correct?

Mr. COMEY. Yes.

Senator SESSIONS. You cannot do the search until you have probable cause and a judge certifies that.

Mr. COMEY. That is correct.

Senator SESSIONS. Now, if you do a search, you can go in and seize all the records in a person's house under normal circumstances.

Mr. COMEY. That are within the scope of the warrant.

Senator SESSIONS. Within the scope of the warrant that is relevant to the crime involved. And so to me, it is no big deal, no huge alteration of that procedure to say you are able to enter the residence, to examine the residence, to see if there are weapons of mass destruction, bomb parts, or other things, and not seize them at that moment because it could, in fact, upset the investigation and allow the terrorist to escape. Is that the issue we are dealing with?

Mr. COMEY. It is one of the issues.

Senator SESSIONS. One of the issues we are dealing with.

Mr. COMEY. That is why that authority is so important.

Senator SESSIONS. And it also changes the standard to requiring that it will endanger life or physical safety of an individual, will result in flight, will result in destruction of or tampering with evidence; whereas, the standard under the PATRIOT Act is it may result in that. Could that be very critical in whether or not a warrant is obtained?

Mr. COMEY. Yes, and because it might be interpreted by a judge to require a quantum of proof well beyond even probable cause to believe these things, which, as you know from your experience, Senator, early in an investigation it is often very difficult to demonstrate it.

Senator SESSIONS. And, in fact, an approved search warrant can find evidence that would strengthen your ability to gain other information.

Let me ask this. On administrative subpoenas, is it not true that probably 50 times this day—I may not be exaggerating—a DEA agent has issued an administrative subpoena to get bank records, motel records, and telephone records on suspected drug dealers?

Mr. COMEY. Absolutely.

Senator SESSIONS. Without approval of a court of grand jury?

Mr. COMEY. That is correct.

Senator SESSIONS. And that IRS agents can seize bank records and that health care investigators can seize health care records by administrative subpoena?

Mr. COMEY. That is correct.

Senator SESSIONS. And these have been appealed to the Supreme Court for many, many years and have been sustained, and it is a part of accepted law in America today.

Mr. COMEY. Yes, Senator.

Senator SESSIONS. But an FBI agent cannot issue an administrative subpoena to get a motel record in the middle of the night that might involve the death of thousands of American citizens.

Mr. COMEY. That is correct, Senator.

Senator SESSIONS. Well, I do not think it is any threat to liberty that they be given that power in a case involving terrorism. If there is any case that power ought to be available, it should be in terrorism cases. And I believe next is Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Chairman. I join with those that pay tribute to our witness. It is a unique position that you are in in terms of all the accolades you have received, but I think you have done a very professional job and we welcome your responses to these questions. We have respect for you.

We have limited time, and there are a number of areas I would like to cover if I could.

One is on hate crimes. We have passed now in July on the defense authorization by a 2:1 majority hate crimes legislation, 18 Republicans. It has been out here since 1997, legislation that was introduced, myself and Senator Specter, the support of 175 law enforcement officials. The administration has yet to have a position, and it is in the conference at this particular time. A majority, Republicans and Democrats, of the House support it. More than two-thirds of the Members of the Senate supported it.

I did not indicate prior to this meeting that I would ask you this question, but can you give us what your position is, what the administration's position is on the hate crimes legislation that is now in the conference on the defense authorization?

Mr. COMEY. Senator, I do not know the answer to that, but I will look into it and follow up on it.

Senator KENNEDY. All right. Second, on the voting rights, there were two recent reports, in the New Yorker magazine, also the Washington Post, that the current Justice Department is undermining, perverting the function of the voting rights for partisan political purposes. There is the 1995 regulations, Federal prosecution of election offenses, and this sets out the guidelines for the Justice Department. And on page 60 and 61, it says, "Non-interference with the elections.

Except for matters involving racial discrimination, the Justice Department does not have statutory authority to prevent"—underlined—"suspected election crime." It continues: "Federal prosecutors shall be extremely careful to not conduct overt investigations during a pre-election period or while the election is underway."

Can you give us the assurances that the Justice Department, and particularly the Civil Rights Division, will not in any way be involved in any political pressure on individuals in terms of their voting rights, but will meet its historical and traditional and rightful position in terms of protecting the voting rights of citizens, access to voting rights for our citizens?

Mr. COMEY. Yes, Senator, and I believe that is what we are trying to do, which is fill two roles that the Department, as you said, has filled historically; that is, to protect people's access to the polls and, where we come across it, to investigate and prosecute fraud. And we are as prosecutors very eager not to have any effect on an

election or put ourselves in a position where even a credible allegation can be made that we were doing something for political reasons.

So, yes, I pledge that to you.

Senator KENNEDY. These articles, both in the New Yorker Magazine and the Washington Post, at least suggest—and I would like you to have a chance to read through them and draw your own fair conclusion—that in many instances the integrity issues have meant harassment to many in these—has been sort of a code word to use it. I am not suggesting that you would support such a matter, but at least they mention the various steps that have been taken. At least they draw some conclusions.

I believe that these guidelines are still in effect, January 1995, in terms of guidance on the Voting Rights Act. Would you be just good enough to read through both those articles—and I will give you the references—both in the New Yorker and the Washington Post and just having read those, still give us the reassurance? I would appreciate it if you would do that.

Mr. COMEY. Certainly, Senator. I have actually, I think, in my briefcase copies of them. I have not had a chance to read them yet.

Senator KENNEDY. I understand. You were instrumental in getting the special prosecutor with real independence investigating the White House, Valerie Plame, CIA role, and we commend you for that, and I know that you have disclaimed any supervisory role in that case. But can you tell us whether there has been any interim report that Mr. Fitzgerald has made that permits you to tell us when we can expect the action in that case?

Mr. COMEY. I do not think it would be appropriate for me to comment, even if I knew. But as you said, Senator, Mr. Fitzgerald has all the powers of the Attorney General, and so he is truly independent of—certainly of me, and I guess I ought to leave it there.

Senator KENNEDY. All right. But can you give us assurance that the timing of the investigation report will not be influenced by any political campaigns?

Mr. COMEY. What I can assure you is that Mr. Fitzgerald is the finest prosecutor I have ever met and will conduct himself in accordance with the highest standards of the Department of Justice.

Senator KENNEDY. Well, he has been highly regarded and respected, and so we would expect him to follow that line.

On assault weapons, the ban now has lapsed. The distinguished Attorney General of New York, Bob Morgenthau, stated in a letter to the New York Times, "Assault weapons kill dozens in the blink of an eye. Terrorists know this, know our laws, recovered training manuals, urged them to obtain assault weapons in the United States, where we really make their mission easier 3 years after 9/11."

Is the Justice Department taking any steps to respond now to the availability and accessibility of these assault weapons to potential terrorists in terms of protecting the American homeland?

Mr. COMEY. With respect to the particular weapons, Senator, I do not know of anything with respect particularly to those. But as you know we are very, very aggressive on investigating and prosecuting guns in the hands of bad guys, obviously terrorists, but also

drug dealers, drug addicts. We have a zero tolerance policy when it comes to that.

Senator KENNEDY. Has the administration given up on trying to get the assault weapons ban renewed?

Mr. COMEY. I am not in a position to know, Senator.

Senator KENNEDY. My time is up, Mr. Chairman.

Senator SESSIONS. Thank you, Senator Kennedy.

You know, Senator Leahy—I wish he had not made the comments he did about the Vice President. I do not think it was the right forum for that. But this is the quote from the Vice President: "If we make the wrong choice, then the danger is we will get hit again, that we will be hit in a way that will be devastating from the standpoint of the United States, and we will fall back into the pre-9/11 mind-set, if you will, that these terrorist attacks are just criminal acts and we are not really at war." And then he issued a clarification. Some said it was a retraction. But whatever, he issued a clarification to make sure that he did not mean to offend anyone by those comments, and we will make this a part of the record, and people can make their own judgment about it.

Senator Feingold, I think you wanted to follow up.

Senator FEINGOLD. Thank you, Mr. Chairman, I have many other questions, but I am just going to make a couple comments and ask you one more question, Mr. Comey. And I do thank you—

Senator SESSIONS. I just recognize you as our Ranking Member to ask these extra questions, because we do need to go the next panel.

Senator FEINGOLD. I understand, and I thank the Chairman.

I do appreciate this, and I think even though we have some strong disagreements, I see at least the germ of some possibility that some of the changes suggested in the SAFE Act could perhaps be something we could come together on. And I hope that happens.

But I am also very concerned about misstatements and mischaracterizations that have been made in defense of the USA PATRIOT Act. Some people accept these factual lapses as part of our political process, but I cannot.

Earlier this month, in my own State, the U.S. Attorney for the Western District of Wisconsin, J.B. Van Hollen, reportedly told the Hudson, Wisconsin, Rotary Club that, "In fact, September 11th would not have happened if the delayed search notice, a part of the PATRIOT Act, had existed at that time." I think that is an outrageous claim, particularly when it is made by one of the chief law enforcement officers in Wisconsin.

No one, not even other administration officials, the 9/11 Commission, has claimed that the September 11th attacks would not have occurred if the delayed notice provision, also known as "sneak-and-peek," in the PATRIOT Act had been in place. More importantly, the delayed notice provision was a well-established legal tool available to law enforcement prior to 9/11, something we have been discussing this morning. That was one of the major arguments made by the administration for including that provision in the PATRIOT Act. In addition, the FISA law that applied to intelligence investigations also allowed for secret searches prior to 9/11.

Mr. Comey, do you agree that delayed notice searches were allowed under the law before 9/11?

Mr. COMEY. Yes, Senator. As I said earlier, it was a judicially created doctrine that existed across the country.

Senator FEINGOLD. Sir, what action will you take to address Mr. Van Hollen's misstatement? And what steps will you take to accurately inform the people of Wisconsin of what the law and the facts were before 9/11?

Mr. COMEY. Senator, I am not familiar, obviously, with what J.B. might have said at that event, whether he is quoted accurately, so I am really not in a position to say. I know him. I know he is a very fine prosecutor and U.S. Attorney. Beyond that, I do not feel I am equipped to comment.

Senator FEINGOLD. The words that I quoted from him, though, you would not agree that the delayed notification provisions would have prevented 9/11, would you?

Mr. COMEY. I do not know what that means, Senator. I am not aware of an issue with respect to delayed notification and 9/11.

Senator FEINGOLD. You have no reason to believe that would be true.

Mr. COMEY. I have no reason to believe there is a connection there.

Senator FEINGOLD. Thank you, Mr. Chairman.

Senator SESSIONS. Thank you.

Senator CRAIG. Mr. Chairman?

Senator SESSIONS. Senator Craig?

Senator CRAIG. No questions. Very briefly I want to thank the Deputy Attorney General again for his presence here and for a level of objectivity that is refreshing on this issue, because I am a strong supporter of the Attorney General and the work the Justice Department is doing that, in my mind, is not in question.

Let me say one final thing, Mr. Chairman. This report, the 9/11 Commission report, is not the Bible. It may be as thick as the Bible, but it has some very valuable statements in it, and I think some valuable findings that all of us are poring over in an attempt to make this country a safer country. Here is one of its recommendations: "The burden of proof for retaining a particular governmental power should be on the executive to explain (a) that the power actually materially enhances security, and (b) that there is an adequate supervision of the executive's use of the powers to ensure protection of civil liberties. If the power is granted, there must be adequate guidelines and oversight to properly confirm its use."

That is something that none of us disagree with, whether it be oversight or guidelines, and sometimes those guidelines are necessary within the law. I would like to characterize the SAFE Act as some of that. You and I may disagree on that.

The current Chairman may disagree. But one of our jobs without question is to make sure that you do it right, and the other job is to make sure the law is instructive, controlling, and shaping.

And that is the attempt of what we are doing here, and I thank you very much for being with us.

Mr. COMEY. Thank you, Senator.

Senator SESSIONS. Thank you very much. We will have the next panel, and, again, thank you for extraordinary testimony. You are a professional and you know the law. You understand how it

works, and I think you have helped us all understand it far better than we did before. Thank you.

I do have a commitment and will have to leave in a few minutes, and I expect Senator Hatch will be back in a few minutes. But I think we would want to go on and get started, and I would like to welcome former Congressman Bob Barr to our hearing today.

Prior to serving in the House, he was United States Attorney for the Northern District of Georgia, in Atlanta, and we worked together when I was the United States Attorney in Alabama at that time, and I got to know you, Bob, at that time and respect you very much. You are now an attorney in private practice, and you occupy the 21st Century Liberties Chair for Privacy and Freedom at the American Conservative Union and consult on privacy matters for the American Civil Liberties Union.

I also want to welcome former Associate Deputy Attorney General Daniel Collins to the Committee today. While in the Office of the Deputy Attorney General he served as the department's chief privacy officer and coordinated the Department's policies on privacy issues. Mr. Collins is now a partner with Munger, Tolles and Olson in Los Angeles, California.

So we would like to thank you both for appearing here today, for caring about the issues that are important to America. We do have threats to our country. We have criminals out there and we have terrorists out there. Some of them go beyond being criminals.

They are unlawful combatants, for whatever that means.

Bob Barr, thank you, and we would be glad to hear your statement at this time.

STATEMENT OF HON. BOB BARR, FORMER REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Mr. BARR. Thank you very much, Mr. Chairman. I would like to thank you and certainly Chairman Hatch, who is now joining us, for the courtesies always extended to me whenever I have the honor of appearing before this body as a witness. And I appreciate very much the opportunity to appear today to talk about the PATRIOT Act, the SAFE Act, and related issues, and to hear the outstanding testimony that I have been listening to in the office next door earlier today from the witnesses and from the Senators on this panel.

I would like, Mr. Chairman if I could, to request that my entire testimony as submitted to the Committee be included in the record.

Chairman HATCH. Without objection, and I am certainly happy to see you again. Sorry I could not be here right at the beginning.

Mr. BARR. Well, I appreciate the Chairman rushing back just to listen to me. I appreciate that honor.

Chairman HATCH. Well, I did, as a matter of fact.

Mr. BARR. But I know that the Chairman, as the other members of the Committee, having served in the other body myself, are extremely busy, and I certainly appreciate the opportunity to be here to submit my statement for the record, which I will not read in its entirety, but just refer to a few things, and then answer either today or any subsequent questions posed to me by yourself, Mr. Chairman, or any other members of the Committee.

I think it is important to emphasize, for the American people primarily, a fact certainly known to this Committee, but which I think bears repeating, and that is that the American people are not left with any impression that prior to enactment of the PATRIOT Act, this Government had no tools with which to fight terrorism or to prosecute crimes involving terrorism. The full range of powers, both procedural as well as substantive, with which acts of terrorism could be investigated and prosecuted were available to the Government prior to the enactment of the PATRIOT Act in 2001. Those tools all remain available today. The PATRIOT Act, of course, supplemented that very broad range of powers that the Government already had. And I and many others, including Senators Craig and Durbin, as they have testified to today, do not in any way seek to dismantle that very carefully crafted range of substantive and procedural powers that have been and are available to the Government to fight terrorism. We are not talking about dismantling the additional powers that were made available to the Government under the PATRIOT Act, simply consistent, I think, with the views of this Committee and the Senate and the House, to take a continuing look at those powers. That is the reason why, of course, the Congress in its wisdom included sunset provisions for many of these—not all, but many of the powers in the PATRIOT Act, and we are simply in support of the SAFE Act, for example, doing, I think, precisely what Congress recommended and codified that we do, and that is to take a regular and constant and continuing look at these powers.

When, for example, one looks, Mr. Chairman at sort of the three stages of what brings us here today—and that is the pre-PATRIOT Act powers the Government has, the powers currently exercised by the Government pursuant to the PATRIOT Act, and other provisions of law, and the SAFE Act—I think it is important to keep in mind just a few things, and that is that before 9/11, that is, before the PATRIOT Act, the Government had roving wiretap power which it could exercise in cases involving terrorism, as well as other criminal cases. It was a carefully circumscribed power, but it was a power that was available in terrorism cases.

Similarly, Mr. Chairman, regarding sneak-and-peek powers, so-called delayed notification search warrants, I think it is important to emphasize that prior to the PATRIOT Act, the Government did have limited sneak-and-peek powers, that is, the ability to execute a search warrant, to search premises and seize evidence pursuant to that warrant. Chairman HATCH. But in both cases, Bob, much more limited than the PATRIOT Act.

Mr. BARR. Yes, sir, absolutely.

Chairman HATCH. I just want to make that clear.

Mr. BARR. With regard to the securing of library and other records, such as Section 215 of the PATRIOT Act provides, prior to 9/11 the Government did have, again, more limited powers but certainly had powers in any instance in which it had credible evidence, reasonable suspicion that an individual or group of individuals were committing or were conspiring to commit acts of terrorism or other criminal acts, it could get those records.

And, finally, with regard to so-called national security letters or administrative subpoenas, prior to the PATRIOT Act the Government, the FBI, had the power to secure those.

Currently, as the Chairman correctly has noted, in all of these different areas—roving wiretaps, sneak-and-peek or delayed notification search warrants, library and other personal records, and national security letters—the Government continues to have those powers, but much broader, in a much broader range of circumstances. And under the SAFE Act, I think it is important also to emphasize, as the Chairman certainly knows but to emphasize for purposes of the record here, that in none of these areas of Government power—roving wiretaps, sneak-and-peek, access to personal records such as library records, and national security or administrative subpoenas—the SAFE Act would not curtail in any significant way, I do not believe, any of these powers. All of them would remain available to the Government. The Government would simply have to do something that I would think we would all agree on if we really stop and think about it, and that is simply to have a reasonable linkage between the records on an individual being sought and some credible suspicion, reasonable suspicion that that individual or those individuals have committed a violent—not a violent act but a criminal act, including acts of terrorism.

My written testimony indicates, provides additional detail of the circumstances in which this would be the case, and I would be most happy to answer any questions by the Chairman or other members today, or anything submitted in writing hereafter.

[The prepared statement of Mr. Barr appears as a submission for the record.]

Chairman HATCH. Well, thank you. I think we will submit questions in writing. I know that you have another appointment, so I am going to accommodate you, and if you would care to, you can leave anytime you—

Mr. BARR. I appreciate that, Mr. Chairman. I am okay time-wise right now. I do have a flight back down to Atlanta to catch. I appreciate the Chairman keeping that in mind.

Chairman HATCH. All right. Thank you.

Mr. Collins, we will take your testimony.

STATEMENT OF DANIEL P. COLLINS, MUNGER, TOLLES AND OLSON, LLP, LOS ANGELES, CALIFORNIA

Mr. COLLINS. Thank you, Mr. Chairman I appreciate the opportunity to testify here today. There are few subjects more important than the prevention of terrorist attacks, and the question whether or not we have the appropriate tools to prevent terrorist attacks in a way that respects and enhances liberty and security is a very important topic.

In my written testimony, I have identified a number of principles that I think should guide that inquiry. I would like to just point to three of them and then discuss some of the specific provisions of the SAFE Act in light of those principles.

First, of course, is unwavering fidelity to the Constitution, and I have not heard—I have listened to all of the comments today. I have not heard anyone contend that any of the provisions of the PATRIOT Act that would be changed by the SAFE Act are in any

way constitutionally infirm. There was some discussion of whether or not the elimination of notice altogether in the search warrant context might violate the Fourth Amendment. But that is not something that the PATRIOT Act does, and so that really is not the question before this Committee.

Second—and I think this is a very important principle—if a tool exists in existing law to fight other types of crime, then the burden, I believe, is on those who deny it to fighting terrorism. If it is good enough for fighting the Mob, if it is good enough for fighting health care fraud, it is good enough to fight terrorism. If the balance is thought to be sufficient in existing law in those contexts, it is sufficient with respect to terrorism.

And third is the principle of technological neutrality. There should not be in the law disparities between the legal regimes that govern one type of communications in one medium and those that govern in another, because that just creates incentives to shift from one medium to the other.

Now I would like to talk about some of the specific provisions.

Section 215 of the PATRIOT Act provides much needed authority on the FISA side, the Foreign Intelligence Surveillance Act side, to obtain business records, and it is comparable to an authority that exists for a very long time on the ordinary criminal side in terms of the grand jury subpoena authority. It is different in certain respects because a court order is required. The court is not merely a rubber stamp because the statute specifically states that the court has the authority to modify the application and the order before it is issued. It has a narrow scope, cannot be used to investigate domestic terrorism, and explicitly provides for protection of First Amendment rights. It has nothing to do on its face with library records as a particular focus of interest.

Section 4 of the SAFE Act would amend the FISA so that the authority conferred by Section 215 could only be exercised if there are "specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power." This is much too narrow a standard. It simply cannot be said in advance that the only important business records that might be needed in an intelligence investigation are records pertaining to the FISA target. That is not at all how business records subpoenas work in the grand jury context. The standard, when it is articulated in other contexts, whether it be relevance or in some statutes there is a heightened standard for particular types of records, is always in terms of the importance to the investigation. Sometimes records about other persons, third parties or related persons other than the target themselves, may be needed for the investigation. To limit on the face of the statute to only records that pertain to the target seems much too strict. Even if one were to believe that some additional reticulation of the standards here were appropriate, that standard is clearly much too strict.

Second, 213 of the PATRIOT Act codifies longstanding authority for delayed notification of search warrants and codifies that with a number of important safeguards: The court must independently find reasonable cause to justify the delay, and the court must set

forth in the warrant the reasonable period for such delayed notice, and the deadline can be extended only by a showing of good cause.

The SAFE Act would change this by requiring—first, eliminating some of the grounds that are specified in the PATRIOT Act for obtaining a delayed notification authorization from the court and would limit it to 7 days.

Now, some of the comments I heard during the hearing this morning reflected, I think, a misunderstanding of the PATRIOT Act. There was an assumption that the court can grant a delayed notification without specifying any period in the warrant. It will just specify a reasonable period. I do not think that that is what the statute actually says.

Chairman HATCH. That is right. That is right.

Mr. COLLINS. The court will determine a period, a period certain that it believes is reasonable in the circumstances of the case and put that in the warrant. Otherwise, the existing provision on extension would make no sense if the court were leaving it indeterminate.

Chairman HATCH. Where the SAFE Act would set a 7-day period, and then you would have to keep going back to get additional time.

Mr. Collins. Every 7 days.

Chairman HATCH. And you would have to find a U.S. Attorney, you would have to go to court, you would have to interrupt your investigation. That is one of the things I find to be a flaw in the SAFE Act, and I think almost everybody in law enforcement thinks that is a flaw as well. But be that as it may, you are pointing out—

Mr. COLLINS. I believe it is too inflexible. I would expect based on the existing case law that predates the PATRIOT Act that 7 days will likely be the presumptive standard.

Chairman HATCH. And probably in most cases they will get it done within 7 days, but that is not always the case.

Mr. COLLINS. That is right, and it leaves it up to the discretion of the Federal judge to determine what under those circumstances is the reasonable period.

Chairman HATCH. Let's say the 7 days expire, and they have got to find a U.S. Attorney, they have got to find a judge, they have got to do all the things that require going back in to get additional time, which they may or may not get.

That may be time enough for the terrorists to escape or to commit terrorist attacks.

Mr. COLLINS. That is correct. There is a need for flexibility here. I think the courts will be strict.

Chairman HATCH. One of the things—I do not mean to keep interrupting you. I guess I do, but one of the things that bothers me is that some who have been proponents of the SAFE Act are consistently saying, well, civil liberties might be violated. Well, I do not know of many criminal laws where civil liberties, you know, could not be violated if you have rogue police officers or you have rogue prosecutors or you have people who are not willing to abide by the law. You could say that about almost every criminal provision.

Mr. COLLINS. I believe, Mr. Chairman you are correct that it reflects a sort of zero-sum thinking. Every tool that you give to the Government can potentially be abused, and so every—

Chairman HATCH. They almost come across like, well, with this Act this is going to be misused because these powers are given to the fight against terrorism, even though basically most of the powers have been in existence for domestic anti-crime purposes for a long time.

Mr. COLLINS. And there are mechanisms in existing law in terms of judicial review and oversight of the Congress.

Chairman HATCH. Sure.

Mr. COLLINS. I would like to make, if I can—I see my time has expired—one further comment.

Chairman HATCH. I have interrupt you. Go ahead.

Mr. COLLINS. It is about Section 2 of the SAFE Act on roving wiretaps, because I think the theory of that provision is to incorporate the specification requirements that are existing in Title III into FISA. But I do not think that the translation works, and the reason why is a little bit technical, and I have alluded to it in my testimony. But I wanted to call attention specifically to it.

There is a requirement in the FISA—it is Section 105(a)(3)(B)—the court must find before issuing an order that there is probable cause that "each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used" by the target. So even though you cannot specify in advance every particular one, because that is only required under FISA "if known," there still is this general requirement that there be some sufficient understanding on the part of the court as to where the interceptions will be made so that the court can find probable cause that the target will be using those and give the authorization.

There is no comparable language in Title III to that. Indeed, the comparable provision of Title III, which is in Section 2518(3)(D), is waived in the case of a roving wiretap. There is a specific clause that waives it for roving wiretaps. It is not waived in FISA. It is instead this general requirement, and I think that that difference is an important one and justifies allowing a John Doe warrant, with a detailed description—and perhaps there can be discussion about whether or not there might be some additional specification of how good the description must be. But you could have a John Doe warrant with a roving wiretap situation where you have this probable cause requirement. I think that that is a different balance from Title III, but I think it is an adequate balance.

[The prepared statement of Mr. Collins appears as a submission for the record.]

Chairman HATCH. Well, I appreciate both of you taking time to be with us. I am going to have to recess now, but we will keep the record open for written questions and any additional statements you would care to make.

Mr. BARR. Could I mention, begging the Chairman's indulgence, just one or two very, very quick points for the record? And I will be glad to supplement those in writing.

In taking up Mr. Collins' challenge, I do wish to go on record that I do believe that some of the provisions in the PATRIOT Act are constitutionally infirm. I think where you have, for example, as in Section 215, the Government now having the ability to secure evidence against individuals who would otherwise be covered by the Fourth Amendment reasonableness provision without showing any

link whatsoever between that person and suspected criminal activity, I do believe that that is violative of the letter if not the spirit of the Fourth Amendment.

With regard to roving wiretaps, I do believe, Mr. Chairman, under the present situation regarding use of the PATRIOT Act for roving wiretaps that it does sweep broadly, so that a person who might simply be in the facility—I think Senator Kyl in his earlier questioning referred to whether or not a person in an apartment complex could have their phone tapped if the Government simply believed that a target might be in that complex. I believe that clearly the roving wiretap provisions in the PATRIOT Act would allow for that scenario, and very clearly, a person against whom the Government has no suspicion whatsoever under the Fourth Amendment standard, or any standard, simply happens to have a phone that might be in proximity to a target known only by general description to the Government or a facility only known by general description to the Government could have their conversations listened in on. And I believe that that, too, would be violative of the Fourth Amendment.

I believe the provision that has been talked a great deal about today, Mr. Chairman, regarding a court's ability to modify a Section 215 application, while certainly provides the court to have some input into how the order is going to be executed, there still under Section 215 is absolutely no provision in the law for the judge to look behind the application. The judge, so long as the Government makes the general assertion to the library or to the pawnshop, the gun shop, or the medical office, whatever it is, that it is part of an ongoing terrorism investigation, no link to the particular person on whom the evidence is being sought, the judge cannot look behind that. And that is the problem with the so-called rubber stamping, that the judge cannot refuse to issue the order. The judge can modify it in some degree.

And, finally, Mr. Chairman, just to reiterate, all of these provisions under FISA, I think it is important to recognize, are in addition to the whole range of powers that are and would remain under the SAFE Act fully available to the Government to go after terrorists, that were available to the Government to go after terrorists pre-PATRIOT Act, and simply because the Government might not have executed or used those powers consistently or made some bad policy decisions, as in the case of not seeking the access to Moussaoui's computer, does not mean, I do not think, that we should not continually take a look at these powers and make sure that they fit properly within the bounds of the Constitution, as I believe that the SAFE Act would help ensure.

Chairman HATCH. Thank you, Mr. Barr.

Mr. Collins, you will have the last word.

Mr. COLLINS. Okay. The Supreme Court has held that there is no Fourth Amendment right to privacy of a person in business records held by a third party. That is why business records in ordinary criminal investigations are obtained by grand jury subpoenas and not by warrants. Given that 215 is aimed at getting business records, the argument that it is constitutionally infirm is, I think, insubstantial. And the concern that roving wiretaps could be placed on a very vaguely defined set of instruments without any control

or supervision of the FISA court as to how the items are placed or the surveillance is actually conducted is inconsistent with the language that I read from Section 105 of FISA, which, as I said, differs from Title III in a material respect and does, I think, limit the ability to place items and conduct surveillance other than in conformity with what it says.

Chairman HATCH. Okay.

Thank you.

Let me just close with these remarks. I am simply not prepared to heighten the requirements for obtaining documents in terrorism cases beyond that which applies in ordinary criminal cases. If criminal investigators can get them in ordinary criminal investigations, we should not add to the requirements in terrorism investigations. I believe that is one of your major points.

I am also not prepared to prohibit Federal judges from having the authority to decide that providing immediate notification of a search would result in the intimidation of witnesses or seriously jeopardize an investigation. I do not think we should strip that authority from Article III judges.

I also do not believe that we should hinder our terrorism investigators with extra constitutional obligations beyond those regulations applicable in ordinary criminal investigations.

In the crucial area of terrorism investigations, I do not think we should raise the hurdles once the Government has probable cause to believe a suspect is an agent of a foreign power.

Now, there are so many other things I would like to say, and I will put my further remarks in the record.

Let me just also put in the record a letter from ONDCP, the Office of National Drug Control Policy, and the DEA, the Drug Enforcement Administration, supporting Section 213 on delayed notifications—in other words, supporting the PATRIOT Act; a letter from the FOP, the Fraternal Order of Police, supporting Section 213; a letter from the Department of Justice regarding al Qaeda using Internet services at public libraries; a letter from DOJ, the Department of Justice, supporting Section 215; a letter from DOJ supporting Section 213 with a delayed notice search warrant report.

I will put in a resolution from the National Associations of Police Organizations representing 236,000 rank-and-file officers and 2,000 police unions throughout the United States; a resolution from the Board of County Commissioners of Collier County, Florida, supporting the PATRIOT Act and its renewal; a resolution of the Pennsylvania Chiefs of Police Association supporting the PATRIOT Act; a resolution of the National Troopers Coalition supporting the PATRIOT Act and its renewal; and a resolution of the National Sheriffs Association supporting the PATRIOT Act.

We have others, but I think I will let it go at that for today.

This has been an interesting hearing to me, and I just want to personally express my gratitude to both of you for being here, for Deputy Attorney General Comey for being here, and, of course, the sincerity on the part of those who believe that there ought to be what I consider to be major changes in the PATRIOT Act. I understand the sincerity, but I think the overwhelming weight of evidence is that the PATRIOT Act is working very well. Now, that

does not mean we cannot continue to look for ways of strengthening it or ways of carefully changing some terms. We are certainly in the process of trying to do that. And to that degree, both of you have been very helpful. I just want you to both know that and I appreciate both of you being here.

We will keep the record open for one week for people to submit any questions in writing and, of course, any resubmissions of statements that you would care to make.

So, with that, we will recess until further notice.

[Whereupon, at 12:30 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

November 8, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

The following are my responses to the questions submitted by the Committee members as you requested in your letter of October 1, 2004:

1. *Section 4 of the SAFE Act would amend the FISA so that the authority conferred by Section 215 could only be exercised if "there are specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power." Suppose that the FBI agents suspected that an as-yet-unidentified individual foreign agent may have consulted certain specific technical titles on bomb-making or nuclear power facilities, or on water treatment facilities and they are informed that 5 persons have checked out those specific titles from public libraries in the relevant area and time period. Would Section 4 bar the agents from getting those records for all 5 persons? Why or why not?*

The hypothetical situation the question provides includes a number of specific and articulable facts, and, in all probability and based on my former experience as a federal prosecutor, such a search would be approved if even the SAFE Act were enacted into federal law. These specific facts include that there is intelligence information suggesting a specific (but not yet identified) foreign agent is in the country, that the information is limited to a specific time period and location, and that the agent has consulted "technical titles," rather than general titles, and that only five people have checked out these titles.

The "specific and articulable facts" standard has been described by the courts as more than hunch, but less than probable cause. The facts described seem to meet that standard precisely – it is certainly more than a hunch, but possibly would not yet amount to probable cause.

It is important to remember that the "specific and articulable facts" standard, while it is an important check on the government's power, is not a high one. The standard is drawn from the Supreme Court case of *Terry v. Ohio*, which held that police on the beat do not need a warrant or probable cause to briefly stop and frisk a suspicious character on the street. These "stop and frisk" cases, the courts have said, involve less than a full arrest and less than a full search, and so do not require full probable cause.

The hypothetical in the question posed, is obviously constructed to test what level of probability "specific and articulable" facts would require. Is a one-in-five chance enough? There is no absolute right answer to this question, because courts are asked to apply their judgment to real life cases based on all the factual circumstances rather than using a mathematical formula that can be rigidly applied to law-school hypotheticals but cannot be used so easily in the real world. I have no doubt that the judges of the Foreign Intelligence Surveillance Court will – if given a proper standard that allows them to do what judges should do – be able to make the right call; and that they would and could continue to do so if the SAFE Act was enacted.

2. *I agree that there have been distortions that inhibit a reasonable and well informed debate about the Patriot Act and that there has been incomplete information about the Patriot Act as mentioned in your written testimony. I also appreciate you citing in your testimony the 9/11 Commission's report where, as you are aware, the report also called for a "full and informed debate on the Patriot Act." As you know, Congress is currently in the midst of a bi-partisan review of the 9/11 Commission's report and its recommendations.*

> *Recently, the ACLU ran a television advertisement claiming that the Patriot Act permits the government to search house* ***without*** *providing notice. As your testimony notes, the governments is* ***required, in all cases****, to give notice of a search or seizure, the Patriot Act codified a delayed notice requirement.*
> *In the interest of full disclosure, do you believe that the ACLU commercial should have informed viewers that the Patriot Act requires the giving of notice in all cases?*

I strongly support the 9/11 Commission's call for a "full and informed debate" on the Patriot Act, and believe that without such a debate, we are fated to enact additional and unnecessary expansions of federal policing power. Like this Committee, I too am concerned at the increasing amount of misinformation circulating on the Patriot Act. I sincerely hope that the distortions that often accompany discussion of the law abate following the November 2004 election.

As to the ACLU's advertisement, I would make two points. First, it *is* true that the Patriot Act expanded the government's ability to conduct secret physical searches and never tell the target. Section 218 applies equally to FISA's physical search power as it does to its electronic surveillance authority.

Second, if, in fact, the ACLU's advertisement refers to Section 213, it simply omits mention of the *indefinite* delay on notice; it does not claim that these secret searches are notice-less. Frankly, this strikes me as a relatively minor detail given the nature of public concern with the sneak and peek provision.

To be clear, Section 213 authorizes the government to seek a warrant allowing agents to break into Americans' homes, search their belongings, peruse the contents of their computers, seize property on a showing of "reasonable necessity" and leave without telling anyone, for an undefined period of time, that they were there. Worse, the government can do so in any case if it simply makes the claim that

notice would delay a trial or jeopardize an investigation. From my perspective, whether notice is forthcoming within a month or a year matters little; notice delayed is notice denied. If government agents are allowed in virtually any or every case, to conduct a search without affording contemporaneous notice, then it has effectively denied the target of the search any ability to contest either the constitutionality of the search or the accuracy thereof (i.e., the possibility that the agents are executing the warrant at the wrong address). Ultimately what concerns me and so many others is that it can be delayed at all under so vague a standard.

I would also draw your attention to the Justice Department's most recent piece of literature about sneak and peek warrants, the September 2004 report titled "Delayed-Notice Search Warrants: A Vital and Time-Honored Tool for Fighting Crime." This report is a subjective treatment of an extremely complex issue. For instance, in the initial cover-letter to Speaker Dennis Hastert, Assistant Attorney General William E. Moschella refers to the sneak and peek searches authorized in the Patriot Act as a "time-honored tool" and claims they are like normal search warrants in every respect save that the government can "temporarily" delay notice.

This analysis glosses over the fact that while sneak and peek searches have been available to the government in limited circumstances for quite some time, this authority was dramatically *expanded* in the Patriot Act, making these secret search warrants far more accessible. Indeed, given the fuzzy justification mentioned above, one could argue that post-Patriot sneak and peek warrants are not "time-honored" tools, but entirely new creatures that bear little resemblance to the delayed-notice warrants – based on unusual circumstances – issued before the statutory authorization in the Patriot Act.

3. *Your testimony supports raising the evidentiary hurdle for obtaining business records in terrorism cases to a "specific and articulable facts" standard. What is your view of using the grand jury standard for obtaining business records in terrorism investigations so that the obtaining business records in terrorism*

cases is the same as that in garden variety criminal investigations, but not more onerous than criminal investigations, such as fraud, bank robbery or assault?

The question makes the common error of presuming that "terrorism investigations" and "foreign intelligence investigations" are the same thing. Critics of the Patriot Act have been accused of inaccuracy, but boosters of the Patriot Act have made this error time and time again.

It is simply wrong, and quite misleading, to state that grand jury subpoenas and other standard criminal powers are not available to the government in terrorism investigations, or that they were not available prior to 9/11. They are available to criminal investigators for all crimes, including terrorism. Every power the government had prior to 9/11 to investigate "ordinary" crime could be used to investigate terrorism crimes.

In international terrorism investigations, the government has (and did have), in addition to its criminal powers, the surveillance powers of the Foreign Intelligence Surveillance Act. The FISA was amended in 1998 to permit the government to obtain a court order requiring certain business records be turned over to the government. Foreign intelligence investigations are different from criminal investigations because they are not limited to the investigation of criminal activity, and therefore are much more likely to intrude on constitutionally-protected activities. As a result, when the FISA records provision was originally enacted, it included a modest safeguard – that there must be "specific and articulable facts" that the records pertained to a terrorist, spy or other foreign agent.

While any power can be abused, grand jury investigations provide three important checks that are not provide in FISA. First, the grand jury itself – an ancient institution composed of common citizens, not government officials – is supposed to provide a check on prosecutorial overreach. Second, grand jury investigations are supposed to involve crimes. Because these checks are not present in

FISA investigations, an individual suspicion standard is essential to ensure against abuse of the FISA records power. Thirdly, while grand juries function on a day-to-day basis without interference from the district court, they are subject to the court's direction and, if need be, the court can and will step in to supervise and ensure the grand jury operates within constitutional bounds.

4. *You mention in your testimony that you previously served as the United States Attorney for the Northern District of Georgia. During your tenure as the United States Attorney, did you or members of your staff ever seek a delay in providing notice of searches because member s of you staff believed that notice may result in intimidation of witnesses or seriously jeopardize an investigation?*

During my tenure as the U.S. Attorney for the Northern District of Georgia (1986 – 1990), I do no recall specifically if any Assistant U.S. Attorneys in my office sought a delay in providing notice of a search. However, it would not surprise me if such action did occur in unusual circumstances. The fact is, I have always supported the ability of the government to request of a court that it be authorized to conduct a delayed-notice search in extraordinary circumstances, including intimidation of witnesses or serious jeopardy to an investigation. My concern is that under the Patriot Act, the exception becomes the rule; the government now is able to seek and obtain delayed-notice searches in virtually any case it wants, not just those involving extraordinary circumstances or vital national security concerns.

5. *Among the alterations made by Section 3 of the SAFE Act is prohibiting Article III judges from delaying notice in instances where immediate notification of a search might result in the intimidation of witnesses. Why do you believe notice should not be delayed in this instance?*

It is my understanding that the drafters of the SAFE Act assumed that witness intimidation would be covered adequately under 18 U.S.C. § 2705(a)(2)(A), which allows delay if notice would endanger

the "life or physical safety of an individual." If that is insufficient, it should be fixed.

6. *The 9/11 Commission Report finds the Patriot Act's removal of the barrier separating intelligence and law enforcement to be beneficial. The report also states that the Patriot Act's update of the surveillance laws to reflect technological developments are "relatively non-controversial." Do you agree that removal of the wall was beneficial? You also support adding a sunset to those provisions which addressed the pen register and trap and trace authority. Do you advocate repealing or altering the changes mad to the trap and trace/pen register authority made by the Patriot Act?*

First, support for the sunset provisions does not necessarily mean support for the repeal of certain provisions. When voting on the measure, we all supported the sunsets because we wanted to give ourselves a second-chance in case the external stresses of 9/11 derailed the deliberative process. If the sunsets are abandoned, that second chance is lost forever.

Moreover, this and other committees have frequently complained about the Justice Department's poor cooperation with congressional oversight efforts. The sunsets arguably are the best piece of leverage the Committee has to force the Administration into the committee room to defend its record and disclose how it has used the most controversial sections of the Patriot Act. For this reason alone, the president's call to remove the sunsets should be rejected.

As to the pen register and trap and trace provisions, I believe Congress needs to clarify what bits and pieces of electronic communications qualify as "content" for the purposes of these investigative tools.

And, regarding the so-called "wall," I believe the FBI was right to revisit the internal guidelines that unduly hampered the exchange of information between criminal and intelligence investigators, but I do not believe that Section 218 was necessary to accomplish this greater

fluidity in information exchange (either internal to the FBI or between it and other agencies). Moreover, I remain quite concerned about the potential that criminal prosecutors will use their greater access to the counter-intelligence toolbox to side-step Fourth Amendment limitations. Section 218, as interpreted by the 2002 Foreign Intelligence Surveillance Court of Review, is directly responsible for this greater access.

If I might be of further assistance, please do not hesitate to contact me. With warm personal regards, I remain,

very truly yours,

BOB BARR
Member of Congress, 1995-2003
21st Century Liberties Chair for Freedom and Privacy
The American Conservative Union

BB:tj

cc: Members, Committee on the Judiciary, United States Senate

Answers to Questions from Chairman Hatch to Dan Collins
September 22, 2004 Hearing of the Senate Judiciary Committee
on "A Review of Counter-Terrorism Legislation and Proposals,
Including the USA PATRIOT Act and the SAFE Act"

Q.1: In your written testimony you discuss the safeguards built into the delayed notice provision. You also indicated that passage of the SAFE Act's revision to section 213 would make the law in this area worse than it was before passage of the Patriot Act. Specifically, how would the law be worse?

Answer:

Section 3(a)(1)(A) of the SAFE Act would limit the grounds upon which a court could authorize delayed notification of the execution of a search warrant. Under the current version of 18 U.S.C. § 3103a(b), as added by the PATRIOT Act, delayed notification may be granted if the court "finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result (as defined in section 2705)." Section 2705, in turn, defines an "adverse result" as any one of the following five things: (1) "endangering the life or physical safety of an individual"; (2) "flight from prosecution"; (3) "destruction of or tampering with evidence"; (4) "intimidation of potential witnesses"; or (5) "otherwise seriously jeopardizing an investigation or unduly delaying a trial." 18 U.S.C. § 2705(a)(2)(A)-(E). Section 3(a)(1)(A) of the SAFE Act would strike the phrase "may have an adverse result (as defined in section 2705)," and would instead require that the court find reasonable cause to believe that immediate notification "will" do one of three things: (1) "endanger the life or physical safety of an individual"; (2) "result in flight from prosecution"; or (3) "result in the destruction of, or tampering with, the evidence sought under the warrant." The SAFE Act would thus eliminate entirely the last two grounds for delayed notification in existing law, *i.e.*, "intimidation of potential witnesses" and "otherwise seriously jeopardizing an investigation or unduly delaying a trial." In addition, the SAFE Act would narrow the third enumerated ground by requiring that the court find reasonable cause to believe that immediate notification will "result in the destruction of, or tampering with, *the evidence sought under the warrant*." S. 1709, § 3(a)(1)(A) (emphasis added). Under the SAFE Act, the fact that *other* evidence would be destroyed or tampered with is irrelevant.

There can be little doubt that this leaves the law worse than it was before the PATRIOT Act codified the pre-existing judicially crafted caselaw on delayed notification. To illustrate this point, one need look no further than the examples cited by Deputy Attorney General Comey in his oral testimony. He described two incidents, one pre-PATRIOT Act and the other post-PATRIOT Act, in which agents seized evidence and delayed notification by making the seizure appear to be a theft. On the facts of the two cases, Mr. Comey stated that, had the SAFE Act been on the books, the narrowing of the permissible grounds might have made a difference in the ability to get delayed notification in one case, but not the other. Moreover, it is worth noting that, *because "the evidence sought under the warrant" was seized* in both cases, it could not possibly be said that *that evidence* could have been tampered with or destroyed as a result of immediate notification. In other words,

under the SAFE Act, covert seizure operations such as those described by Deputy Attorney General Comey could be undertaken only if one of *two* grounds were present — *i.e.*, only if immediate notification would "endanger the life or physical safety of an individual" or would "result in flight from prosecution." This is substantially more restrictive than pre-PATRIOT Act law. *Cf. United States v. Villegas*, 899 F.2d 1324, 1338 (2d Cir. 1990) (emphasizing the importance of the covert search and noting that failure to delay notification would prematurely terminate an ongoing investigation: "[t]he agents showed good reason to believe that Villegas had numerous coconspirators who had not yet been identified").

Q.2: In your written testimony you state that some argue that there is always tension between law enforcement and privacy. Did the Patriot Act address this tension in ways where law enforcement tools were upgraded and privacy protected?

Answer:

The PATRIOT Act correctly rejects "zero-sum" thinking about law enforcement tools and privacy protection. Not every expansion in law enforcement authority necessarily threatens privacy; it is possible to have *both* increased law enforcement authority to act in appropriate cases *and* increased privacy protection. Thus, in creating or expanding a particular law enforcement tool, the task confronting the Congress is to fashion the substantive standards and procedural requirements governing that tool so as to ensure *both* that (1) the tool will be available in those cases where it is needed and (2) the opportunities for abuse of the tool are properly restricted. As technologies change, and as terrorists and other criminals become more resourceful, needs will arise from time to time for new tools and new ways of doing things. In such circumstances, a "zero-sum" approach is neither sensible nor constructive; the task is *how* to provide the needed tools in a way that respects and enhances privacy.

The PATRIOT Act contains numerous examples in which Congress, in providing new or upgraded tools, also acted to ensure that necessary and appropriate safeguards were included. A few examples will illustrate the point.

- Federal statutory law ("Title III") contains an appropriately stringent set of standards governing the interception of live communications by wiretapping. *The PATRIOT Act leaves unchanged the full panoply of substantive protections provided by Title III.* Instead, it merely extends this pre-existing set of strict standards so that wiretapping will be authorized in terrorism cases under the same standards that it was already authorized in organized crime cases. One of the requirements of Title III is that the investigation must involve an offense that is on Title III's list of offenses that are eligible for wiretapping. 18 U.S.C. § 2516. The PATRIOT Act simply adds to this list six terrorism offenses, unlawful possession of chemical weapons, and computer fraud and abuse. Pub. L. No. 107-56, §§ 201, 202, 115 Stat. at 278. But, as noted, it leaves unchanged the full range of substantive protections in Title III, including the extensive judicial oversight provided for in Title III. I suppose that,

under a "zero-sum" approach, one could conceive of this increased wiretap authority as being literally a loss of "privacy" for that subset of persons with respect to whom there is enough evidence to persuade a federal judge to find probable cause of criminal involvement in chemical weapons and other serious crimes. But that shows why it makes no sense to think that every increase in law enforcement authority is necessarily a threat to privacy.

- Section 216 of the PATRIOT Act upgrades the laws governing pen registers — devices to capture routing and signaling information, but not content — in order to make clear that these laws apply, in an even-handed way, to both electronic communications and telephonic communications. In doing so, however, it also contains specific provisions that are tailored to unique practical concerns that are presented *only* in the context of electronic communications. Much has been said about the specific privacy concerns raised about the use of *government-installed* programs to implement pen register orders in the context of electronic communications. To take account of these legitimate concerns, the Act provides for judicial oversight of such deployments by requiring detailed reporting to the court whenever such a government-installed program is used to implement a pen/trap order involving electronic communications. 18 U.S.C. § 3123(a)(3). This is another good illustration of upgrading law enforcement tools in a manner that is designed to preserve and enhance privacy. The SAFE Act would make the mistake of sunsetting this eminently sensible provision.

- In conferring authority to obtain business records in the FISA context, the PATRIOT Act does not follow the grand jury subpoena model, but instead requires *prior* judicial authorization, limits the types of investigations in which such records can be obtained, and provides explicit protection for First Amendment rights. 50 U.S.C. § 1861(a)-(c).

- The PATRIOT Act further eliminates the loophole in prior law under which *hackers* were arguably protected by the wiretap law from law-enforcement monitoring authorized by the operators of the computers they invade. Pub. L. No. 107-56, § 217. This law enforcement tool may infringe on the "privacy" of hackers, but it has obvious privacy-enhancing aspects for the rest of us.

Q.3: The 9/11 Commission recommended that the government bear the burden to prove that it should retain, and presumably add, a particular power. Do you believe the government has carried that burden with respect to the provisions in the Patriot Act? Also, do you have an opinion of whether the government has carried that burden in relation to its support of S. 2679, Senator Kyl's "Tools to Fight Terrorism Act"?

Answer:

This recommendation, which is contained on page 394 of the 9/11 Commission report, has in my view been somewhat misunderstood. The Commission's recommendation on this score was as follows:

> The burden of proof for retaining a particular governmental power should be on the executive, to explain (a) that the power actually materially enhances security and (b) that there is adequate supervision of the executive's use of the powers to ensure protection of civil liberties. If the power is granted, there must be adequate guidelines and oversight to properly confine its use.

I do not think that this language can be, or should be, read to create some sort of rebuttable presumption in favor of going back to the inadequate pre-PATRIOT Act set of tools for fighting terrorism. There is no such presumption in favor of reviewing and restricting the tools to fight, say, health care fraud, and it seems unimaginable that the Commission was in any way intending to suggest that Congress should be *stricter and stingier* when it comes to providing tools to fight terrorism than it is in providing tools to fight other crimes. If anything, the opposite is true.

Rather, it seems to me that the Commission, being mindful of the fact that many key provisions of the PATRIOT Act will need to be affirmatively renewed and extended (due to the current sunset provision), was articulating a standard for approaching that looming question of reauthorization. Viewed from that more limited perspective, the Commission's recommendation is quite sensible. Under our Constitution, it is of course the Executive Branch that carries out the laws, and it therefore necessarily falls to that branch (as the Commission notes) to explain whether and how a particular tool can be useful in the actual fight against terror. It is also reasonable to expect that the Executive Branch would be called upon to explain how effective in practice are the measures that have been put in place to ensure protection of civil liberties. As I have argued above, however, it remains *the Congress' task* to review the substantive standards and procedural requirements governing each tool subject to sunset, and to do so in a way that ensures that (1) the tool will be available in those cases where it is needed and (2) the opportunities for abuse of the tool are properly restricted.

I wish to add two other notes of caution against misinterpreting the Commission's recommendations. First, I do not read the Commission's recommendation that the Executive Branch should explain "that the power actually materially enhances security" to mean that the executive

must demonstrate that it has actually or regularly *used* this authority in fighting terrorism. The fact that a particular arrow is rarely used does not mean that it is not a necessary part of the quiver. Such tools may need to be preserved for a more extraordinary occasion in which it may prove vital. Indeed, having a presumption that the Government will lose any authorities that it hasn't used, or hasn't used frequently, would create perverse incentives to overuse some potentially potent tools. A low incidence of use may reflect, not a lack of need, but an appropriate restraint on the Government's part in using certain tools. Of course, the Executive Branch should *explain* why it needs the tool, but that is different from imposing some sort of burden to *demonstrate through actual or frequent use* that it needs the tool. I read the Commission's recommendation as imposing the former burden, but not the latter.

Second, the Executive Branch can, I think, fully carry its "burden of proof" to "explain" the need for a tool by pointing out that the tool currently exists in permanent law for fighting crimes *other* than terrorism. As I explained in my testimony, any tool that is available to fight the mob or drug traffickers should presumptively be available to fight terrorism. In such a situation, it seems to me that the burden then shifts to those who would *deny* the tool from being available to fight terrorism even though it is available to fight other crimes. As I read it, nothing in the Commission's recommendation is inconsistent with imposing this shifted burden onto the *opponents* of such tools.

For the reasons I have explained at length in my written testimony, I believe that a dispassionate review of the currently sunsetted provisions in the PATRIOT Act confirms that each of them should be made permanent in substantially their current form.

Likewise, I believe that the testimony presented by the Department of Justice at the September 13, 2004 hearing on S. 2679, the "Tools to Fight Terrorism Act," is sufficient to explain why the tools in that bill are warranted and are properly crafted. In particular, the Department's testimony correctly notes that administrative subpoenas are currently available to fight health care fraud and child pornography, but *not* terrorism. This strikes me as an instance in which, as described above, the burden clearly shifts to the opponents of administrative subpoena authority to explain why such a disparity should be allowed to persist.

Q.4: The SAFE Act alters the standard for delaying notices of searches from believing that immediate notice "may have an adverse result" to "will" result in the enumerated events. Do you believe this is a significant change? If so, how?

Answer:

As I noted in my answer to Question 1, *supra*, the SAFE Act would not only limit the enumerated grounds on which delayed notification would be authorized, it also would change the relevant verb by striking the phrase "*may* have an adverse result (as defined in section 2705)," and would instead require that the court find reasonable cause that immediate notification "*will*" do one of three things. Despite this word change, it is unclear that any real substantive change is intended or that this change in language would be significant. Although the Supreme Court has in other

contexts placed some weight on the use of a form of the verb "will" rather than the verb "may," *see, e.g.*, *I.N.S. v. Stevic*, 467 U.S. 407, 422 (1984) (use of "would" in statute, rather than "might," suggests that event must be shown to be more likely than not), the full context of the language in 18 U.S.C. § 3103a makes any such change here less significant. Under either formulation, the statute still only requires "*reasonable cause* to believe" that immediate notification "may" or "will" have one of the enumerated effects. "Reasonable cause" is presumably less than "probable cause," *cf. United States v. Ramsey*, 431 U.S. 606, 612-14 (1977), and "probable cause" itself, "as the very name implies," only "deal[s] with probabilities." *Illinois v. Gates*, 462 U.S. 213, 231 (1984) (citation and internal quotation marks omitted). Given that the statute's "reasonable cause" language — which the SAFE Act would retain — already appears to contemplate something less than a "likelihood" of an event's occurrence, it seems of lesser importance that the SAFE Act says "reasonable cause to believe" that something "will" occur and that current law says "reasonable cause to believe" that something "may" occur. (The latter, for example, would likely not be construed as requiring only "reasonable cause" of a *possibility*.)

Q.5: The SAFE Act would allow a delay in circumstances where the government could show that immediate notice would "result in the destruction of, or tampering with, the evidence sought under the warrant." In addition to the change in standard addressed in the preceding question, is limiting the delay to the "evidence sought under the warrant" too restrictive? Why or why not?

Answer:

This aspect of the SAFE Act is fully discussed above in my response to Question 1.

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 1, 2005

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find responses to questions posed to Mr. James Comey, Deputy Attorney General, following Mr. Comey's appearance before the Committee on September 22, 2004. The subject of the hearing was, "A Review of Counter-Terrorism Legislation and Proposals, Including the USA PATRIOT Act and the SAFE Act."

We hope that this information is helpful. Please do not hesitate to call upon us if we may be of additional assistance in connection with this or any other matter.

Sincerely,

William E. Moschella
Assistant Attorney General

cc: Patrick J. Leahy
Ranking Minority Member

Enclosure

Hearing Before the Senate Judiciary Committee On
"A Review of Counter-Terrorism Legislation and Proposals, Including the USA PATRIOT Act and the SAFE Act"
Witness: Deputy Attorney General James Comey
September 22, 2004

Follow up Questions from Senator Hatch

1. **The Department has supported S. 2204 which is a bi-partisan bill I introduced with Senators Schumer, Cornyn and Feinstein dealing with terrorist hoaxes, as well as a variety of other legislative proposals designed to fight terrorism, including eliminating section 224, the sunset provisions. As you know, the 9/11 Commission's Report places on the government the burden to prove that a particular provision should be retained, or presumably added. You testified at the hearing that you approach all law enforcement tools and ask "is something broken" and if it is not broken, then you "don't see a reason to change it." Under either standard, do you believe the Department has made the case for eliminating all of the provisions identified in section 224?**

   ANSWER: Yes. The numerous speeches, reports, hearing testimonies, responses to Congressional questions, correspondence to legislators, and other public statements made by Department officials since the passage of the USA PATRIOT Act have provided ample, sound justification for each provision of the Act subject to sunset in December 2005 pursuant to section 224. *See, e.g.*, U.S. Department of Justice, *Report from the Field: The USA PATRIOT Act at Work* (July 2004) (www.lifeandliberty.gov/docs/071304_report_from_the_field.pdf); Letter from William E. Moschella, Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice, to Senator Dianne Feinstein (June 28, 2004) (attached).

2. **The SAFE Act alters the standard for delaying notices of searches from believing that immediate notice "may have an adverse result" to "will" result in the enumerated events. Does the Department believe this is a significant change? If so, how?**

   ANSWER: We believe this would represent a significant change. Current law defines an "adverse result" for purposes of delayed-notification search warrants as "(A) endangering the life of physical safety of an individual; (B) flight from prosecution; (C) destruction of or tampering with evidence; (D) intimidation of potential witnesses; or (E) otherwise seriously jeopardizing an investigation or unduly delaying a trial." 18 U.S.C. § 2705(a)(2). In cases involving the use of such warrants, the government must demonstrate to the court a substantial likelihood that immediate notification would lead to one or more of these results. It is hard to imagine how the government could ever prove with certainty that

immediate notice "will" result in any of these results and it would be paradoxical and counterproductive to impose a standard of absolute certainty at this early stage in the criminal investigative process.

3. **The SAFE Act would allow a delay in circumstances where the government could show that immediate notice would "result in the destruction of, or tampering with, the evidence sought under the warrant." In addition to the change in standard addressed in the preceding question, is limiting the delay to the "evidence sought under the warrant" to restrictive? Why or why not?**

   ANSWER: In order to be granted a delayed notification, current law requires the government to demonstrate to a court's satisfaction that the subject of the search likely would destroy or tamper with evidence. Evidence not necessarily specified in a search warrant may nonetheless be relevant to a criminal investigation. It makes little sense to create an implicit safe harbor for the destruction of or tampering with such evidence in these circumstances by denying the use of delayed-notification search warrants.

4. **Many people have expressed concern about Section 213 of the Patriot Act, which permits courts to issue delayed-notification search warrants in certain narrow circumstances. Are there circumstances where the Department would find it necessary to delay notice of a search warrant where witnesses may be intimidated and it would not also fit into one of the remaining three categories left intact by the SAFE Act? I ask you the same question for "otherwise seriously jeopardizing an investigation" and for "unduly delaying a trial"?**

   ANSWER: First, it is important to note that the SAFE Act does not leave "intact" the three "remaining" categories of cases in which a delayed notification search warrant may be sought. As noted above, the SAFE Act would require the government to prove that immediate notice "will" result in the endangerment of the life or physical safety of an individual, flight from prosecution, or the destruction of or tampering with evidence sought in the warrant. The requirement of proof with certainty is a material change to the three categories not eliminated altogether by the SAFE Act. Also as noted above, the SAFE Act limits the availability of delayed notification search warrants in cases of evidence tampering or destruction by requiring that such evidence must be specified in the warrant. Current law, by contrast, wisely recognizes that evidence may be relevant to a criminal investigation even if it is not necessarily specified in a search warrant.

   With respect to the first question, it is possible to conceive of cases in which the intimidation of potential witnesses would necessarily endanger the life or physical safety of an individual, lead to the destruction of or tampering with evidence sought in the warrant, or result in flight from prosecution. However, it is equally possible to imagine cases in which immediate notice might result in witness intimidation, but the government might not be able to prove *with certainty* (the novel proposed SAFE Act standard) that one or more of the remaining factors

would obtain. In such cases, the SAFE Act's elimination of witness intimidation as a basis for delayed notification works a needless, potentially harmful change to current law. Similar analysis applies to the circumstances in which immediate notice would seriously jeopardize an investigation or unduly delay a trial.

5. **Critics of current section 215 complain that there is no evidentiary standard written into the statute so that as long as the appropriate person specifies that the records concerned are "sought for an authorized investigation..." the FISA court judge is powerless to deny the request. Do you believe the statute is written requiring the government to show the court that the documents sought are "relevant" and to deny the application if it is not? How so?**

   ANSWER: The Department supports the current standard for obtaining business records under 50 U.S.C. § 1861, which is the equivalent of a relevance standard. 50 U.S.C. § 1861 currently provides that the FISA court may enter an order requiring the production of records only if such records are "sought for an authorized investigation conducted in accordance with [50 U.S.C. § 1861(a)(2)] to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities." This is the equivalent of a relevance standard because, for example, if records are irrelevant to an authorized investigation to protect against international terrorism, then it is not possible to maintain that such records are being "sought for" that investigation.

6. **Bob Barr testified that "[T]he FISA judge has no discretion in the statute, codified at 50 U.S.C. § 1861, to deny the request..." of the government for business records. Does the Department believe that the FISA court can deny a governmental request if they make an improper showing of need? What statutory language supports your position?**

   ANSWER: Pursuant to section 215, a judge "shall" issue an order "approving the release of records if the judge finds that the application meets the requirements of this section." 50 U.S.C. § 1861(c)(1). This is the same standard that applied to requests for the production of tangible things under the FISA that existed prior to the PATRIOT Act. Before issuing an order requiring the production of any records under section 215, a federal judge must find that the requested records are sought for (and thus relevant to) "an authorized investigation . . . to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities." 50 U.S.C. § 1861(b)(2). Moreover, the statutory language explicitly expects that orders may be "modified" by the Court and that the judge's order approving the request for release of records can be made only "if the judge finds that the application meets the requirements of this section." 50 U.S.C. § 1861(c)(1).

Follow up Questions from Senator Leahy

The Justice Department's website currently states that 361 individuals have been criminally charged in the United States in terrorism investigations, and that 191 individuals have been convicted or have pled guilty. When the convictions numbered 184 earlier this year, I understood from TRAC data that 171 of those so-called terrorism defendants received a sentence of one year or less. U.S. Sentencing Guideline 3A.14 provides a minimum offense level of 32 for any offense where the government can prove by the minimal "preponderance of the evidence" standard that the offense "involved, or was intended to promote, a federal crime of terrorism." A level 32 is at least a 10-year sentence. At first glance, it certainly appears that this guideline was not applied in at least 171 of these cases, and I wonder how they could really have "involved" terrorism.

7. **Of the 191 convictions referenced on DOJ's website, how many resulted in a sentence of one year or less?**

   ANSWER: Of the 191 convictions to which you refer, 104 defendants received a sentence of one year or less. This includes those defendants who were deported from the U.S. at the conclusion of their prison terms.

8. **How many of the 191 convictions were for an offense that "involved" terrorism?**

   ANSWER: All of these convictions referenced on the Justice Department website have been identified by the Criminal Division as terrorism or anti-terrorism cases since September 11, 2001. These cases include certain investigations conducted by Joint Terrorism Task Force (JTTF) agents and any other cases known to the Criminal Division in which there is evidence that an individual was engaged in terrorist activity or associated with terrorists or foreign terrorist organizations. The charges and convictions tracked by the Criminal Division reflect not only "terrorism" charges such as violations of the material support statutes, 18 U.S.C. §§ 2339A and 2339B, but also non-terrorism charges such as immigration, firearms, and document fraud violations that have some nexus to international terrorism.

9. **Can you reconcile the apparent conflict between extremely short sentences and a guideline factor that all but guarantees a 10-year sentence for offenses that involve terrorism?**

   ANSWER: Each case is weighed on its own facts to determine whether or not seeking the terrorism enhancement is appropriate. Factors considered include (but are not limited to) the nature of the offense, the harm caused, the proximity of the defendant to the act of terrorism, and the relative culpability compared to other terrorism-related defendants.

The fact that a particular defendant was not charged with such an offense or publicly linked to terrorism by the FBI does not mean that law enforcement had no concerns or evidence regarding his connection with terrorism. Likewise, the fact that an alien was deported rather than prosecuted does not mean that he had no knowledge of, or connection to, terrorism. In certain cases, evidence of a defendant's knowledge of, or connection to, terrorist activity may not be sufficient to prove a terrorism crime beyond a reasonable doubt, or proving a criminal offense may require the disclosure of sensitive sources or classified information. In situations like these, the best alternative from a national security and law enforcement perspective is to pursue other options, including prosecution for non-terrorism offenses and removal from the United States.

DOJ's website states that longer prisoner sentences are being leveraged into cooperation pleas. I have several questions about this common sense notion.

10. How many of the 191 convictions have been pursuant to cooperation deals?

ANSWER: The Department of Justice does not maintain a list of this information. However, the Department's investigators and prosecutors routinely inform defendants who wish to plead guilty that plea agreements will require their full and truthful cooperation with any and all government investigations. Such cooperation has yielded valuable intelligence about terrorist networks, further bolstering our efforts to protect the American people from terrorist attacks.

11. What does the typical "cooperation plea" yield for a defendant involved in terrorism?

ANSWER: Requiring cooperation from a defendant is a standard practice in plea agreements including terrorism related cases. Just as we have seen in drug and organized crime conspiracy cases, defendants who are inside or close to a terrorist conspiracy often have the best information on the activities of the operation. Thus, securing the cooperation of defendants is essential to disrupting terrorist operations and prosecuting other offenders. Infrequently, the Department will enter into a plea agreement that does not include cooperation, although such a decision is not made lightly. In return for a defendant's cooperation, if a defendant meets the criteria for providing substantial assistance to authorities, the government may move to reduce a defendant's sentence under Section 5K1.1 of the Federal Sentencing Guidelines or under Rule 35 of the Federal Rules of Criminal Procedure.

The Justice Department's website claims that "over 515 individuals linked to the September 11th investigation have been removed from the United States." (Emphasis added.)

12. What exactly does it mean to be "linked" to the September 11th investigation?

ANSWER: Aliens who were encountered based upon leads related to the investigation into the terrorist attacks of September 11th were deemed to be linked to the investigation.

13. Does deporting a person who is "linked" to the most horrific tragedy in U.S. history actually make America any safer? How?

ANSWER: Yes. As stated above, in certain cases, evidence of a defendant's knowledge of, or connection to, terrorist activity may not be sufficient to prove a terrorism crime beyond a reasonable doubt, or proving a criminal offense may require the disclosure of sensitive sources or classified information. In situations like these, the best alternative from a national security and law enforcement perspective is to pursue other options, including removal from the United States and the implementation of measures to prevent the individual's return.

I have three questions regarding your press conference on June 1, 2004, at which you released newly declassified intelligence information about Jose Padilla, a U.S. citizen who has been held for two years as an "enemy combatant." I posed these same questions to Attorney General Ashcroft over three months ago, following his one and only appearance before the Judiciary Committee in an 18-month period, but I have yet to receive any answers.

14. The U.S. Attorney's Manual prohibits the release by DOJ of any information that will have a substantial likelihood of materially prejudicing an adjudicative proceeding. The ABA Model Rules of Professional Conduct contain a similar prohibition for all lawyers. How did this press conference square with longstanding DOJ policy and ABA ethics rules?

ANSWER: The Department released the information regarding Mr. Padilla on June 1, 2004, because the information had become available in unclassified form at that time. It was important to share the information with the American public to show that, while additional intelligence had been developed concerning Padilla since his designation as an enemy combatant, the new intelligence continued to support his detention as an enemy combatant and as a threat to Americans. The bar association rules and provisions of the USAM are designed to safeguard the fairness of civil and criminal proceedings, particularly jury proceedings. In this instance, Padilla was in custody by virtue of his designation as an enemy combatant, and there was and remains extraordinary public value in informed commentary on the circumstances under which this anti-terrorism measure is to be applied. By way of background, the Department had already received requests

from members of Congress for information relating to Padilla's status and had previously advised former Senate Judiciary Committee Chairman Orrin Hatch that unclassified responsive material could be released upon formal request. Chairman Hatch made a formal, written request on April 22 2004, and was provided with responsive material that had been declassified on June 1, 2004. Chairman Hatch released that material to the public that morning. As of June 1, 2004, briefing before the Supreme Court had been completed in Rumsfeld v. Padilla; argument had been held; and the case had been taken under submission. In our view it cannot reasonably be said that dissemination of the information about Padilla on June 1, 2004, could give rise, in the words of ABA Model Rule 3.6, to "a substantial likelihood of materially prejudicing" the Supreme Court of the United States in its resolution of the issues that had been presented to it. Accordingly, release of the information at the June 1, 2004, press conference was not inconsistent with Department policy, USAM §1-7.401(H),1-7.500, or ABA Model Rule 3.6(a).

15. Can you bring us up to date on the Padilla case? Just what does the government intend to do with this man, who you yourself have called a highly trained al-Qaeda soldier?

ANSWER: As you know, the United States has been engaged in habeas corpus litigation with Jose Padilla since shortly after he was designated an enemy combatant, which has resulted in a June 2004 Supreme Court decision, *Padilla v. Rumsfeld*, 124 S.Ct. 2711 (2004). In that decision, the Supreme Court held that Padilla, who is being held in the U.S. Naval Brig in South Carolina, had improperly filed his action in U.S. District Court in the Southern District of New York. After the Supreme Court decision, Padilla refiled his action in the U.S. District Court for the District of South Carolina. *Padilla v. Commander C.T. Hanft, USN*, C/A No. 02:04-2221-26AJ (D.S.C.). The district court granted summary judgment in favor of Padilla, and the government has sought a stay of the ruling pending an appeal to the Fourth Circuit. In the meantime, the United States is fully complying with the law, including as set out by the Supreme Court in *Padilla* and other decisions. Given this continued litigation, we are unable to comment further on this matter.

16. You reportedly concluded the June 1 press conference with the comment, "We could care less about a criminal case when right before us is the need to protect American citizens and to save lives." That strikes me as a little dramatic coming from a top official in the Justice Department. What is so wrong with our criminal justice system that we cannot we ensure the viability of a criminal terrorism case <u>and</u> protect American citizens?

ANSWER: As we explained in our previous correspondence, dated February 3, 2005, which contained responses to questions posed to the Attorney General following his hearing before the committee on June 8, 2004, when the choice is between prosecution and saving lives at risk from terrorist attacks, it is more important to protect the United States and its citizens than it is to prosecute anyone criminally.

The statement to which you refer, which was in response to and made in the context of a reporter's question, was meant to accentuate the unique circumstances in this case. Most importantly, the response was meant to assure the American people that their protection is paramount to prosecutorial strategy. The statement by no means was intended to cast a negative image of our criminal justice system, nor to impugn its effectiveness. Indeed, every day the Department avails itself of the criminal justice system to prevent terrorism and protect American citizens. The Department does not believe that these two objectives are necessarily, or even normally, incompatible.

Attorney Brandon Mayfield was exonerated earlier this summer after federal agents wrongfully detained him for two weeks as a material witness in the Madrid bombing case. I have asked for the Inspector General to look at the errors that led up to this mess and sent a letter – which remains unanswered – to the Attorney General seeking an explanation of what happened. So, imagine my surprise yesterday when the New York Times reported that a federal judge unsealed a document on the motion of the government. Prosecutors argued that this document supported the government's decision to hold Mr. Mayfield detained for two weeks.

17. The grand jury secrecy rules are designed to protect innocent suspects. The Justice Department has relied on these rules repeatedly to withhold information about its use of the material witness statute. What could possibly justify unsealing the Mayfield affidavit at this time, except to try to justify the Department's actions at the expense of further harm to Mr. Mayfield's reputation?

ANSWER: The affidavit in support of the Government's request that Mr. Mayfield be arrested as a material witness in an ongoing criminal investigation was filed by the Government under seal. On May 24, 2004, after Mr. Mayfield had been released and the Government had moved to dismiss the material witness proceedings, the United States District Court in Portland, Oregon unsealed the affidavit sua sponte (that is, on the Court's own initiative). The Government did not ask that the affidavit be unsealed and, in fact, had previously argued that it should remain under seal. On or about September 20, 2004, the date mentioned in your question, the Court unsealed a second document that the Government had similarly filed under seal accompanied by a formal motion that it remain under seal. After that document was filed, Mr. Mayfield's attorneys opposed the Government's request that the document be sealed and asked that portions of it be unsealed. The Government reiterated its position that the document should be sealed and opposed the unsealing proposed by Mr. Mayfield's attorneys. The Government further stated that if the Court disagreed with its position, the entire document -- and not solely the portions selected by Mr. Mayfield's attorneys -- should be unsealed. The Court chose the latter approach and the entire document was unsealed.

One of the 9-11 Commission's key recommendations was the creation of a civil liberties board to oversee the "enormous authority" granted to the government to combat terrorism. On August 27, 2004, President Bush issued an executive order to create a civil liberties board. But the board established by the order had no investigative powers and no accountability to Congress. Moreover, it is comprised solely of Administration officials from the law enforcement, intelligence and homeland security communities; it is the proverbial fox guarding the hen house.

18. Congress is currently considering several proposals to create a civil liberties board that is independent, accountable and has investigatory powers. Will you cooperate with and support a civil liberties board created by Congress?

ANSWER: Yes. As President Bush made clear in Executive Order 13353 (Aug. 27, 2004), "the United States Government has a solemn obligation . . . to protect the legal rights of all Americans, including freedoms, civil liberties, and information privacy guaranteed by Federal law, in the effective performance of national security and homeland security functions." Always mindful of that obligation, the Department supports and will cooperate with the civil liberties board created by the National Intelligence Reform Act of 2004, which the President signed into law on December 17, 2004.

19. We were informed last week by a press release that the President's civil liberties board held its first meeting on September 13. Given that secrecy and lack of opportunity for public discourse have been major factors in the civil liberty concerns raised by post-9-11 homeland security efforts, do you believe that convening this meeting without much public notice and discourse was consistent with the level of openness and transparency necessary for a board charged with protecting civil liberties?

ANSWER: The President's Board on Safeguarding Americans' Civil Liberties is committed to openness and transparency and is considering options for holding public meetings and hearings.

20. What was the agenda at the September 13 meeting, what issues were discussed, were any conclusions reached, and when does the board plan to meet next?

ANSWER: The President's Board on Safeguarding Americans' Civil Liberties met for the first time on September 13, 2004, for the purpose of organizing itself. Thereafter, the Board met on October 19, 2004, November 18, 2004, December 16, 2004, and February 15, 2005, and most recently on March 30, 2005.

S.1709, the SAFE Act, in part, directly targets the broad definition of "electronic communication service" provider. This is the authority that gives the FBI power to issue national security letters to libraries. There is no definition of a "service" provider that I could find in Title 18 of the United States Code. There is, however, a definition of "service provider" in the Digital Millennium Copyright Act. See 17 USC 512. This definition is quite broad; it incorporates any provider of network access, as well as any entity providing "access for digital online communications." Under such a broad definition, it could be argued that any employer that provides a way for users to get online access -- as for example the United States Senate -- is an "electronic communication service" provider.

21. What is the definition of a provider of "electronic communication services" currently used by the Department?

ANSWER: Pursuant to 18 U.S.C. 2709, the FBI can serve a national security letter for certain records that are held by an "electronic communications service." That term is not defined within that chapter, but 18 U.S.C. 2711(1) provides that "the terms defined in section 2510 of this title have, respectively, the definitions given such terms in that section." 18 U.S.C. 2510(15) defines "electronic communications service" as "any service which provides to users thereof the ability to send or receive wire or electronic communications." The Department uses that definition when determining whether a particular provider is an "electronic communications service."

22. Should the definition be clarified to ensure that it applies only to those entities which are truly "service providers" rather than simply entities that house computers for use by third parties? If not, why not?

ANSWER: The Department believes that the definition at 18 U.S.C. 2510(15) is sufficiently narrow in its present form. In many instances, "hous[ing] computers for use by third parties" is the essential function of a communications service provider.

There was an interesting article published by a law librarian in the Law Library Journal this summer entitled "Post-USA Patriot Act Electronic Surveillance at the Library." The author explains how law enforcement can now watch what library patrons are reading online, while they are reading it, with a simple pen register order obtained under Section 216 of the PATRIOT Act. This is because, and I'm quoting from the author here, "by simply conflating email headers and web site addresses with telephone numbers, and conflating a particular technology for telephones with the full range of computer interception devices (including the FBI's Carnivore program), the potential range of information retrievable has been exponentially increased."

23. Is it true that post-PATRIOT Act, a pen register attached to a library computer can easily recover information such as web sites visited, pages downloaded, online order forms accessed, and pictures viewed, rather than just simple numbers "called" by the computer? If so, would you agree that it raises heightened Fourth Amendment concerns and the need to treat this information differently?

ANSWER: On May 24, 2002, the Deputy Attorney General issued a memorandum that addressed the collection of information concerning Internet communications through pen registers and trap-and-trace devices and the use of any such collected information. As set forth in the PATRIOT ACT, information collected through the use of a pen register or trap-and-trace device "shall not include the contents of any communication." 18 U.S.C. § 3127(3), as amended by Pub. L. No. 107-56, § 216(c)(2), 115 Stat. at 290; 18 U.S.C. § 3127(4), as amended by Pub. L. No. 107-56, § 216(c)(3), 115 Stat. at 290. The memorandum and related section of the U.S. Attorney's Manual reflect the PATRIOT ACT's limitation on the collection of content and recognize that collection of content through the use of these devices implicates the Fourth Amendment, although, as the Supreme Court has held, information concerning the source and destination of a communication is not protected under the Fourth Amendment. First, the memorandum requires the use of reasonably available technology to avoid collection of any content. Second, in the event that despite the use of reasonably available technology, some collection of a portion of content occurs, no affirmative investigative use may be used of that content, except in a rare case in order to prevent an immediate danger of death, serious physical injury, or harm to the national security. Third, recognizing that the line between information concerning the source and destination of a communication and "content" has been the subject of debate, any questions about what constitutes "content" must be coordinated with Main Justice. Section 9-7.500 of the U.S. Attorney's Manual confirms the Department's commitment to the legitimate privacy interests of Internet users, providing that the use of a pen register to collect all or part of a URL is prohibited without prior consultation with the Computer Crime and Intellectual Property Section of the Criminal Division.

24. On May 24, 2002, your predecessor issued a memorandum to field offices instructing them on how to prevent "overcollection" -- i.e., the inadvertent gathering of communication content -- when using pen/trap devices. How has your office exercised oversight on this directive? Have there been overcollections of content and were they ever used in cases or investigations?

ANSWER: The memorandum referenced above was addressed to the Assistant Attorneys General for the Criminal, Antitrust and Tax Divisions, all United States Attorneys, the Director of the FBI, Commissioner of the INS and the Director of the Marshals Service. Former Deputy Attorney General Thompson's memorandum served as an important reminder of the Department's policy regarding avoidance of "overcollection" in the use of pen registers and trap and trace devices and incorporated recent amendments made by the USA PATRIOT Act.

The FBI issued detailed guidance to all field offices in response to the DAG's 5/24/02 memo on pen registers in November 2002. This guidance requires (1) the use of reasonably available technology to avoid overcollection; (2) that there be no affirmative use of incidentally collected content; and (3) that questions concerning "content" be coordinated with the Department. FBI division counsel in the field have been given training on these issues as well.

Finally, existing mechanisms within the Department of Justice and FBI guide the collection of information under authority of chapter 206 of Title 18, United States code, 18 U.S.C. § 3121, et seq. Such mechanisms also guide what steps are to be taken if "overcollection" occurs.

25. The U.S. Attorney's Manual addresses the May 24 memo. One issue that has been raised in this regard is whether a pen register order may be used to collect the URLs (the address of a page on the World Wide Web). Because of privacy and other concerns relating to the use of pen register orders in this fashion, prosecutors are required to have prior consultation with the Department in order to collect all or part of a URL with a pen register order. Can you bring me up to date on this issue -- have there been consultations and subsequent approvals and on what basis and in what circumstances?

ANSWER: There have been consultations with prosecutors in the field concerning section 9-7.500 of the U.S. Attorneys' Manual. We are not aware of any instances in which authorization was granted.

26. The U.S. Attorney's Manual states that this policy does not apply to applications for pen register orders that would authorize collection of Internet Protocol (IP) addresses, even if such IP addresses can be readily translated into URLs or portions of URLs. Similarly, this policy does not apply to the collection, at a web server, of tracing information indicating the source of requests to view a particular URL using a trap and trace order. Why the difference in policies?

ANSWER: An Internet Protocol (IP) address, like the number of a telephone, merely identifies a particular device on a network. Collection of IP addresses accessed by a specific target of investigation is an essential preliminary step in a wide variety of online cases, and does not implicate the Fourth Amendment. *Cf. Smith v. Maryland*, 442 U.S. 735 (1979) (source and destination addressing information for telephone calls not subject to Fourth Amendment).

In your testimony, you discussed Section 215 of the PATRIOT Act, which allows the FISA Court to order the production of business records and other documents. On September 17, 2003, the Attorney General attempted to allay concerns about the broad scope of Section 215 by announcing that the Department had never once used this tool.

27. Critics of Section 215 have speculated that it could be used to investigate library users' reading habits. Is this true?

ANSWER: Section 215 of the PATRIOT Act assists authorities in catching terrorists and spies by specifically authorizing the Foreign Intelligence Surveillance Court ("FISA court") to require a person or organization to produce "any tangible things" to investigators in international terrorism and espionage cases. These are the same types of materials that prosecutors have long been able to obtain with grand jury subpoenas in criminal investigations, although section 215 applies in a much narrower set of circumstances than do grand jury subpoenas.

Section 215 has been attacked for its potential application to libraries, with some critics suggesting that libraries should be exempted from it or that the provision should be repealed altogether. These critics ignore both the law and the facts. First, although a section 215 order could be issued to a bookstore or library if it possessed records relevant to an espionage or international terrorism investigation, the provision does not single them out or even mention them. And such an order would require court approval in any event, ensuring an independent check on the Executive branch.

Furthermore, libraries and bookstores have never been exempt from similar investigative authorities. Prosecutors have always been able to obtain records for criminal investigations from bookstores and libraries through grand jury subpoenas. In cases as varied as the 1997 Gianni Versace murder case and the 1990 Zodiac gunman case, grand juries have subpoenaed library records in order to advance a criminal investigation. Carving out bookstores and libraries from section 215, then, would simply make them safe havens for terrorists and spies who have, in fact, used public library computers to do research and communicate with their co-conspirators. (Notably, moreover, section 215 can be used to obtain documents only if the FISA court so permits; section 215 orders thus require more scrutiny than grand jury subpoenas, which do not need to be approved in advance by a judge.)

In addition to the requirement of court approval, section 215 establishes other important safeguards. For instance, it preserves First Amendment rights by prohibiting the FBI from obtaining records in an investigation "of a United States person solely on the basis of activities protected by the first amendment to the Constitution of the United States." 50 U.S.C. § 1861(a)(2). Section 215 also provides for thorough congressional oversight. On a semi-annual basis, the Attorney General is required to "fully inform" Congress of all requests for the production of tangible things under section 215. *See* 50 U.S.C. § 1862.

Simply put, section 215 of the PATRIOT Act provides the government with an important tool for investigating and intercepting terrorism, and at the same time establishes robust safeguards to protect law-abiding Americans.

28. The Justice Department has said that another PATRIOT Act tool – the enhanced National Security Letter (NSL) authority provided by Section 505 – can be used to obtain certain library records. As Congress revisits the PATRIOT Act over the next several months, will the Department consider declassifying information on this issue, specifically, whether NSLs have been served on libraries, how often, and under what circumstances?

ANSWER: Information regarding the use of NSLs remains classified. At this time, there are no plans to declassify the information requested on this issue. However, the Department has and will continue to provide the Congress with information on the use of NSLs in a classified format.

29. Earlier this year, the 1st Circuit Court of Appeals issued a decision in *United States v. Councilman* dismissing the Department's indictment of an ISP under the wiretap laws for systematically intercepting, copying and reading its customers' incoming e-mails for corporate gain. Specifically, the majority rejected the argument that an intercept occurs – and the Wiretap Act applies – when an e-mail is acquired contemporaneously with its transmission, regardless of whether the e-mail may be in momentary electronic storage at the time of acquisition. This decision appears to be inconsistent with the nature of electronic communications systems and the commonly-held understandings of the protections afforded by the Electronic Communications Privacy Act (ECPA). Notwithstanding that the Department has filed for an *en banc* rehearing of this decision, would you support an amendment to ECPA clarifying that its wiretap provisions apply to searches contemporaneous with transmission, regardless of whether those searches occur while the communication resides in storage incidental to the transmission process?

ANSWER: On October 5, 2004, the First Circuit granted the Department's motion for rehearing en banc and vacated the original panel's opinion in United States v. Councilman; on December 8, 2004, the en banc court heard oral argument in the case. The Department does not support a legislative fix during the pendency of the First Circuit's deliberations.

Updating Questions on PATRIOT Act - Since the enactment of the PATRIOT Act, the Department of Justice has been faced with significant new challenges to which it has responded using existing authorities as well as those contained in the Act. The following questions seek updated information regarding the use of both preexisting authorities and the authorities conferred by the Act based on

the questions asked in a letter dated April 1, 2003, to Attorney General Ashcroft from the Chairman and Ranking Member of the House Committee, and the response dated May 13, 2003, from the Department. *These follow-up questions match the numbered questions from the April 1, 2003 letter.* Unless otherwise indicated, please provide your responses to the following questions current through September 1, 2004 to both the House and Senate Judiciary Committees. Should any answer require the disclosure of classified material, please provide those answers under separate cover to the Committees in accordance with appropriate security procedures.

30. The Department of Justice (DOJ) has increased the use of National Security Letters (NSLs) that require businesses to turn over electronic records about finances, telephone calls, e-mail and other personal information. On May 13, 2003, DOJ responded that there had been no challenge to the propriety or legality of NSLs. Is that still correct? Has any litigation resulted from the issuance of NSLs (*i.e.* challenging the propriety or legality of their use)? If so, please describe.

ANSWER: National Security Letters (NSLs) can be used to seek information from: 1) wire and electronic communications providers (telephone companies and Internet Service Providers); 2) financial institutions; and 3) credit reporting companies. The information provided in response to an NSL concerns, respectively: 1) telephone and email accounts; 2) financial records; and 3) full credit reports in terrorism cases and limited, redacted credit information in counter intelligence cases. The information provided in response to an NSL is not limited to "electronic" records, although generally responsive records are provided in electronic form.

On September 29, 2004, United States District Judge Victor Marrero issued a decision striking down one of the National Security Letter ("NSL") statutes, 18 U.S.C. § 2709, as unconstitutional. The statute at issue, originally enacted in 1986, provides that a wire or electronic communications service provider shall comply with a request from the FBI for certain subscriber information, toll billing records, and electronic communication transaction records, upon certification that the records sought are relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities. The statute also prohibits a service provider (or its employees, officers, and agents) from disclosing to any person that the FBI has sought or obtained access to information under the section. (In 2001, the USA Patriot Act removed the previous requirement that NSLs have a nexus to a "foreign power" or an "agent of a foreign power," and instead permits NSLs to be issued where the information sought is relevant to an investigation of terrorism or clandestine intelligence activities.)

The ACLU brought this suit under seal on behalf of itself and a service provider that received an NSL challenging the constitutionality of section 2709 on its face and as applied. Specifically, plaintiffs assert that (a) section 2709 violates the First, Fourth, and Fifth Amendments because it does not provide for judicial review of the FBI's authority to seek disclosure of purportedly constitutionally

protected information, and (b) the non-disclosure provision, 18 U.S.C. § 2709(c), burdens speech categorically and permanently without any judicial review in violation of the First Amendment. A redacted version of the ACLU's suit was unsealed and the parties cross-moved for summary judgment.

In his decision, Judge Marrero held that section 2709, as applied, violates the Fourth Amendment "because it effectively bars or substantially deters any judicial challenge to the propriety of an NSL request." Judge Marrero reasoned that given the "imposing language" of an NSL, the manner in which it is served, and the non-disclosure requirement, the recipient of an NSL would not believe that he/she could contest its validity and therefore would be coerced into immediate compliance. In support of that conclusion, Judge Marrero inferred that hundreds of NSLs had been issued and that this is the only legal challenge that has been brought.

Judge Marrero further opined that the lack of a judicial forum for service providers to contest the validity of an NSL also "may, in a given case, violate a subscriber's First Amendment rights." In that regard, Judge Marrero asserted that individual internet subscribers have a right to engage in anonymous internet speech, and that the NSL authority – absent a provision for judicial review – may violate that right.

Finally, Judge Marrero held that the non-disclosure provision "operates as an unconstitutional prior restraint on speech in violation of the First Amendment." Judge Marrero emphasized that the ban on disclosure is without exception and for all time, and that the statute provides no avenue for judicial review of the need for secrecy.

In conjunction with his decision, Judge Marrero stayed enforcement of the judgment pending any appeal or, if no appeal is filed, for 90 days from the date of the Order. The Government has filed a notice of appeal of the district court's September 28, 2004, decision, which held that certain procedural aspects of section 2709 of the Electronic Communications Privacy Act that predate the USA PATRIOT Act are unconstitutional. In addition, the District Court has authorized the disclosure of limited portions of the record that do not reveal the nature of the NSL or the entity upon which it was served.

31. On May 13, 2003, DOJ responded that no administrative disciplinary proceedings or civil actions had been initiated under Section 223 of the PATRIOT Act for any unauthorized disclosure of certain intercepts. Have there been any since that date? If so, please describe each case, the nature of the allegations, and the current status of each case.

ANSWER: An informal survey of Department of Justice components indicated that no administrative disciplinary proceedings or civil actions have been initiated under Section 223 of the USA PATRIOT Act.

32. Have the information-sharing provisions of the PATRIOT Act, including Sections 203 and 218, produced concrete results in the war on terrorism since their enactment? Can you provide specific examples of cases in which these new information-sharing authorities have been used?

ANSWER: As described in the document "Report from the Field: The USA PATRIOT Act at Work," available on www.lifeandliberty.gov, Sections 203 and 218 have been used extensively to produce positive results in the war on terror. Under Section 203, the Department has made disclosures of vital information to the intelligence community and other federal officials that have been used to support the revocation of visas of suspected terrorists, to prevent their reentry into the United States, to track terrorists' funding sources, and to identify terrorist operatives overseas. With regard to the use of Section 218, that section has:

- Helped authorities in investigating and dismantling the "Portland Seven" cell, by allowing authorities to monitor activities related to a possible domestic terrorist attack while continuing to compile sufficient evidence to take down all members of the cell.

- Aided authorities investigating the "Virginia Jihad" case, which involved members of a Northern Virginia mosque who trained for jihad by participating in paintball and paramilitary training, including eight individuals who traveled to terrorist training camps run by the violent Islamic extremist group Lashkar-e-Taiba (LET). As the result of an investigation, which included the use of information obtained through FISA, prosecutors were able to bring charges against these individuals. Six of the defendants in that case have pleaded guilty, and three were convicted at trial in March 2004.

- Helped secure an indictment against Sami Al-Arian and several co-conspirators on charges related to their involvement with the Palestinian Islamic Jihad (PIJ).

- Assisted in the investigation of Yemeni citizens Mohammed Ali Hasan Al-Moayad and Mohshen Yahya Zayed, who have been charged with conspiring to provide material support to al Qaeda and HAMAS.

- Facilitated the indictment of Enaam Arnaout, the Executive Director of the Illinois-based Benevolence International Foundation (BIF) for conspiring to obtain charitable donations fraudulently in order to provide financial assistance to Chechen rebels and organizations engaged in violence and terrorism. He was sentenced to over 11 years in prison.

- Assisted the prosecution in San Diego of several persons involved in an al Qaeda drugs-for-weapons plot, in which the defendants conspired to distribute approximately five metric tons of hashish and 600 kilograms of heroin to undercover United States law enforcement officers, partially in exchange for four "Stinger" anti-aircraft missiles that they then intended to sell to the Taliban.

- Supported the successful prosecution of Khaled Abdel Latif Dumeisi, who was convicted by a jury in January 2004 of illegally acting as an agent of the former government of Iraq, and two counts of perjury. Before the Gulf War, Dumeisi passed information on Iraqi opposition members located in the United States. During this investigation, intelligence officers conducting FISA surveillance of Dumeisi coordinated and shared information with law enforcement agents and prosecutors investigating Dumeisi for possible violations of criminal law. Because of this coordination, law enforcement agents and prosecutors learned of an incriminating telephone conversation which corroborated other evidence that Dumeisi was acting as an agent of the Iraqi government and provided a compelling piece of evidence at Dumeisi's trial.

33. Have any terrorism related awards been paid since April 30, 2003, under the reward authorities provided in Section 501 of the Act or under the newly enacted 28 U.S.C. §530(C)(b)(1)(J) from 2002 to the present? If so, what were the dollar amounts and were any of these paid to non-U.S. citizens?

ANSWER: The Attorney General has not exercised the authority to pay rewards under Section 501 of the USA PATRIOT Act or 28 U.S.C. section 530c from 2002 to the present.

34. How many times since April 1, 2003, has DOJ sought an order delaying notice of the execution of a warrant under Section 213 of the PATRIOT Act, allowing a court to order delayed notice of the execution of a search warrant if "the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result"; how many times have such orders been approved by the court, and what is the total to date?

ANSWER: The Department will forward this information under separate cover as soon as it is compiled.

Section 213 also allows the notice of the execution of a warrant to be delayed when the warrant prohibits the seizure of, among other things, any tangible property, unless "the court finds reasonable necessity for the seizure." 18 U.S.C. §3103a (b)(2).

35. In the May 13, 2003 letter, DOJ stated that the government asked a court to find reasonable necessity for a seizure in connection with delayed notice 15 times; 14 of which were granted. How many times since that report has the government asked a court to find reasonable necessity for a seizure in connection with delayed notification? And what is the total to date?

ANSWER: The Department will forward this information under separate cover as soon as it is compiled.

36. Since DOJ's May 13, 2003 letter, have there been any additional grounds the government has used to argue that seizure was reasonably necessary under a warrant for which the government also asked for delayed notification?

ANSWER: The Department will forward this information under separate cover as soon as it is compiled.

37. How often since April 1, 2003, has a court found "reasonable necessity for the seizure" in connection with a warrant for which it also permitted delayed notification? And what is the total to date?

ANSWER: The Department will forward this information under separate cover as soon as it is compiled.

38. How often since April 1, 2003, has a court rejected the government's argument that a seizure was reasonably necessary in connection with a warrant for which the government sought delayed notification? What is the total to date? And what were the grounds for these rejections?

ANSWER: The Department will forward this information under separate cover as soon as it is compiled.

39. Beyond those listed by DOJ on May 13, 2003, have there been additional grounds on which the courts found that the seizures were reasonably necessary in connection with warrants for which delays in notification were granted?

ANSWER: The Department will forward this information under separate cover as soon as it is compiled.

40. What grounds in addition to those already disclosed have the courts rejected as establishing reasonable necessity for a seizure in connection with a warrant for which the government sought delayed notification?

ANSWER: The Department will forward this information under separate cover as soon as it is compiled.

Section 213 also allows a court to order delayed notice when "the warrant provides for the giving of such notice within a reasonable period of its execution, which may be extended for by the court for good cause show." 18 U.S.C. §3103a(b)(3).

41. Please provide updated information on the shortest and longest periods of time for which the government has requested initial delayed notice, including during the time since April 1, 2003.

ANSWER: The Department will forward this information under separate cover as soon as it is compiled.

42. On May 13, 2003, DOJ stated that the government has argued that the delay period was reasonable in light of the need: (1) to protect the physical safety of cooperators, confidential sources, and informants; (2) to prevent the harassment or intimidation of witnesses; (3) to prevent compromising an investigation, which may cause the subject to flee; and/or (4) to prevent the removal or destruction of evidence by avoiding disclosure of the scope and nature of the investigation. Please provide any additional information on the grounds the government has used to argue that the period of delayed notification was reasonable.

ANSWER: The Department will forward this information under separate cover as soon as it is compiled.

43. How often has the government sought an extension of the period of delayed notice since April 1, 2003? What is the total to date?

ANSWER: The Department will forward this information under separate cover as soon as it is compiled.

44. On May 13, 2003, DOJ stated a court has never rejected the government's request for delayed notification on the ground that the period for giving delayed notice was unreasonable. Has a court, since April 1, 2003, issued such a rejection and on what grounds?

ANSWER: The Department will forward this information under separate cover as soon as it is compiled.

45. Has a court since April 1, 2003 rejected the government's request for an extension of the period of delayed notification and, if so, on what grounds?

ANSWER: The Department will forward this information under separate cover as soon as it is compiled.

46. Please identify all cases brought since the FISA Review Court's decision that use information that was previously unavailable under FISA procedures. Of the 4,500 intelligence files that were reviewed, please detail the criminal cases that were generated as a result.

ANSWER: After passage of the USA Patriot Act (specifically sections 218 and 504), but before the FISA Review Court's decision referred to in your question, the Attorney General instructed Department attorneys to review FBI counterterrorism intelligence files for the purpose of identifying any such files that deserved more thorough evaluation for potential criminal investigation. The now complete project involved more than 5000 intelligence files. This was only possible after "the Wall" was lowered, enabling significant cooperation and information sharing between criminal and intelligence investigators and prosecutors. While it is not possible to detail each case, more than 500 criminal investigations were initiated as a result of the review ordered by the Attorney General. Some of these separate intelligence investigations were subsequently consolidated and pursued in multi-district criminal investigations. Of course, not all of the files so identified led to criminal cases, and, of those that did, a number are still on-going investigations which we are not able to discuss at this time. However, the July 2004, Department of Justice publication entitled, "Report from the Field: The USA PATRIOT Act at Work," identified several cases which did benefit from the review of FBI counterterrorism intelligence files including: the Al-Arian case, the "Virginia Jihad" case, and the Arnaout case. In addition, the Infocom, Holy Land Foundation, and Hassoun cases are illustrative of criminal investigations that were assisted by the investigative file review.

The Al-Arian case involves a February 19, 2003, 50-count indictment charging the defendants with using facilities in the United States, including the University of South Florida, to serve as the North American base for Palestinian Islamic Jihad (PIJ), which was designated as a Foreign Terrorist Organization (FTO) in 1995, and providing material support to the PIJ and conspiring to murder abroad. On September 21, 2004, a 53-count superseding indictment was returned. Eight years of intercepted conversations and faxes obtained pursuant to orders issued by the Foreign Intelligence Surveillance Court demonstrate the defendants' active involvement in PIJ's worldwide operations. Sami Al-Arian, Bashir Nafi, Abd Awda, Mazen Al-Najjar and Ramadan Shallah were all on the Shura council of the PIJ. Shallah has been PIJ's acknowledged worldwide leader since November 1995.

The "Virginia Jihad" case involves members of the Dar al-Arqam Islamic Center in Falls Church, Virginia, who participated in paintball and paramilitary training with the encouragement of Dar al-Arqam's spiritual leader, Ali al-Timimi. The training took place from approximately Spring/Summer 2000 until late September 2001. The evidence in this case indicates that soon after the terrorist attacks of September 11, 2001, a meeting was held at the home of Yong Ki Kwon. During this meeting, Sheikh Ali Al-Timimi encouraged those in attendance to go to Pakistan to receive military training from Lashkar-e-Taiba in order to be able to go fight against American troops soon expected to arrive in Afghanistan. This

encouragement was significant enough that four of those who attended this meeting, Yong Ki Kwon, Khwaja Mahmood Hasan, Masoud Ahmad Khan and Mohammed Aatique, left the United States and traveled to a Lashkar-e-Taiba training camp less than a week after this meeting. They were assisted in their travels by Randall Todd Royer, who had been to the Lashkar-e-Taiba camp previously. None of the four traveled into Afghanistan after completing their training.

On June 25, 2003, eleven defendants were indicted in a 41 count indictment in connection with the "Virginia Jihad" case. Subsequently, four of these defendants, Yong Ki Kwon, Mohammed Aatique, Donald Thomas Surratt, and Khwaja Mahmood Hasan, pled guilty and agreed to cooperate. On September 25, 2003, a superseding indictment was filed charging the remaining seven defendants conspiracy to levy war against the United States, conspiracy to provide material support to al Qaeda, conspiracy to contribute services to the Taliban, conspiracy to contribute material support to Lashkar-e-Taiba, supplying services to the Taliban, commencing an expedition against a friendly nation, conspiracy to possess and use a firearm in connection with a crime of violence, receipt of firearm or ammunition with cause to believe a felony will be committed therewith, false official statements, and using a firearm in connection with a crime of violence. The first phase of the case has been completed with all of the defendants convicted. The prosecution of Ali Al-Timimi is the second phase of the case; trial is scheduled to begin on April 4, 2005.

Enaam Arnaout, Executive Director of Benevolence International Foundation (BIF) (purportedly a charity organization based in Chicago), has had a long-standing relationship with Usama Bin Laden and his associates. Arnaout used his organization to illicitly obtain funds from unsuspecting people for terrorist organizations and to serve as a channel for people to contribute money knowingly to such groups. The Syrian-born naturalized citizen has been in federal custody since he was arrested April 30, 2002, on earlier perjury charges. The indictment describes a multi-national criminal enterprise that for at least a decade used charitable contributions from innocent Americans--Muslim, non-Muslim and corporations alike--to covertly support al Qaeda, the Chechen mujahideen, and armed violence in Bosnia. The indictment alleges that BIF--which was not itself indicted but is subject to asset freezing and forfeiture--operated, with Arnaout, other individuals and entities, as a criminal enterprise that engaged in a pattern of racketeering activity. The objectives of the enterprise were to raise funds and provide other material support for the violent activities of mujahideen and terrorist organizations, including al Qaeda and Hezb e Islami, around the world. On February 10, 2003, Arnaout pleaded guilty to a racketeering conspiracy, admitting that donors of BIF were misled into believing that their donations would support peaceful causes when in fact funds were spent to support violence overseas. Arnaout also admitted to providing various items to support fighters in Chechnya and Bosnia-Herzegovina, including boots, tents, uniforms, and an ambulance.

The Infocom case focuses on Infocom, an Internet service provider believed to be a Hamas front organization that also exported computers and computer components to state sponsors of terrorism, Libya and Syria, in violation of the International Economic Emergency Powers Act (IEEPA). In addition, Mousa Abu Marzook, a leader of Hamas and a specially designated terrorist, had a financial arrangement with Infocom, whereby he invested $250,000 in Infocom several years ago, and Infocom was sending him regular payments as interest, also in violation of IEEPA. Infocom has several ties to the Holy Land Foundation for Relief & Development, including common officers and employees. The trial pertaining to the illegal shipment and false statement charges began on June 7, 2004, against the five defendants in the U.S. and the corporation. On July 7, 2004, the defendants were convicted of conspiring to export proscribed computer equipment to Libya and Syria, state sponsors of terrorism, conspiring to file false shipping export declarations, making illegal exports to Syria, and making false statements on export declarations. All defendants except one were also convicted of money laundering and all but one were also convicted of making illegal exports to Libya. Trial on the remaining counts of the indictment, which pertain to dealing in the property of Marzook, a designated terrorist (50 U.S.C. § 1701), began on March 28, 2005.

The Holy Land Foundation for Relief & Development (HLF) was the largest Muslim charity in the United States until it was declared a Specially Designated Terrorist Organization (SDT) on December 4, 2001, and shut down. HLF was a Hamas front organization that raised millions of dollars for Hamas over a 13 year period. HLF received start up assistance from Mousa Abu Marzook, a leader of Hamas and a specially designated terrorist. HLF has ties to Infocom, mentioned above. On July 27, 2004, seven defendants were indicted on 42 counts, including conspiracy and substantive counts of the following: IEEPA violations for dealing in the property of an SDT (Hamas), providing material support to a Foreign Terrorist Organization (Hamas), money laundering, and filing false tax returns.

Adham Hassoun and Mohamed Youssef have been indicted for providing material support to terrorism and other related charges in the Southern District of Florida. Approximately nine (9) years worth of FISA surveillance from different FBI field offices determined that defendants Hassoun, Youssef and other un-indicted co-conspirators were part of a fund raising and recruitment network for mujahideen fighting in jihad conflicts all over the world. This North American fund-raising and recruitment network operated, over the course of the electronic surveillance, primarily in Florida, San Diego, Los Angeles, Detroit and Canada, and had connections to known terrorists overseas and known OFAC specially designated charities such as GRF and Holyland Foundation. While the co-conspirators in this network funded violent jihad in multiple foreign destinations, their primary areas of concentration included Afghanistan, Bosnia, Chechnya and the Horn of Africa. The investigation has uncovered at least three specific recruits who traveled overseas and fought in violent jihad conflicts. One of these recruits filled out an application for a terrorist training camp that was recovered overseas after September 11, 2001.

The FISA Review Court's decision permits enhanced coordination between law enforcement and intelligence officials. On May 13, 2003, DOJ reported that its Office of Intelligence Policy and Review had planned eight training sessions between May and September 2003. Please provide a report or summary of these eight training sessions including:

47. What topics were addressed?

ANSWER: Please see combined answer to question 50, below.

48. Who actually gave the training?

ANSWER: Please see combined answer to question 50, below.

49. Who actually received the training?

ANSWER: Please see combined answer to question 50, below.

50. Was the training coordinated with the Intelligence Community in general and/or the Director of Central Intelligence?

ANSWER: The training was conducted at the National Advocacy Center (NAC) in Columbia, South Carolina, from May 2003 to July 2003. A separate conference was held May 20-23, 2003 in Washington, D.C. for Assistant United States Attorneys (AUSAs) and FBI field agents in the D.C. area. The training was developed by a National Security Training Working Group that was chaired by former Associate Deputy Attorney General David S. Kris. The Working Group included representatives from OIPR, FBI, the Counterterrorism Section (CTS) of the Criminal Division - Department of Justice (DOJ), Central Intelligence Agency (CIA), Security and Emergency Planning Staff of the Justice Management Division (JMD), and the Executive Office for United States Attorneys (EOUSA). The attendees for each National Security Conference consisted of district/regional teams with members from the United States Attorneys' Offices (USAOs) and the FBI. Team members from the USAO included the Anti-Terrorism Task Force (ATTF) Coordinator, International and National Security Coordinator, and other AUSAs who focus on counterterrorism issues. Team members from the FBI included Assistant Special Agents in Charge (ASACs), FBI counterterrorism (CT) and counterintelligence (CI) squad supervisors, Joint Terrorism Task Force (JTTF) supervisors, and Chief Division Counsel (CDC). Members of the district/regional USAO/FBI teams generally consisted of about 10-15 members per district, although additional members were included for larger districts.

Each National Security Conference consisted of three and half days of training. The first two days of each Conference consisted of a series of lectures and panels. Topics included: An Overview of the Intelligence Community; An Overview of the FISA Process; FI and FCI Investigations and Collection Tools; Law Enforcement Investigations and Collection Tools; Information and Coordination Between Intelligence and Law Enforcement; Information Sharing From Law Enforcement To Intelligence, and Other CIA and PATRIOT Act Issues; Classified Information and Procedures Act; Homeland Security and Immigration Issues; Use of FISA Information and FISA Suppression Litigation; and a Practical/Tactical Decision-Making Panel. The sessions were presented by faculty from OIPR, CTS-CRM, FBI, CIA, Office of Immigration Litigation (OIL), and Department of Homeland Security (DHS). On the third day of each Conference, the attendees were separated into three breakout groups and each group worked through a 12-segment hypothetical that was developed specifically for the Conferences by the National Security Training Working Group. Each breakout group was led by a group of facilitators representing OIPR, CTS-DOJ, FBI, CIA, OIL, and DHS and involved all participants in interactive discussion of the hypothetical. Each Friday session included a presentation on handling Classified Information by the Security and Emergency Planning Staff of JMD and a "Train-the-Trainer" session so that participants at the Conference could return to their districts and provide additional training to FBI SAs in the field offices. Most of the sessions at the Conferences were classified at the secret level.

Each National Security Conference participant received a 12-section binder of materials that was developed by the National Security Training Working Group. Each section of the binder contained relevant statutes, case law, Executive Orders, policy memoranda, and guidance corresponding to each topic on the agenda. Other materials distributed to attendees included publications from CIA and the Security and Emergency Planning Section.

Two additional National Security Conferences were held on September 8-9, 2003 and September 10-11, 2003, at Ft. Belvoir in Alexandria, Virginia. This training was held for all FBI Headquarters Supervisory Special Agents (SSAs) who work on CT or CI investigations, Intelligence Operations Specialists in CT and CI, FBI Attorneys from the National Security Law Branch (NSLB), DOJ Attorneys from the Counterespionage Section (CES) and all DOJ Headquarters Attorneys in CTS-DOJ and OIPR who did not attend the First Phase of training. The anticipated number of participants for these two Conferences combined was approximately 750 attendees. The training included presentations on Foreign Intelligence (FI) and Foreign Counterintelligence (FCI) Investigations; FISA; Law Enforcement and Criminal Tools; Information Sharing; FISA Litigation; CIPA, and a Practical/Tactical Decision-making panel. On the second day of each Conference, the CT agents and the CI agents broke out into separate groups and work through a hypothetical developed specifically for these two Conferences by representatives from FBI CT and CI Sections, CES, and the National Security Training Working Group. All sessions at these two Conferences were classified at the secret level. The written materials provided to students at the National Advocacy Center have been distributed to those attending the training at Ft. Belvoir.

51. How many emergency FISA surveillance orders has DOJ processed since April 1, 2003? What is the total number since September 11, 2001? How many emergency FISA surveillance orders requests have been denied?

ANSWER: The answer to this question is classified, and will be transmitted under separate cover.

52. On May 13, 2003, DOJ listed a number of steps that have been taken to improve the efficiency of processing FISA applications. Please detail if, in fact, those reforms did improve the efficiency of processing FISA applications. Provide a flow chart of the approval process for processing all FISA applications from the time of receipt through the conclusion of the surveillance. Have there been any further improvements to procedures that would increase the efficiency of processing FISA applications? What is the timeframe in which FISA applications must be submitted to the court after receipt of the request by law enforcement?

ANSWER: Under the FISA statute as enacted by Congress, each application for electronic surveillance and/or physical search requires (1) the personal approval of the Attorney General (or the Deputy or Acting Attorney General), (2) a certification by a high-ranking executive branch official who has national security responsibilities (such as the Director of the FBI), and (3) the approval of a federal judge. The Department and the requesting agencies have put in place procedures to carefully review all applications for FISA collection authority in order to ensure that such applications meet all of the criteria and requirements of the statute before they are submitted to these officials for their signatures. While we must comply with the law in all respects in submitting an application, and ensure that the facts set forth in those applications are accurate, we also continually make improvements to the FISA process to make it as efficient as possible under the circumstances.

In essence, the FBI FISA process involves the FBI submitting a request for FISA coverage to the Department through the Office of Intelligence Policy and Review (OIPR), which reviews the request and prepares a draft application that it sends to the FBI for review. The FBI transmits its comments on the draft to OIPR, which then incorporates the comments into a final draft that is returned to the FBI for the Director's signature. After that, the FBI sends the certified application to OIPR to obtain the signature of the Attorney General and file it with the FISA court for its consideration.

As the Committee notes in its question, the Department previously reported on certain changes to the FISA process that had been implemented by April 2002, as well as others implemented by January 2003. These changes have improved the efficiency of the FISA process by, for example, creating additional supervisory personnel within OIPR to review applications to ensure that all factual and legal

matters are addressed as quickly as possible, and by establishing a mechanism for OIPR and FBI officials to meet on a regular basis (which is now at least twice each week) to discuss cases and legal and procedural matters that arise.

OIPR and the Department continue to seek ways to improve further the FISA process. In particular, in an April 16, 2004 memorandum to the FBI and OIPR, the Attorney General directed certain changes in the Department's FISA procedures. The Attorney General directed that duplicative work on FISAs by attorneys in the National Security Law Branch (NSLB) of the FBI's Office of General Counsel be eliminated and that the FBI assign up to 15 NSLB attorneys to OIPR to work full-time under OIPR supervision for a one-year period. The Attorney General established a task force made up of attorneys from OIPR and NSLB to address and resolve pending requests on a group of terrorism cases. The directive also delegated authority to certain OIPR supervisors to approve FISA packages to be presented to the FBI Director, Attorney General, and Deputy Attorney General and created, on a detailee basis, additional supervisory position for an NSLB and a Criminal Division attorney within OIPR. OIPR has implemented, at the Attorney General's direction, an intensive training program for Assistant U.S. Attorneys from districts that generate high volumes of FISA requests. The Attorney General also instructed the Department's technical personnel to develop further technological interfaces and improvements to link OIPR's and FBI's information management systems. Finally, the Attorney General required the Deputy Attorney General, in consultation with OIPR and FBI's General Counsel, to review the implementation of these procedures within six months. This review found that, in general, substantial progress had been made in keeping with the requirements of the Attorney General's memorandum.

The Department will continue to evaluate the FISA process and make improvements to maximize the efficiency and effectiveness of its operations. A major improvement in the past year has been a substantial increase in the number of attorneys working in OIPR to process FISA requests. In the past year, several detailees from various components and U.S. Attorneys' Offices have worked or currently are working in OIPR processing FISA applications. OIPR also has been able to bring on board in recent months several attorneys who had been hired but who could not be brought in until the security clearance process was completed, a process that currently takes many months to complete. OIPR has been fortunate to have many highly skilled and talented individuals in its applicant pool and plans to continue to supplement its attorney work force in the coming year.

These questions pertain to Section 215 of the PATRIOT Act

53. Since August 1, 2003, how many times has the Department or one of its components invoked its authority under Section 215 of the Act to request certain records? For each request, what type of entity was contacted for the records (*i.e.*, library, bookstore, religious institution, car rental company, phone company)?

ANSWER: By letter of 12/23/04, the Department provided to the Committee the number of times, if any, authorities under section 1861 of the Foreign Intelligence Surveillance Act (FISA), as amended, had been approved by the Foreign Intelligence Surveillance Court. This classified semiannual report was submitted pursuant to section 1862(b) of the FISA, and covered the period 1/1/04 through 6/31/04.

The Department provides information pertaining to the operational use of authorities under section 1861 of the FISA to the Senate and House Intelligence Committees on a semiannual basis, pursuant to section 1862(a) of the FISA. The last semiannual report under this section was dated 12/23/04, and covered the period 1/1/04 through 6/31/04. It is our understanding that under applicable Senate Rules and procedures, all Senators are permitted to review this semiannual report upon request to the Senate Select Committee on Intelligence.

54. Can you compare and contrast the processes for obtaining a grand jury subpoena and a search warrant with the process for obtaining a court order under Section 215? In particular, do the three orders require the same standard of proof? Furthermore, for which of the three requests (Section 215, grand jury subpoena, or search warrant) could a library or bookstore that receives a request challenge that request in court?

ANSWER: Grand jury subpoenas do not require judicial approval, whereas search warrants and section 215 orders do. Additionally, grand jury subpoenas and section 215 orders are based on a relevance standard, whereas search warrants are governed by probable cause. Finally, section 215 orders and grand jury subpoenas may each be challenged in court, whereas a recipient cannot delay compliance with a search warrant by seeking judicial review.

55. Critics of Section 215 have speculated that it could be used to investigate library users' reading habits. Is this true and, if so, would the Department use Section 215 to obtain such information?

ANSWER: As noted above, information about the use of section 215 is classified, but the Department has provided such information to the House and Senate Intelligence and Judiciary Committees in accordance with statutory requirements. The Department stresses, moreover, that the federal government has no interest in the reading habits of law-abiding Americans, and would only use section 215 to obtain information that is relevant to a terrorism or espionage investigation.

The PATRIOT Act supplemented the government's authority to freeze and forfeit assets of suspected terrorists and terrorist organizations.

56. On May 13, 2003, DOJ stated that since September 11, 2001, the United States has frozen over 600 bank accounts and $124 million in assets around

the world. DOJ also stated that the Department has conducted 70 investigations into terrorist financing with 23 convictions or guilty pleas to date. Please update this information and provide details of the cases and whether, in fact, there have been forfeitures of any U.S. based terrorist assets. Under what authorities were these forfeitures made?

ANSWER: Since the May, 2003 report, the volume of terrorist financing criminal investigations has approximately doubled. As of this writing, DOJ has brought terrorist-support-type charges against 113 people in 25 judicial districts, of which 64 have been convicted so far. The Department's efforts have helped freeze more than $136 million in assets from more than 660 accounts around the word. Because Executive Order 13224 permits the Department of Treasury to freeze assets of persons and entities associated with terrorists under a standard that is far more expedient that for judicial forfeiture of assets, most identified terrorist assets in the United States have been frozen rather than forfeited. However, civil forfeiture actions have been filed in combination with criminal cases involving the Holy Land Foundation for Relief and Development (Dallas), Benevolence International Foundation (Chicago) and Help the Needy Enterprises (Syracuse). Of these, only the Holy Land Foundation forfeiture action involves the terrorism-based forfeiture authority of the USA PATRIOT Act. The other two cases involved forfeiture predicated on money laundering.

57. The Attorney General has said that DOJ's Civil Division has been involved in judicial challenges to the OFAC designation and freezing actions of terrorist-related entities that have a U.S. presence. These challenges involved two Illinois-based charities suspected of being associated with al Qaeda (Benevolence International Foundation and Global Relief Foundation), a Texas entity believed to be a Hamas front (Holy Land Foundation for Relief and Development) and two entities affiliated with an al Qaeda-connected Somalian financial network known as al-Barakaat (Global Service International, Inc. and Aaran Money Wire Service). Have any further seizures or forfeitures been challenged in court?

ANSWER: As of February 2005, one additional OFAC freezing action involving Islamic American Relief Agency has been challenged in court. Blocking action against another entity with a U.S. presence – Al Haramain Foundation – has not resulted in litigation.

58. Regarding the above-mentioned and possible further seizures or forfeitures that have been challenged in court, what have been the results of any such challenges? Have any decisions by lower courts been appealed? What were the results of such appeals?

ANSWER: The Civil Division has yet to suffer an adverse ruling in any of these challenges, all of which have reached the U.S. Court of Appeals.

59. Have any forfeiture cases been brought pursuant to 18 U.S.C. §981(a)(1)(G) since May 13, 2003, and, if so, has any court, pursuant to Section 316 of the PATRIOT Act (codified at 18 U.S.C. § 983 note), admitted evidence that would otherwise be inadmissible in a forfeiture proceeding? If so, what circumstances justified admitting such evidence in such cases?

ANSWER: The only forfeiture action initiated so far under 18 U.S.C. § 981(a)(1)(G) is part of the Holy Land Foundation indictment, which was returned by a Dallas grand jury on July 27, 2004. Trial will not occur until early 2006.

60. In reference to the May 14, 2002, revisions to the investigative guidelines that clarified investigative procedures relating to religious sites, DOJ stated in the May 13, 2003 letter that the Bureau had carried out an informal survey of 45 field offices to approximate the number of investigations that included visiting religious sites. The survey revealed that fewer than ten offices have conducted investigative activities at mosques since September 11, 2001. Since that report, have there been any additional investigations that have involved religious sites?

ANSWER: As indicated in our letter, dated May 13, 2003, officials in the FBI's Office of the General Counsel conducted an informal survey of the FBI's field offices in response to numerous requests. Since then, the FBI has not identified a need for additional surveys, and this information is not captured as a matter of course. Consequently, we are unable to determine whether any additional FBI investigations have involved religious sites.

61. On May 13, 2003, DOJ described the security measures the FBI and DOJ have taken to secure information obtained through data-mining and investigations. Have there been any breeches in this security system? If so, how did the FBI or DOJ respond and how was the system's vulnerability fixed?

ANSWER: An initial monitoring capability was deployed on the FBI's top secret/sensitive compartmented network in October 2003, and was expanded in August 2004 to include the sensitive but unclassified (SBU) network. Connectivity to and monitoring of FBI systems at the secret level is imminent. The monitoring conducted to date has led to the discovery of system vulnerabilities on the FBI SBU network, and remedial actions have been taken to correct deficiencies. The evaluation of similar vulnerabilities on the FBI's secret network has resulted in recommendations for remedial actions, including system patching.

The FBI has established the Enterprise Security Operations Center (ESOC) as its centralized incident coordination and reporting activity. Since ESOC began performing this role in September 2004, there have been no unauthorized access breeches, and only a single security breech has been reported. There was,

however, no information system vulnerability associated with the incident. An investigation by the Security Compliance Unit, in cooperation with ESOC, identified all the locations of the data spill, which occurred on the FBI's secret network. Clean up was accomplished by the FBI's Information Technology Operations Division, and monitored by ESOC.

62. In its May 13, 2003, response to the House Judiciary Committee, DOJ indicated the reason for not disclosing the number of material witnesses detained since September 11 as being "The fact that few have elected to do so suggests they wish their detention to remain non-public." DOJ also stated that Rule 6(e) of the Federal Rules of Criminal Procedure prohibits providing the number of said witnesses. Is there any case law for such a position? Also, please update the information provided on May 13, 2003, with respect to each such detainee since September 11, 2001: (1) the length of detention of each detainee; (2) the number of such detainees who either sought review of or filed an appeal from a detention order under 18 U.S.C. § 3145; and (3) the results of such review or appeal.

ANSWER: The Department has consistently taken the view that Federal Rule of Criminal Procedure 6(e) and court orders in individual cases prohibit the Department from revealing the number of material witnesses who have been detained pending testimony before a grand jury. The Department is not at liberty to reveal the details of individual cases, because doing so could reveal the direction and focus of secret grand jury investigations. Disclosing such information would impede the war on terror and hinder the Department's terrorism investigations of the September 11th attacks. As such, it continues to be our legal obligation to protect the specific number of material witnesses detained as part of the 9/11 investigation, the districts and investigations to which they relate, and the length of those witnesses' detention.

To our knowledge, no court has had the occasion to decide whether or not the number of material witnesses in an investigation is protected by Rule 6(e). However, the Department feels that this is the appropriate position given the purpose of Rule 6(e) and court cases discussing the grand jury secrecy requirement. We are aware that two district courts have held that the identities of grand jury material witnesses may be disclosed under certain circumstances. In the so-called "Portland 7" case, the court ordered that the name of a material witness be made public, even though the detention hearing was closed to protect grand jury secrecy. *See In re Grand Jury Material Witness Detention*, 271 F. Supp. 2d 1266, 1268 (D. Or. 2003). Similarly, a judge in the Southern District of New York held that a material witness warrant served for a grand jury witness was only secret to the extent necessary to protect the integrity of the grand jury process. *In re Application of the United States for a Material Witness Warrant*, 214 F. Supp. 2d 356, 363-64 (S.D.N.Y. 2002). Although the Department did not appeal either of these holdings (in both cases, the material witnesses were eventually charged criminally, rendering the material witness issues moot), it is the Department's position that these two holdings were incorrect. Releasing the

names of material witnesses may reveal the scope and direction of sensitive terrorism investigations, and would potentially interfere with the Department's law enforcement efforts. Thus it is the Department's view that grand jury secrecy rules still require protection of the information.

With regard to your request for an update of the number, length of detention and appeal status of persons who have been detained as material witnesses, the Department did not provide such information in our May 13, 2003 response to the House Judiciary Committee. As we stated in that letter, grand jury secrecy rules prevent the Department from providing the number of detainees who have appealed their detention orders, or the results of such appeals, except where they have already been made public by the courts. *See, e.g., United States v. Awadallah*, 349 F.3d 42 (2d Cir. 2003). We note again, however, that material witness warrants are rarely challenged on appeal because they are an appropriate law enforcement technique that has been authorized by Congress, used routinely by the Department in many types of cases, and repeatedly approved by federal courts throughout the country. *See, e.g., Bacon v. United States*, 449 F.2d 933 (9th Cir. 1971).

On October 31, 2001, the Department of Justice promulgated an interim rule, with provision for post promulgation public comment, that requires the director of the Bureau of Prisons to monitor or review the communications between certain inmates and their lawyers for the purpose of deterring future acts that could result in death or serious bodily injury to persons or substantial damage to property that would entail the risk of death or serious bodily injury to persons. 66 Fed. Reg. 55062, 55066 (2001).

63. Is the rule now final and have there been any internal policies or procedures enacted or drafted relating to the final rule? If so, please provide.

ANSWER: The interim rule that was published on October 31, 2001, at 66 Fed. Reg. 55062 and effective as of October 30, 2001, has not yet been finalized. It has, however, been legally operational since its effective date of October 30, 2001. No internal policies or procedures have been enacted or drafted with regard to this rule.

64. On May 13, 2003, DOJ stated that the only inmate that had been subject to the interim rule was Sheik Omar Ahmad Rahman. Have there been any other inmates subject to the interim rule since that time?

ANSWER: No, Omar Ahmad Rahman is still the only Federal inmate subject to the attorney-client monitoring provision of 28 C.F.R. § 501.3(d).

On May 13, 2003, DOJ stated that the Flying Squads had been formed in June 2002.

65. Have there been any changes to the program? Please describe.

ANSWER: The Fly Team has developed and implemented an Assessment and Selection Protocol for agents interested in being assigned to the Fly Team. This protocol includes a comprehensive psychological assessment battery, a week of practical scenarios evaluated by current team members, review of applicable field experience, and interview by senior FBI personnel. In order to validate the newly instituted selection process, the Fly Team sponsored an after-action conference with Department of Defense (DoD) Special Forces personnel involved in the selection and assessment of Special Forces operatives to compare best practices. The Fly Team has also requested that the FBI Administrative Services Division's Industrial/Organizational Psychologist conduct a job analysis of the Fly Team to identify the specific skill sets needed to function on the team. This will serve to further validate and refine the selection process, as well as to identify the training necessary to acquire these skill sets.

The Fly Team initiated a Psychological Assessment of current Fly Team members in order to:

- determine the traits, skills, knowledge, and abilities possessed by successful and resilient Fly Team members in order to develop criteria for the selection of new members, and

- establish a baseline psychological status of each Fly Team member as part of a comprehensive Risk Management Program.

- designed to protect the overall well-being of Fly Team agents in light of the unique stresses inherent in short-notice deployments to hostile environments, including combat zones, for extended and unknown durations.

The Risk Management Program is designed to protect the well-being of Fly Team agents in light of the unique stresses inherent in short-notice deployments to hostile environments (including combat zones) under threat of injury or death, prolonged absences from home for extended and unknown durations with limited communication capability, inadequate resources, isolation, and exposure to mass casualties. Because these factors can have a significant impact on the ability to function at peak levels while maintaining a balanced home life, the Fly Team is addressing this issue proactively, adding to the staff an SSA who has a Ph.D. in clinical psychology with a specialty in stress and trauma management. This should not only ensure consistently high quality duty performance under adverse circumstances, but should also assist in reducing the attrition rate of the highly trained and specialized Fly Team members.

In addition to the operational and administrative components, the Fly Team has included a training component in the organizational structure. This training component consists of a Supervisory Special Agent (SSA) and two Special Agents, who are tasked with developing the Fly Away Core Training (FACT) Program for new Fly Team recruits and with ensuring the continued training of current members.

66. Please update the number that have deployed into investigations since the May 13, 2003 response.

ANSWER: Since 5/13/2003, the Fly Team has deployed 42 times (37 international and 5 domestic deployments), as follows:

5/3/2003 - 5/2004	Iraq	Operation Iraqi Freedom	Entire Fly Team (60-90 day deployments)
5/13-30/2003	Saudi Arabia	Attacks on 3 residential compounds in Riyadh	5 Fly Team members
5/17-24/2003	Morocco	Foreign police cooperation in response to 3 simultaneous explosions in Casablanca, Morocco	1 Fly Team member
5/30-6/10/2003	Sierra Leone	Conflict Diamonds and Terrorism Financing	2 Fly Team members
6/07/2003	Afghanistan	Debrief captured subject from 1998 U.S. Embassy bombing in Nairobi	1 Fly Team member
6/29-7/13/2003	Nairobi, Kenya	Foreign police cooperation in response to Mombasa bombing; subject debriefings	1 Fly Team member
7/18-25/2003	Memphis/ Nashville RA	On-going IT investigations	3 Fly Team members
7/19/2003-9/07/2003	Sana'a, Yemen (Fusion Cell)	Support to ongoing USS Cole investigation	1 Fly Team member
8/06/2003-9/05/2003	Minneapolis	Multiple ongoing IT investigations	10 Fly Team members
8/8-17/2003	Jakarta, Indonesia	Foreign police cooperation in response to bombing of the J.W. Marriott Hotel	2 Fly Team members
8/16-28/2003	Milan, Italy	Debriefing in support of Operation Iraqi Freedom	1 Fly Team member

9/16/2003	Bangkok, Thailand and Honolulu, HI	DOD exercise	3 Fly Team members
10/10-12/13/2003	Jakarta, Indonesia	To serve as Acting Assistant Legal Attache	1 Fly Team member
10/14-28/2003	Minneapolis	Ongoing IT investigation	1 Fly Team member
10/15-24/2003	Gaza Strip; Tel Aviv, Israel	Murder of 3 US citizens & injury of 1 US citizen in IED attack	3 Fly Team members
11/21/2003 - 01/05/2004	Istanbul, Turkey	Foreign police cooperation in response to multiple Al-Qaeda bombings	3 Fly Team members
1/2004 - 7/2004	Iraq	Debriefing of High Value Detainee	3 Fly Team members
1/6-15/2004	Suriname/ Guyana	Terrorism assessment requested by Legal Attache, Caracas	2 Fly Team members
1/12-16/2004	Denver	IT investigations	5 Fly Team members
2/2-17/2004	Sierra Leone/ Liberia	Conflict diamonds and terrorism financing	2 Fly Team members
2/14-21/2004	Qatar	Foreign police cooperation in response to assassination of Chechnyan official	4 Fly Team members
3/2004 - 6/2004	GTMO	Detainee interviews	5 Fly Team members (45-day rotations)
3/15-5/21/2004	GTMO	Electronic surveillance enhancement	2 Fly Team members
4/15-19/2004	Nairobi, Kenya	Rewards for justice	1 Fly Team member
5/2004	Amman, Jordan	Foreign police cooperation in response to Jordanian disruption of Al-Qaeda multiple bomb threat	1 Fly Team member
5/5 - 8/15/2004	Afghanistan	Operation Enduring Freedom	3 Fly Team members
5/3-19/2004	Saudi Arabia	Attack on Yanbu petrochemical plant	4 Fly Team members
6/2004	Afghanistan	To serve as On-Scene Commander	1 Fly Team member

6/2004	Afghanistan	Afghanistan assessment	1 Fly Team member & other FBI counterterrorism personnel
6/1-8/2004	Saudi Arabia	Attack on Oasis Hotel and residential compound; Al-Khobar, Saudi Arabia	2 Fly Team members
6/4-17/2004	Sana'a, Yemen	Counterterrorism operational support	1 Fly Team member
6/14-30/2004	Istanbul, Turkey	2004 NATO Summit	3 Fly Team members
7/19-8/31/2004	Athens, Greece	2004 Summer Olympic Games	4 Fly Team members & other FBI Command Post Personnel
7/29/2004-8/27/2004	Mexico	2004 Fall Threats - interview "special interest" aliens	3 Fly Team members
8/22-9/2/2004	London, UK	Support of Al-Qaeda disruption	1 Fly Team member
8/28-9/02/2004	London, UK	Assistance provided in Dulfer report preparation	1 Fly Team member
9/2004	Afghanistan	Murder of 3 US citizens in attack on DynCorp compound; to serve as On-Scene Commander	1 Fly Team member
8/02-22/2004	Pakistan	Debrief of 1998 US Embassy (Tanzania) bombing fugitive	1 Fly Team member
9/27/2004 - 10/07/2004	Nassau, Bahamas and Barbados	Terrorism assessment	4 Fly Team members
10/9/2004 -	Nashville	Ongoing IT investigations	4 Fly Team members
11/2004 - 02/2005	Afghanistan	Operation Enduring Freedom	2 Fly Team members
12/09/2004 - 12/15/2004	Saudi Arabia	Attack on US Consulate, Jeddah	4 Fly Team members

67. Have there been any FBI sweeps other than those reported in DOJ's letter of May 13, 2003, and if, so, what were the outcomes? As before, you can provide this information in classified form, under separate cover.

ANSWER: The May 13, 2003, letter describes FBI activities to monitor, question, arrest, detain or deport immigrants in an attempt to gather intelligence in order to continue to analyze the current threat to the United States.

In proactively addressing threat information obtained prior to the fall Presidential election, the FBI formed the '04 Threat Task Force. A specific set of intelligence requirements was developed to assist FBI field offices in addressing current intelligence gaps related to these threats. The '04 Threat Task Force asked every field office to conduct targeted and intelligence-driven interviews of subjects of pending and recently closed counterterrorism investigations who had not been previously interviewed unless, in the judgment of the field office, such an interview would compromise ongoing or proposed intelligence collections.

In addition, the FBI has continued to meet with national and local leaders of Muslim, Sikh, and Arab-American organizations to address issues such as hate crimes and civil rights violations, and to enlist the assistance of these communities in the current challenges in the war on terror.

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 4, 2005

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

We have indicated in some of our responses to questions for the record, including those recently submitted on April 1, 2005, that we would supplement our responses to some questions. This letter is intended to supplement previous information we have provided regarding the usage of section 213 of the USA PATRIOT Act ("the Act"), relating to delayed-notice search warrants. We believe the information contained herein completely answers all the Committee's questions submitted to date regarding section 213 and we look forward to working with you on this and other issues related to the reauthorization of the USA PATRIOT Act.

As you know, the Department of Justice believes very strongly that section 213 is an invaluable tool in the war on terror and our efforts to combat serious criminal conduct. In passing the USA PATRIOT Act, Congress recognized that delayed-notice search warrants are a vital aspect of the Department's strategy of prevention: detecting and incapacitating terrorists, drug dealers and other criminals before they can harm our nation. Codified at 18 U.S.C. § 3103a, section 213 of the Act created an explicit statutory authority for investigators and prosecutors to ask a court for permission to delay temporarily notice that a search warrant was executed. While not scheduled to sunset on December 31, 2005, section 213 has been the subject of criticism and various legislative proposals. For the following reasons, the Department does not believe any modifications to section 213 are required.

To begin with, delayed-notice search warrants have been used by law enforcement officers for decades. Such warrants were not created by the USA PATRIOT Act. Rather, the Act simply codified a common-law practice recognized by courts across the country.[1] Section 213 simply created a uniform nationwide standard for the issuance of those warrants, thus ensuring that delayed-notice search warrants are evaluated under the same criteria across the nation. Like any other search warrant, a delayed-notice search warrant is issued by a federal judge only upon a showing that there is probable cause to believe that the property to be searched for or seized constitutes evidence of a criminal offense. A delayed-notice warrant differs from an ordinary search warrant only in that the judge specifically authorizes the law enforcement officers executing the warrant to wait for a limited period of time before notifying the subject of the search that a search was executed.

[1] *See infra* note 4.

In addition, investigators and prosecutors seeking a judge's approval to delay notification must show that, if notification were made contemporaneous to the search, there is reasonable cause to believe one of the following might occur:[2]

1. notification would endanger the life or physical safety of an individual;
2. notification would cause flight from prosecution;
3. notification would result in destruction of, or tampering with, evidence;
4. notification would result in intimidation of potential witnesses; or
5. notification would cause serious jeopardy to an investigation or unduly delay a trial.

To be clear, it is only in these five tailored circumstances that the Department may request judicial approval to delay notification, and a federal judge must agree with the Department's evaluation before approving any delay.

Delayed-notice search warrants provide a crucial option to law enforcement. If immediate notification were required regardless of the circumstances, law enforcement officials would be too often forced into making a "Hobson's choice": delaying the urgent need to conduct a search and/or seizure *or* conducting the search and prematurely notifying the target of the existence of law enforcement interest in his or her illegal conduct and undermine the equally pressing need to keep the ongoing investigation confidential.

A prime example in which a delayed-notice search warrant was executed is Operation Candy Box. This operation was a complex multi-year, multi-country, multi-agency investigative effort by the Organized Crime Drug Enforcement Task Force, involving the illegal trafficking and distribution of both MDMA (also known as Ecstasy) and BC bud (a potent and expensive strain of marijuana). The delayed-notice search warrant used in the investigation was obtained on the grounds that notice would cause serious jeopardy to the investigation (*see* 18 U.S.C. § 2705(a)(2)(E)).

In 2004, investigators learned that an automobile loaded with a large quantity of Ecstasy would be crossing the U.S.-Canadian border en route to Florida. On March 5, 2004, after the suspect vehicle crossed into the United States near Buffalo, Drug Enforcement Administration (DEA) Special Agents followed the vehicle until the driver stopped at a restaurant. One agent then used a duplicate key to enter the vehicle and drive away while other agents spread broken glass in the parking space to create the impression that the vehicle had been stolen. The ruse worked, and the drug traffickers were not tipped off that the DEA had seized their drugs. A subsequent search of the vehicle revealed a hidden compartment containing 30,000 MDMA tablets and ten pounds of BC bud. Operation Candy Box was able to continue because agents were able to delay notification of the search for more than three weeks.

On March 31, 2004, in a two-nation crackdown the Department notified the owner of the car of the seizure and likewise arrested more than 130 individuals. Ultimately, Operation Candy Box resulted in approximately 212 arrests and the seizure of $8,995,811 in U.S. currency, 1,546 pounds of MDMA powder, 409,300 MDMA tablets, 1,976 pounds of marijuana, 6.5 pounds of

[2] *See* 18 U.S.C. § 2705(a)(2).

methamphetamine, jewelry valued at $174,000, 38 vehicles, and 62 weapons. By any measure, Operation Candy Box seriously disrupted the Ecstasy market in the United States and made MDMA pills less potent, more expensive and harder to find. There has been a sustained nationwide eight percent per pill price increase since the culmination of Operation Candy Box; a permanent decrease of average purity per pill to the lowest levels since 1996; and currency seizures have denied traffickers access to critical resources - preventing the distribution of between 17 and 34 million additional Ecstasy pills to our nation's children.

Had Operation Candy Box agents, however, been required to provide immediate notification of the search of the car and seizure of the drugs, they would have prematurely revealed the existence of and thus seriously jeopardized the ultimate success of this massive long-term investigation. The dilemma faced by investigators in the absence of delayed notification is even more acute in terrorism investigations where the slightest indication of governmental interest can lead a loosely connected cell to dissolve. Fortunately though, because delayed-notice search warrants are available, investigators do not have to choose between pursuing terrorists or criminals and protecting the public – we can do both.

It is important to stress that in *all* circumstances the subject of a criminal search warrant is informed of the search. It is simply false to suggest, as some have, that delayed-notice search warrants allow the government to search an individual's "houses, papers, and effects" without notifying them of the search. In every case where the government executes a criminal search warrant, including those issued pursuant to section 213, the subject of the search is told of the search. With respect to delayed-notice search warrants, such notice is simply delayed for a reasonable period of time – a time period defined by a federal judge.

Delayed-notice search warrants are constitutional and do not violate the Fourth Amendment. The U.S. Supreme Court expressly held in *Dalia v. United States* that the Fourth Amendment does not require law enforcement to give immediate notice of the execution of a search warrant.[3] Since *Dalia*, three federal courts of appeals have considered the constitutionality of delayed-notice search warrants, and all three have upheld their constitutionality.[4] To our knowledge, no court has ever held otherwise. In short, long before the enactment of the USA PATRIOT Act, it was clear that delayed notification was appropriate in certain circumstances; that remains true today. The USA PATRIOT Act simply resolved the mix of inconsistent rules, practices and court decisions varying from circuit to circuit. Therefore, section 213 had the beneficial impact of mandating uniform and equitable application of the authority across the nation.

The Committee has requested detailed information regarding how often section 213 has been used. Let us assure you that the use of a delayed-notice search warrant is the exception, not the rule. Law enforcement agents and investigators provide immediate notice of a search warrant's execution in the vast majority of cases. According to Administrative Office of the U.S. Courts (AOUSC), during a 12-month period ending September 30, 2003, U.S. District Courts handled 32,539 search warrants. By contrast, in one 14-month period – between April 2003 and July 2004 –

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[3] *See Dalia v. United States*, 441 U.S. 238 (1979); *see also Katz v. United States*, 389 U.S. 347 (1967).

[4] *See United States v. Freitas*, 800 F.2d 1451 (9th Cir. 1986); *United States v. Villegas*, 899 F.2d 1324 (2d Cir. 1990); *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000).

the Department used the section 213 authority only 61 times according to a Department survey. Even when compared to the AOUSC data for a shorter period of time, the 61 uses of section 213 still only accounts for less than 0.2% of the total search warrants handled by the courts. Indeed, since the USA PATRIOT Act was enacted on October 26, 2001, through January 31, 2005 – a period of more than three years – the Department has utilized a delayed-notice search warrant only 155 times.[5]

We have been working with United States Attorneys across the country to refine our data and develop a more complete picture of the usage of the section 213 authority. We have manually surveyed each of the 94 United States Attorneys' Offices for this information which, we understand, is not in a database. We are pleased to report our additional findings below.

In September 2003, the Department made public the fact that we had exercised the authority contained in section 213 to delay notification 47 times between October 2001, and April 1, 2003.[6] Our most recent survey, which covers the time frame between April 1, 2003, and January 31, 2005, indicates we have delayed notification of searches in an additional 108 instances. Since April 1, 2003, no request for a delayed-notice search warrant has been denied. It is possible to misconstrue this information as evidence that courts are merely functioning as a "rubber stamp" for the Department's requests. In reality, however, it is an indication that the Department takes the authority codified by the USA PATRIOT Act very seriously. We judiciously seek court approval only in those rare circumstances – those that fit the narrowly tailored statute – when it is absolutely necessary and justified. As explained above, the Department estimates that it seeks to delay notice of fewer than 1 in 500 search warrants issued nationwide. To further buttress this point, the 108 instances of section 213 usage between April 1, 2003, and January 31, 2005, occurred in 40 different offices. And of those 40 offices, 17 used section 213 only once. Looking at it from another perspective over a longer time frame, 48 U.S. Attorneys' Offices – or slightly more than-half – have never sought court permission to execute a delayed-notice search warrant in their districts since passage of the USA PATRIOT Act.

To provide further detail for your consideration, of the 108 times authority to delay notice was sought between April 1, 2003, and January 31, 2005, in 92 instances "seriously jeopardizing an investigation" (18 U.S.C. § 2705(a)(2)(E)) was relied upon as a justification for the application. And in at least 28 instances, jeopardizing the investigation was the sole ground for seeking court approval to delay notification, including Operation Candy Box described above. It is important to note that under S.1709, the "SAFE Act," which was introduced in the 108th Congress, this ground for delaying notice would be eliminated. Other grounds for seeking delayed-notice search warrants were relied on as follows: 18 U.S.C. § 2705(a)(2)(A) (danger to life or physical safety of an individual) was cited 23 times; 18 U.S.C. § 2705(a)(2)(B) (flight from prosecution) was cited 45 times; 18 U.S.C. § 2705(a)(2)(C) (destruction or tampering with evidence) was cited 61 times; and 18 U.S.C. § 2705(a)(2)(D) (intimidation of potential witnesses) was cited 20 times. As is probably

[5] The data reflected in this letter were gathered from paper surveys completed by each U.S. Attorney's Office. While we believe the survey method to be accurate, we cannot completely rule out the possibility of reporting errors.

[6] *See* Letter from Jamie E. Brown, Acting Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice to F. James Sensenbrenner, Chairman, House of Representatives Committee on the Judiciary (May 13, 2003).

clear, in numerous applications, U.S. Attorneys' Offices cited more than one circumstance as justification for seeking court approval. The bulk of uses have occurred in drug cases; but section 213 has also been used in many cases including terrorism, identity fraud, alien smuggling, explosives and firearms violations, and the sale of protected wildlife.

Members of the Senate Judiciary Committee have also been concerned about delayed notification of seizures and have requested more detailed explanation of the number of times seizures have been made pursuant to delayed-notice warrants. The Department is pleased to provide the following information.

Seizures can be made only after receiving approval of a federal judge that the government has probable cause to believe the property or material to be seized constitutes evidence of a criminal offense and that there is reasonable necessity for the seizure. (*See* 18 U.S.C. § 3103a(b)(2)). According to the same survey of all U.S. Attorneys' Offices, the Department has asked a court to find reasonable necessity for a seizure in connection with delayed-notice searches 45 times between April 1, 2003, and January 31, 2005. In each instance in which we have sought authorization from a court during this same time frame, the court has granted the request. Therefore, from the time of the passage of the USA PATRIOT Act through January 31, 2005, the Department has exercised this authority 59 times. We previously, in May 2003, advised Congress that we had made 15 requests for seizures, one of which was denied.[7] In total, since the passage of the USA PATRIOT Act, the Department has therefore requested court approval to make a seizure and delay notification 60 times. Most commonly, these requests related to the seizure of illegal drugs. Such seizures were deemed necessary to prevent these drugs from being distributed because they are inherently dangerous to members of the community. Other seizures have been authorized pursuant to delayed-notice search warrants so that explosive material and the operability of gun components could be tested, other relevant evidence could be copied so that it would not be lost if destroyed, and a GPS tracking device could be placed on a vehicle. In short, the Department has sought seizure authority only when reasonably necessary.

The length of the delay in providing notice of the execution of a warrant has also received significant attention from Members of Congress. The range of delay must be decided on a case-by-case basis and is always dictated by the approving judge or magistrate. According to the survey of the 94 U.S. Attorneys' Offices, between April 1, 2003 and January 31, 2005, the shortest period of time for which the government has requested delayed-notice of a search warrant was 7 days. The longest such specific period was 180 days; the longest unspecified period was until "further order of the court" or until the end of the investigation. An unspecified period of time for delay was granted for six warrants (four of these were related to the same case). While no court has ever rejected the government's request for a delay, in a few cases courts have granted a shorter time frame than the period originally requested. For example, in one case, the U.S. Attorney for the District of Arizona sought a delay of 30 days, and the court authorized a shorter delay of 25 days.

Of the 40 U.S. Attorneys' Offices that exercised the authority to seek delayed-notice search warrants between April 1, 2003, and January 31, 2005, just over half (22) of the offices sought

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[7] *See* Letter from Jamie E. Brown, Acting Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice to F. James Sensenbrenner, Chairman, House of Representatives Committee on the Judiciary (May 13, 2003).

extensions of delays. Those 22 offices together made approximately 98 appearances to seek additional extensions. In certain cases, it was necessary for the Offices to return to court on multiple occasions with respect to the same warrant. One case bears note. The U.S. Attorney in the Southern District of Illinois sought and received approval to delay notification based on the fifth category of adverse result – that immediate notification would seriously jeopardize the investigation. The length of the delay granted by the court was 7 days. However, the notification could not be made within 7 days and the office was required to seek 31 extensions. So, each week for almost eight straight months, the case agent was made to swear out an affidavit, and the Assistant United States Attorney (AUSA) then had to reappear before the judge or magistrate to renew the delay of notice.

In the vast majority of instances reported by the U.S. Attorneys' Offices, original delays were sought for between 30 to 90 days. It is not surprising that our U.S. Attorneys' Offices are requesting up to 90-day delays. Ninety days is the statutory allowance under Title III for notification of interception of wire or electronic communications (*see* 18 U.S.C. 2518(8)(d)). In only one instance did a U.S. Attorney's Office seek a delay of a specified period of time longer than 90 days (180 days), and the court granted this request. In another instance, an office sought a 90-day delay period, and the court granted 180 days. In seven instances, the Department sought delays that would last until the end of the investigation. In only once instance was such a request modified. In that matter, the court originally granted a 30-day delay. However, when notification could not be made within 30 days, the U.S. Attorney's Office returned to the judge for an extension, and the judge granted an extension through the end of the investigation, for a total of 406 days. This is, according to our survey, the longest total delay a court authorized. However, most extensions were sought and granted for the same period as the original delay requested.

In one case, a court denied a U.S. Attorney's Office's request for an extension of the delay in providing notice. This matter involved three delayed-notice search warrants – all-stemming from the same investigation. The original period of delay sought and granted was for 30 days on all three warrants. The Office then sought 30-day extensions on all three warrants out of concern that the multiple targets of the investigation might flee to a foreign country if notified. The court denied our request. The judge in the matter reasoned that the need to delay notification warranted only a 30-day stay of service, particularly in light of the fact that one of the targets of the investigation was, by this time, in federal custody in California on an unrelated matter. At some point after notification was made, however, the other targets fled to Mexico.

In sum, both before enactment of section 213 and after, immediate notice that a search warrant had been executed has been standard procedure. Delayed-notice search warrants have been used for decades by law enforcement and, as demonstrated by the numbers provided above, delayed-notice warrants are used infrequently and scrupulously – only in appropriate situations where immediate notice likely would harm individuals or compromise investigations, and even then only with a judge's express approval. The investigators and prosecutors on the front lines of fighting crime and terrorism should not be forced to choose between preventing immediate harm – such as a terrorist attack or an influx of illegal drugs – and completing a sensitive investigation that might shut down an entire terror cell or drug trafficking operation. Thanks to the long-standing availability of delayed-notice warrants in these circumstances, they do not have to make that

choice. Section 213 enables us to better protect the public from terrorists and criminals while preserving Americans constitutional rights.

As you may be aware, the Department published a detailed report last year that includes numerous additional examples of how delaying notification of search warrants in certain circumstances resulted in beneficial results. We have enclosed a copy for your convenience.

If we can be of further assistance regarding this or any other matter, please do not hesitate to contact this office.

Sincerely,

William E. Moschella
Assistant Attorney General

Enclosure

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

SUBMISSIONS FOR THE RECORD

Patriot Act Op-Ed
By Daniel Adams

President Bush, in his 2004 State of the Union Address, had asked Congress to renew provisions of The Patriot Act that are set to expire in December of 2005. One cannot put such a request in proper perspective without noting the irony of the Act's name in the context of American history.

James Otis Jr., born in 1725 in West Barnstable, Massachusetts, was known throughout the colonies as simply "The Patriot." He earned this distinction by being the first colonist to speak out against the tyranny perpetrated upon the colonies by the British Government.

In 1760, King George III imposed the Writs of Assistance, which made it legal for colonists' private homes, businesses and ships to be searched by British customs officers at any time for any reason without a search warrant. As Advocate General in Boston, it was Otis's duty to enforce these Writs.

Instead, Otis resigned his position. In February of 1761, in the council chamber of Boston's Old State House, he delivered a now-famous four-hour speech in which he outlined an inspired argument against the Writs. He spoke not only of the constitutional injustices, but also of the violations the Writs perpetrated against our Natural Laws. He raised the dispute to a higher level, denouncing England's human rights violations, and even threw in an argument against slavery, for good measure. He was the first to utter the phrase, "taxation without representation."

John Adams, who was present for Otis's speech, years later remarked, "Mr. Otis's oration breathed into this nation the breath of life… American independence was then and there born." Thus, when a colonist of that era uttered the phrase, "The Patriot," his fellow colonist knew he meant the gentleman from West Barnstable.

We are now faced with similar impositions upon our freedoms, imposed by another George. The "Patriot" Act of today makes it legal for government officials to set up surveillance on citizens not suspected of a crime, without a court order and without showing just cause. It allows F.B.I. agents to obtain individual business and educational records without certifying that the target is considered a foreign agent or suspect of any kind. It also establishes a secret court that creates case law without public scrutiny or knowledge.

The Bush Administration claims they will not abuse these new powers; but subpoenas issued last winter after a college antiwar forum in Iowa make that promise sound hollow. And even if Attorney General Ashcroft acts with the wisdom of Solomon, what about subsequent administrations?

The Patriot Act's similarities to the Writs of Assistance are obvious, and the audaciousness of our government to give it a name that evokes the memory of James Otis "The Patriot" is unnerving.

There is another ironic parallel here. In 1798, during the administration of John Adams, Congress enacted the "Alien and Sedition Acts" which greatly restricted an American citizen's freedom of speech. The acts were created out of a fear of war with France and the presence of a growing population of foreigners emigrating from Europe who were thought to be sympathetic to the French. Because of the blatant constitutional violations within these acts, the Adams Administration and the entire Federalist Party were brought down as Thomas Jefferson won the next election. Partially because of Jefferson's fervent objections to the Alien and Sedition Acts, that election will forever be known to us as "The Revolution of 1800."

Our nation is now contemplating similar issues, and it is an election year. We are faced with an analogous foreign threat, made manifest with the heartbreaking experience of September 11, and our reactions to it will have long-lasting repercussions. Do we react in panic, enacting and renewing legislation that echo the Alien and Sedition Acts and the Writs of Assistance? Or do we, instead, rely on the wisdom of James Otis, and the subsequent Patriots he inspired, like Samuel Adams, John Hancock, George Washington and Patrick Henry, and have faith that the constitutional rights they gave us should be enforced no matter what the cost? And given that faith, do we have the courage of our convictions, akin to the electorate of 1800?

That is a major question that must be answered by the voters in this next election, and by our Senators and Congressmen, who, now faced with our president's request, would do well to crack open a history book for guidance.

(Daniel Adams, a feature film director and writer, resides in West Barnstable)

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Right-Left Call For Modest Corrections to the Patriot Act, Simple Fixes To Bring Controversial Act Back in Line with Constitution,

FOR IMMEDIATE RELEASE
Wednesday, September 22, 2004

Contact: Shin Inouye
(202) 675-2312

WASHINGTON – The American Civil Liberties Union today renewed its call for corrections to be made to the Patriot Act to bring it back in line with the Constitution, and urged Congress to reject measures that would further expand upon the Act. That sentiment was echoed today by members of the Senate Judiciary Committee – from both parties – and a Republican former member of Congress.

The ACLU has endorsed the bipartisan "Security and Freedom Ensured Act," (S. 1709/H.R. 3352), sponsored by Senators Larry Craig (R-ID) and Richard Durbin (D-IL), who spoke before their colleagues on the Judiciary Committee. The SAFE Act would make modest, but crucial, changes to the powers granted under the Patriot Act – giving law enforcement access to the tools they need to fight terrorism, but also protecting against abuse of those powers – and expands the Patriot Act's sunset provisions.

In his testimony before the Committee, former Republican Congressman Bob Barr commented on the SAFE Act, saying that, "I think is an excellent first step in any move to rein in the Patriot Act. It amends certain Patriot Act provisions to add safeguards against abuse, such as some judicial review, and expands the sunset provisions to include other problematic sections that escaped notice in the original bill." Noting that the SAFE Act would preserve personal freedoms, and is narrowly construed, Barr gave the measure "a passing grade."

The SAFE Act would permanently narrow the hot-button "sneak and peek" powers, which allow federal agents to search Americans' homes without notifying them for an indeterminate period. It would also restore key privacy protections for "roving wiretaps."

Regarding arguably the most controversial Patriot Act provision, section 215, which allows the FBI to obtain Americans' medical, business, library and even genetic records without probable cause, the SAFE Act would preclude investigative fishing expeditions by requiring some individualized suspicion that the targets of the order have some connection to a foreign government or organization. The ACLU is involved with litigation challenging the constitutionality of that power.

The ACLU also warned against further expansion of the Patriot Act's powers, noting that a thorough review of the current powers has yet to happen. To date, 356 communities, encompassing nearly 55 million Americans nationwide have passed resolutions asking Congress to revisit the Patriot Act and oppose any further expansion of the law. Support for the SAFE Act comes from a diverse section of groups, including the American Conservative Union and the American Jewish Committee – an organization that had supported the Patriot Act.

"Congress should not expand the Patriot Act without a thorough examination of its effectiveness," said Laura W. Murphy, Director of the ACLU Washington Legislative Office. "The Justice Department has been less than forthcoming on its use of these new powers, raising questions on what rights have been compromised. We have strong bipartisan support to fine tune the Patriot Act to both give law enforcement the tools they need and protect our fundamental freedoms."

The American Jewish Committee

The American Jewish Committee's Statement on the Security and Freedom Ensured ("SAFE") Act

The American Jewish Committee ("AJC") has consistently advocated a broad, multifaceted response to global and domestic threats of terrorism, including enactment of legislation that is both mindful of preserving civil liberties and gives law enforcement authorities the tools to apprehend terrorists, as well as, to the maximum extent feasible, to prevent the commission of such crimes. Even prior to the terrorist attacks of September 11, 2001, AJC sought to balance its concern for civil liberties and due process, with the need to strengthen national security protections. For example, in February 2000, then AJC President Bruce Ramer testified before the House Judiciary Subcommittee, urging Congress to reject the Secret Evidence Repeal Act (H.R. 2121, 106th Congress) in the form it was introduced, and adopt a more balanced approach because "[i]ts categorical ban on the use of classified information in immigration proceedings fails to draw the balance between due process concerns and national security interests."[1]

AJC was also a supporter of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("PATRIOT") Act, hailing its passage by Congress in late 2001, including provisions that modified then current surveillance law.[2] As a counterweight to providing government with broader powers, however, AJC supported the inclusion of sunset provisions that would apply to the entire act, to ensure ongoing Congressional oversight and prevent potential abuses of civil liberties.[3]

Since that time, AJC has supported a number of Administration anti-terrorism efforts, while continuing to be a vocal defender of civil and privacy rights. For example, while not opposing the creation of military tribunals for the prosecution of suspected terrorists who are not U.S. citizens, in a January 2002 letter AJC urged Secretary of Defense Donald Rumsfeld to include due process safeguards in the procedures governing those tribunals, writing that inclusion of such measures "will not hamper the Government's ability to bring terrorists to justice, but will reaffirm the principles that have made our nation an example around the world of how to achieve justice and security under the rule of law."

AJC takes very seriously the need to give law enforcement the tools they need to fight terrorism, especially because the Jewish community has been targeted by terrorists around the world. At the same time, AJC feels very strongly about the need to protect the constitutional rights of all Americans, particularly because Jewish Americans and other minority groups have been the victims of discrimination throughout this country's history.

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[1] *Hearing of The House Judiciary Subcommittee on Immigration and Claims on The Secret Evidence Repeal Act (H.R. 2121)*, 106th Cong. (February 10, 2000) (testimony of Bruce M. Ramer, President, American Jewish Committee).
[2] *AJC Anti-Terrorism Legislative Update*, October 8, 2001.
[3] Id.

A bi-partisan coalition in the Senate has introduced the Security and Freedom Ensured ("SAFE") Act to address several provisions of the PATRIOT Act that, it is argued, have the potential to negatively affect civil liberties. This legislation appears to place reasonable limits on the authority given to law enforcement under the USA PATRIOT Act, without materially hindering their ability to investigate and prevent terrorism.

At a meeting of AJC's Board of Governors in September 2004, the Board followed the recommendation of its Domestic Policy Commission and AJC's chapters to support passage of this legislation.

AJC supports the passage of the SAFE Act and believes that it is a thoughtful legislative measure to amend the PATRIOT Act, as it increases protections for civil liberties while retaining powerful tools for law enforcement to employ in its effort to combat terrorism. Specifically, just as AJC called for sunset provisions to be imposed on every section of the PATRIOT Act prior to its passage, AJC believes that imposing additional sunset provisions as outlined by the SAFE Act merely gives Congress the authority to oversee their use and prevent abuses of power, without hindering in any way its ability to reauthorize them. Furthermore, the sunset provisions will encourage the Justice Department to cooperate more fully with Congressional oversight committees. Finally, AJC notes that the possibility that the provisions will expire would not prejudice Congress's decision to reauthorize them.

With regard to the other provisions of the SAFE Act, AJC believes that as roving wiretaps are one of the most intrusive forms of surveillance, requiring the government to specify, at the very least, either the identity of the suspect or the location of the targeted device is not too heavy a burden to impose on law enforcement. Despite claims by law enforcement that the SAFE Act provision in this regard would create a loophole ripe for exploitation by terrorists, AJC believes that the SAFE Act has struck a fair balance between granting law enforcement the power they need to pursue terrorists, while at the same time protecting the public from intrusions into its private communications. Similarly, the SAFE Act's restrictions on delayed-notice search warrants are reasonable restraints on law enforcement's ability to engage in secret searches, while still allowing the government to delay notice until there is no risk of flight from prosecution, destruction of evidence, or danger of to a person's physical safety. Along with the SAFE Act's other two provisions regarding National Security Letters and access to library records, AJC believes that passage of the SAFE Act by Congress would constitute a moderate and sensible means of correcting flaws in the USA PATRIOT Act.

AN OPEN LETTER TO THE 108th CONGRESS

September 20, 2004

Dear Members of the 108th Congress:

We are all acutely aware that the time remaining for this Congress to fulfill its duties will expire in just a few days.

Although every Congress handles important legislation, such legislation rarely addresses widespread, substantial government reform. The task facing you to implement the 9/11 Commission's recommendations is a monumental one. It is also historic. This Congress must rise above politics by drafting and ratifying legislation that is true to the 41 core reforms recommended by the Commission. This is the only conscionable response to systemwide failures that left America vulnerable to the horrific terrorist attacks that killed 2,749 people on 9/11. The families, along with millions of concerned Americans, are waiting and watching.

We call on each of you and your leadership Senate Republican Leader Frist, Senate Democratic Leader Daschle, Speaker Hastert, House Republican Leader DeLay, and House Democratic Leader Pelosi to resolve today, this 20th day of September, to work together in keeping with the highest standards of bipartisan, bicameral cooperation in order to produce legislation that will ensure this Congress place in history.

We ask the Leaders of Congress to sign a pledge today to demonstrate to the Nation your commitment to lead the Members in achieving legislation in this session that fully addresses the 9/11 Commission's 41 core recommendations. Such legislation should be unencumbered by amendments designed to extend or expand the Patriot Act, provide a debt ceiling increase, or introduce extraneous, unrelated provisions. We also ask that you begin today to open a bipartisan, bicameral dialogue so that your constituents from both parties are assured of representation as promised by our Constitution.

Together, as Americans, Congress, the 9/11 Commission and we, the families, must achieve the only legacy that suitably honors those who died on September 11th â€ a better, safer America.

Respectfully,

Carol Ashley, Beverly Eckert, Mary Fetchet

Members, The Family Steering Committee for the 9/11 Commission

Voices of September 11th ("Voices") is a non-profit 9/11 family advocacy group providing information and resources for 9/11 families and survivors. Voices of September 11th makes every effort to present accurate information and to provide an open forum to discuss the related issues. Voices, however, cannot guarantee the accuracy of all the information provided nor does it necessarily support all of the opinions expressed in this forum. Voices strongly recommends consulting appropriate legal, financial or other resources before acting on the information presented here.

OFFICE OF BOB BARR
Member of Congress, 1995-2003

TESTIMONY SUBMITTED TO THE SENATE JUDICIARY COMMITTEE, CONCERNING THE USA PATRIOT ACT, THE SAFE ACT, AND RELATED MATTERS

BY
BOB BARR
FORMER MEMBER OF CONGRESS, 1995-2003,
FOR THE SEVENTH DISTRICT OF GEORGIA
September 22, 2004

Chairman Hatch, Ranking Member Leahy, and distinguished committee members, I thank you for your invitation to testify today and vigorously applaud your continued attention to these matters. I believe strongly that the current post-9/11 debate over civil liberties is the most important issue faced by America in a generation. From our earliest days as a republic, the tension between security and freedom has been ever-present. It rarely, however, has been as intense as it is now.

My name is Bob Barr. Until January of last year, I was the Republican United States Congressman from the Seventh District of Georgia. Prior to that, I was appointed by President Reagan to serve as the United States Attorney for the Northern District of Georgia, and worked as an official with the Central Intelligence Agency. I have also served as an attorney in private practice. Currently again a practicing attorney, I also now occupy the 21st Century Liberties Chair for Privacy and Freedom at the American Conservative Union, and consult on privacy matters for the American Civil Liberties Union. I appear before you today as a conservative, as a former law enforcement and

national security official, and as a citizen concerned with unfortunate erosions of personal liberty that have occurred in the aftermath of 9/11.

We are now three years out from those tragic attacks and the catch phrase of the day continues to be: "9/11 changed everything." But, did it? Certainly, it has had significant repercussions for the economy, politics, national defense, domestic security operations, and even our general culture. But it should not change the way in which we, as Americans, want to be governed. And it certainly should not be allowed to amend our Bill of Rights. Though the 9/11 attacks may have made us more fearful of terrorism and more aware of the threats facing us from beyond our shores, they have not created any public or congressional support for changes to the basic institutions of our democratic government, such as the separation of powers or the mutually reinforcing checks and balances that protect against government abuses. I urge you to take this into account when considering the Security and Freedom Ensured Act ("SAFE" Act). It takes measured steps to constrain the excessive executive branch investigative and surveillance power authorized in 2001's USA Patriot Act (the "Uniting and Strengthening America by Providing Appropriate Tools Required to Interdict and Obstruct Terrorism Act, also known simply as the "Patriot Act").

Before going into detail on the specific provisions of the SAFE Act, it is crucial to note an important recommendation in the 9/11 Commission Report. On page 394 and 395, the commissioners included this finding: "The burden of proof for retaining a particular governmental power should be on the executive, to explain a) that the power actually

materially enhances security and b) that there is adequate supervision of the executive's use of the powers to ensure protection of civil liberties. If the power is granted, there must be adequate guidelines and oversight to properly confine its use." The commission's recommendation refers primarily to the Patriot Act, which, because of the speed with which it was passed and the atmosphere surrounding its consideration, contained several unnecessary and potentially abusive expansions of government law enforcement or intelligence-gathering authority. Accordingly, the commission also supported further congressional debate on the Patriot Act, and – importantly -- said nothing about removing the sunsets in the law, a position that bolsters the arguments of those seeking to enact the SAFE Act.

The 9/11 Commission, which recommended some of the most sweeping expansions of the federal government since the end of World War II, included this particular recommendation because of its agreement with the argument above: that 9/11 did not really change core American values, especially the basic constitutional strictures that shape our government. The Commission expressly realized that its suggestions for a radically expanded domestic surveillance infrastructure, and the consolidation of managerial and operational authority over that infrastructure, require concomitant safeguards. One of these key safeguards is ensuring the executive has to explain itself *before* it asks for or is granted more power. Another is to reform and increase congressional oversight. I believe the SAFE Act is a key component of these renewed safeguards.

Before continuing, it is important to note that I voted for the Patriot Act and continue to support portions of it. I did so for three main reasons. First, much of the Patriot Act is largely non-controversial and simply updates existing laws to reflect the new challenges of 21st century technology. Second, I took the administration at its word when it suggested the more wide-ranging powers in the law would be used exclusively for counter-terrorism, and were only necessary given the extraordinary threat Al Qaeda and like groups represent. Third, I believed that the administration would respect our inclusion of sunset provisions in the bill to force Congress to look anew at these measures with its nerves a little less frayed. Instead, however, the Bush administration has freely used the Patriot Act in cases unrelated to terrorism, and has vigorously campaigned to have the sunset provisions removed, which would make the entire Patriot Act a permanent fixture of our legal landscape.

Consequently, I believe, as do Senators Larry Craig, Richard Durbin, and committee members Edward Kennedy, Arlen Specter and Russell Feingold, that some refinement of the Patriot Act is necessary. They have proposed the SAFE Act, which I think is an excellent first step in any move to rein in the Patriot Act. It amends certain Patriot Act provisions to add safeguards against abuse, such as some judicial review, and expands the sunset provisions to include other problematic sections that escaped notice in the original bill. Unfortunately, given the extreme politicization of the current election cycle, it appears unlikely the SAFE Act will pass until after November 2nd. I would certainly hope, however, that additional legislation to *expand* the Patriot Act will likewise not be rushed through before the November election. Given the recriminations

and distortions that have surfaced during the presidential campaign, I do not believe a reasonable and well-informed conversation can be had in Congress about these issues. Along these lines, I have included a short discussion of the newly introduced "Tools to Fight Terrorism Act," sponsored by Senator Jon Kyl. Though I applaud Senator Kyl's enthusiasm for giving the law enforcement and intelligence communities the proper tools to fight terrorism, I fear that certain provisions in the new bill resemble too closely a "Son of Patriot Act" or "Patriot II." For instance, I do not believe we should give the administration extended administrative subpoena power, allow the secret use of secret evidence in immigration proceedings, until the administration makes a compelling public case for the powers it has *already* received. I will discuss the Kyl bill in more detail below.

The SAFE Act is actually quite a modest piece of legislation. The Senate version has only six sections, compared with the 158 sections in the Patriot Act, and would only make changes to a handful of statutes. Crucially, it does not repeal any provision of the Patriot Act and, despite the protestations of some opponents, it would not do anything to rebuild the so-called "wall" between domestic law enforcement and counter-intelligence. Rather, its six sections simply restore some judicial review to enhanced law enforcement access to records and things under the Foreign Intelligence Surveillance Act ("FISA"). The SAFE Act would also remove a catch-all justification for delayed-notification (or "sneak and peek") search warrants, require additional reporting by the Justice Department on its use of certain Patriot Act powers, and expand

the sunsets to include four other provisions. As you can see, compared to the breadth and complexity of the Patriot Act, the SAFE Act is quite modest.

The most needed provision of the SAFE Act deals with delayed-notification, or "sneak and peek," search warrants. The Patriot Act is the only criminal statute Congress has ever passed that authorizes law enforcement agents to get a warrant to secretly search a person's home for evidence of crime. "Sneak and peek" warrants authorized law enforcement agents to break into someone's house or office, search their possessions, download the documents on their computer, seize items secretly when they can show "reasonable necessity," and not tell the target for an indeterminate amount of time afterward. The Patriot Act, however, applied the definition of "adverse result" under 18 U.S.C. § 2705(a)(2), which applies to the accessing of stored electronic communications, as the justification needed for a court to grant a sneak and peek search and seizure. Section 2705(a)(2) is quite broad. Prior to the Patriot Act, the courts upheld delayed-notification search warrants as constitutional, and they were available in terrorism investigations, in cases when notice would threaten a person's life or physical safety, prompt evidence or witness tampering or incite flight from prosecution. Additionally, some courts applied a presumptive seven-day limit on delay, with extensions possible after a new showing of necessity. These extraordinary powers thus we allowed to be exercised when the government could demonstrate a need to use them, and the process worked quite well. The Patriot Act, by using the definition of adverse result under Section 2705, created a new catch-all grounds for delay: if notice would, "jeopardiz[e] an investigation or unduly [delay] a trial." As a former prosecutor, I can

assert from experience that such a vague definition could apply in a myriad of cases where it would be highly inappropriate. The United States Supreme Court, additionally, has ruled on the constitutional implications of the "knock and announce" convention for the execution of search warrants, which is violated here. In *Wilson v. Arkansas*, 514 U.S. 927 (1995), in a decision written by Justice Thomas, the court declared the knock and announce convention to be rooted in the Constitution, not just the common law.

That said, Congress need not do away with delayed notification search warrants completely, and the SAFE Act recognizes these competing interests; it seeks only to balance them by removing the catch-all link to Section 2705, and by specifying that notice can be delayed only when it would a) threaten life or physical safety, b) result in flight from prosecution, or c) lead to the destruction of or tampering with evidence.

Conservatives, especially, should be supportive of this modest, but crucial, change. And all Americans, including Republicans, Democrats and Independents, should not forget that extraordinary powers granted to any one administration, can and will be used by subsequent administrations, including those with which we may disagree. Who knows how such powers might be employed in the future? As with the RICO statute, will the Patriot Act or a Patriot II be co-opted to surveil and harass abortion protesters or Second Amendment supporters? Given recent reports that the FBI has used a heavy hand in interviewing real and potential left-wing protesters before the Republican National Convention, this is clearly far from beyond the realm of possibility. Political activists, of any ideological stripe, are prime targets for excesses by law enforcement

because of their gadfly nature. Any intimation of potential disruptiveness, especially in the post-9/11 environment, immediately draws extensive law enforcement attention. If the investigative power is overly broad, as it largely is with the current sneak and peak statute, it cannot help but be overused. I strongly support the limiting provision in the SAFE Act.

The SAFE Act also includes a new check on the expansion of the FISA business records provision in the Patriot Act. Section 215 of the Patriot Act allows federal agents to seek a FISA court order for the production of any document or "tangible thing" that they assert is "sought for" an ongoing terrorism or espionage investigation, so long as it is not "solely" based on the First Amendment activities of United States citizens or permanent residents. (A Section 215 order can, therefore, be based exclusively on First Amendment activities for all other persons in the United States). The FISA judge has no discretion in the statute, codified at 50 U.S.C. § 1861, to deny the request, and the recipient of the court order is barred from telling anyone save those necessary for its execution. The change was a significant expansion of the scope of the business records provision. Prior to the Patriot Act, the authority to order the production of such documents required "specific and articulable facts" that the target was a foreign power or agent thereof. The pre-Patriot power applied to a limited subset of records, namely those held by common carriers, rental car agencies, self-storage businesses, and the like. The Patriot Act vastly expanded this section of FISA. Under a plain reading of the statute, it could easily sweep in the personal, medical, travel, firearms-purchase, library or even genetic records of Americans who may have nothing

to do with an intelligence or terrorism investigation. Again, conservatives have ample reason to be concerned about Section 215 of the Patriot Act, especially given that we now know the FBI has sought court orders pursuant to its authority. Consider the damage a provision like 215 could do if used for political advantage. Also, I think that as we discuss the SAFE Act, and particularly its impact on Section 215 of the Patriot Act, we should look back at that test posed by the 9-11 Commission for new government powers. The first part of that test says that the burden is on the government to explain how, "[T]he power actually materially enhances security." Although the Department of Justice is reluctant to give out much information on this section, it did testify last year that, at that time, it had never been used. If true, then this power fails the test off the bat, before we even begin to look at its constitutional impact. On the other hand, if the government *is* using it, which seems clear today, then it still fails part two of the commission test, because its use is being inadequately supervised. I know members of this committee have tried for a long time to get answers about its use, to no avail.

The SAFE Act, again, takes a middle of the road approach to fixing the overbreadth of the Patriot Act's provision. Instead of returning the code to status quo ante, which covered only certain records, it leaves the scope of Section 215 untouched to include any "tangible things," but reinstalls the "specific and articulable facts" standard for obtaining one of these orders. By doing so, the SAFE Act would prevent the misuse of Section 215 against political dissidents, and would serve to insulate innocent third parties from having their personal information seized secretly by the FBI. It would also

expand reporting requirements on the use of Section 215 court orders to the House and Senate judiciary and intelligence committees.

The second provision in the Senate version of the SAFE Act deals with a post-9/11 change to wiretapping law that has been little noticed by the media and public, but is extraordinarily significant in its scope and potential misuse. Section 206 of the Patriot Act created roving wiretap authority under FISA. It did so, however, without including the "ascertainment" requirement included in the criminal roving wiretap statute. So, instead of just "following the person, not the phone," the new roving wiretap statute allows secret intelligence wiretaps presumably of multiple devices without any formal requirement that agents "ascertain" that their target is at the location or using the device. Although this is bad in and of itself, the Intelligence Authorization Act that year expanded the authority even further, creating an entirely new creature: the "John Doe" roving wiretap. The post-Patriot specification procedures in the FISA wiretapping statute require the FBI applicant to specify the identity of the target, "if known," and the nature and location of the places or facilities to be wiretapped, again "if known." This is an extreme amount of discretion. It allows FBI agents to engage in investigative fishing expeditions against anyone who meets the general physical description in the surveillance order, the only real requirement for specificity. The SAFE Act, again, does nothing to remove the roving wiretap authority under FISA; it simply would require agents to specify either the identity of the target *or* the location where the wiretap will be installed. Authorities could provide an alias under the SAFE Act if the target's real name is unknown. The SAFE Act would also reinstall the ascertainment requirement;

preventing agents, for instance, from randomly wiretapping apartments in an apartment complex because they have a hunch that a single suspect fitting their general description might be in one of them. If the SAFE Act is enacted, roving intelligence wiretaps would have precisely the same safeguards as criminal roving wiretaps.

Finally, Sections 5 and 6 of the SAFE Act provide greater privacy protections for library users and expand the sunset provisions in the Patriot Act, respectively. Section 505 of the Patriot Act lowered the standard that the FBI has to meet to issue "national security letters" ("NSLs"), which are effectively administrative subpoenas, issued at the sole discretion of a Justice Department official. Some continue to insist that libraries which provide public access to the Internet can be treated as an Internet Service Provider (ISP), for the purposes of NSLs. This opens the records of any library patron up to FBI scrutiny without any court review. Section 5 of the SAFE Act would clarify that libraries do not meet the definition of a traditional communications service provider. Authorities would still be absolutely free to seek orders for the production of records about Internet activity in libraries, but would have to go through the library's actual Internet Service Provider, just as they do when they seek records about an individual's home Internet use – hardly a burdensome requirement.

Section 6 expands the sunset provision in Title II of the Patriot Act to include the sneak and peek section, the provision expanding pen register and trap and trace authority to Internet communications (which fails to clarify what constitutes "content" in electronic mail headers and Internet surfing logs), the section providing for single jurisdiction

national search warrants in terrorism investigations, and the national security letter expansion. The sunset expansion is necessary to ensure that poorly drafted or potentially abusive provisions in the Patriot Act are given a re-airing in front of Congress before public interest in the Patriot Act disappears.

In sum, I applaud Senators Craig and Durbin, as well as the 18 other Republican and Democratic Senate sponsors of the SAFE Act, for their attention to civil liberties. I have long argued that the appropriate way to maximize the effectiveness of both intelligence and law enforcement requires two things, neither of which involve fostering investigative fishing expeditions. First, the intelligence and law enforcement community should be properly resourced. The FBI should not have to wait until 2004 (or 2005) before entering the digital age. The fact that the "Trilogy" information technology project at the FBI has taken so long to implement is inexcusable. Such infrastructure investments are absolutely essential to let rank-and-file special agents do their jobs. Second, the government should encourage old-fashioned policing techniques. All of the legal shortcuts in the world cannot replace the human ability to deduce and intuit the facts of a case from traditional shoe-leather policing. The same evidence-based, agent-level approach should obtain in counter-terrorism efforts. The SAFE Act maintains the Patriot Act powers that foster these two approaches, and does away with the constitutionally suspect dead weight in the bill like John Doe intelligence wiretaps. It deserves this committee's support.

Before I conclude, some comments are in order about the "Tools to Fight Terrorism Act," sponsored by Senator Kyl. As I said before, Senator Kyl should be applauded for his vigilance. However, S. 2679 bears far too much resemblance to the "Son of Patriot" legislation leaked from the Justice Department in February 2003 to leave me and many other conservatives and liberals with a sense of comfort. It contains a number of provisions that track parts of that draft legislation, as well as a number of other Patriot-style powers that have failed to win congressional passage over the past three years. For instance, S. 2679 includes the administrative subpoena, pre-trial detention and expanded death penalty powers requested by President Bush in September 2003, as well as provisions encouraging the increased use of secret evidence and allowing the government to target individuals for highly attenuated connections to organizations secretly designated as "terrorist groups" by the government.

Two points should be made about S. 2679. First, it is clearly a sequel to the Patriot Act and, as such, Congress should defer consideration of the measure until after the election; it must not become a political prop. Right now, the incomplete and inaccurate information that is flying around about the Patriot Act and other similar government powers would be lethal to considered and reasonable policy making. Second, S. 2679, as it stands, fails to meet the standard put forward by the 9/11 Commission for expansions of executive branch authority, laid out in the recommendation on pages 394 and 395. It does not meet the burden set forward for the expansion of government power, mentioned above, and fails to include proper safeguards. Instead, S. 2679 proceeds on the same "trust us" view of the executive branch implicit in the Patriot Act

and its progeny. The most recent field report by the Justice Department provides just another example of the lack of a basis for this trust. Though it paints a nice picture of the administration's use of the non-controversial provisions in the law, it says *nothing* about the administration's use of the provisions that have drawn criticism from Washington watchers and the public. This record is hardly something deserving of reward by the Congress. In another example, as mentioned earlier, the Attorney General declassified a memo in September 2003 disclosing that Section 215 of the Patriot Act had never been used, raising questions about why his department lobbied so hard for the new power after 9/11. But then, to make matters worse, a recent FOIA request by the ACLU shows that, in fact, the FBI's National Security Law Branch asked the Office of Intelligence Policy and Review to submit a 215 request less than a month after the Ashcroft memo. Such unhappy coincidences do not inspire the trust needed to grant extraordinary *additional* national security authority that would be exercised with even more insulation from judicial review.

In the final analysis, the greatest issue implicated in the current debate is the separation of powers doctrine and how it will withstand the stresses of the post-9/11 era. I submit that the basic principles and national values should remain unchanged. The mutual checks and balances on executive, legislative and judicial authority in the United States should remain, even in the context of national security and counter-terrorism. Although Congress should actively be seeking to provide for the most effective policies and powers in these areas, it should not be expanding the executive's general authority at its own expense or that of the courts. The SAFE Act strikes this particular balance. It

says, for instance, that it is okay for authorities to have broad access to business records beyond those of just common carriers or rental car companies, but that agents should show a judge, in an ex parte proceeding, specific and articulable facts that show a reason to believe the target is a member of a terrorist organization or is engaged in terrorist activity. That, to me, is a reasonable counter-terrorism policy. It is flexible enough to meet changing circumstances and cunning foes, but is internally limiting, the natural enemy of potential abuse.

As a conservative, I try and apply a simple test to all government policies, from firearms laws to the Patriot Act. Will they preserve personal freedoms, will they work, and are they narrowly constructed? Applied to the SAFE Act, the answers are yes, yes, and yes -- a passing grade. Applied to the new Tools to Fight Terrorism Act, the answers are no, perhaps, and no, which is not the best score. As a final word, note that when applied to the Patriot Act, the results are similar: no, yes and no, and emphatically no. I urge you to consider that as you deliberate further on these vitally important matters.

Thank you again Chairman Hatch and Ranking Member Leahy for your vigorous oversight of our constitutional liberties.

RESOLUTION NO. 2004- 198

A RESOLUTION SUPPORTING THE UNITED STATES LAW TITLED "UNITING AND STRENGTHENING AMERICA BY PROVIDING APPROPRIATE TOOLS REQUIRED TO INTERCEPT AND OBSTRUCT TERRORISM," COMMONLY KNOWN AS THE USA PATRIOT ACT.

WHEREAS, the USA Patriot Act was created through bi-partisan action of the United States Congress by overwhelming support, 98 for and 1 opposed in the United States Senate and 357 and 66 opposed in the United States House of Representatives on October 26, 2001; and

WHEREAS, the USA Patriot Act is recognized and specifically constructed as a law enforcement tool to disrupt terror organizations and prevent terrorist attacks; and

WHEREAS, the USA Patriot Act has effectively encouraged law enforcement at all levels to share intelligence and act collectively to preserve public and officer safety; and

WHEREAS, it has been reported that there has been no finding of government abuse or misuse of the USA Patriot Act; and

WHEREAS, the International Association of Chiefs of Police, the National Sheriff's Association and the Florida Domestic Security Oversight Board have endorsed the USA Patriot Act.

NOW, THEREFORE, BE IT RESOLVED THAT the Board of County Commissioners of Collier County, Florida duly assembled and upon lawful vote supports the USA Patriot Act as it is currently constituted; urges Congress to renew its support by renewing the Act, rejecting sun-setting of the Act, urges Congress to recertify the Act in 2006 and amending only those parts that may be found through due process to be contrary to Constitutional consideration.

This Resolution adopted after motion, second, and majority vote favoring same this 8th day of June, 2004.

ATTEST:
Dwight E. Brock, CLERK
BY: _____
Deputy Clerk
Approved as to form and legal sufficiency
David C. Weigel, COUNTY ATTORNEY

BOARD OF COUNTY COMMISSIONERS
COLLIER COUNTY, FLORIDA
BY: _____
Donna Fiala, CHAIRMAN

November 25, 2003

Security & Privacy

Right-Left Coalition Letter Endorsing the SAFE Act, October 15, 2003

October 15, 2003

Re: Support S. 1709, the Security and Freedom Enhanced (SAFE) Act of 2003

Dear Senator:

We, the undersigned organizations, are writing in strong support of the S. 1709, the Security and Freedom Enhanced (SAFE) Act of 2003, sponsored by a strong bipartisan team lead by Senators Larry Craig (R-ID) and Richard Durbin (D-IL) and including Senators Crapo (R-ID), Feingold (D-WI), Sununu (R-NH), Wyden (D-OR) and Bingaman (D-NM).

The government has taken many steps, which we support, to combat terrorism. However, we reject the idea that it is necessary to sacrifice civil liberties in order to increase security. For that reason, our organizations agree that the powers authorized by the USA PATRIOT Act should be balanced with appropriate safeguards, including meaningful judicial and Congressional oversight. Now is the time to correct some of the provisions of the USA PATRIOT Act by passing the SAFE Act.

The SAFE Act would prevent fishing expeditions into sensitive personal records by requiring that the records in foreign intelligence investigations sought pertain to an alleged spy, terrorist or other foreign agent. In contrast, under the USA PATRIOT Act, federal agents can get a court to order that anyone's library or other records be turned over regardless of whether there is any suspicion about the person whose records are turned over.

The SAFE Act allows roving wiretaps in intelligence investigations, but requires that the government make sure the target is actually using the telephone or other device it is monitoring.

The SAFE Act would apply this safeguard, which already protects innocent conversations in criminal investigations, to roving intelligence wiretaps. The SAFE Act makes sure "sneak and peek" searches are subject to meaningful judicial oversight and are not approved as a matter of routine. Under the SAFE Act, the government may get a court to delay notice of a search only to protect someone's life or safety or to prevent flight from prosecution or to prevent destruction of evidence. Notice would be delayed only for seven days - instead of an indefinite period - and the seven-day period could be renewed only with court permission.

Finally, the SAFE Act would sunset the "sneak and peek" search provision of the USA PATRIOT Act, and three other provisions of the law that expand surveillance powers. This, along with new reporting requirements, would enhance Congress's role in overseeing the way the government is using powers granted in the USA PATRIOT Act.

Finding the right way to fight terrorism while preserving privacy and civil liberties is demanding, but essential. We applaud Senators Craig and Durbin for introducing the SAFE Act and urge you to co-sponsor it. With your help, it can become law this year.

Sincerely,

David Keene, Chairman
American Conservative Union

Larry Pratt, Executive Director
Gun Owners of America

Steve Lillienthal, Director
Center for Privacy and Technology Policy
Free Congress Foundation

Laura Murphy, Director
Washington Legislative Office
American Civil Liberties Union

Jim Dempsey, Executive Director
Center for Democracy and Technology

Lisa Dean
Washington Policy Liason
Electronic Frontier Foundation

Christopher Finan, President
American Booksellers Foundation for Free Expression

Lynne Bradley, Director
Office of Government Relations
American Library Association

Free Speech | Data Privacy | Government Surveillance | Cryptography | Domain Names | International | Bandwidth | Security | Internet Standards, Technology and Policy Project | Terrorism | Authentication | Right to Know | Spam

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Testimony of Daniel P. Collins
before the Senate Committee on the Judiciary
September 22, 2004

Chairman Hatch and Members of the Committee, I appreciate the opportunity to testify here today. The prevention of terrorist attacks is a matter of the most vital importance to our Nation. The Congress has few responsibilities that are more important than ensuring that the men and women who work day in and day out to protect us all have the tools that they need to get the job done — and to get it done in a way that *both* enhances security and respects liberty.

My perspective on these matters is informed by my service over the years in various capacities in the Justice Department. Most recently, I served from June 2001 until September 2003 as an Associate Deputy Attorney General ("ADAG") in the office of Deputy Attorney General Larry Thompson. During the same period, I also served as the Department's Chief Privacy Officer, and in that capacity, I had the responsibility for coordinating the Department's policies on privacy issues. I also served, from 1992 to 1996, as an Assistant United States Attorney in the Criminal Division of the U.S. Attorney's Office for the Central District of California in Los Angeles. And prior to that, I had served from 1989 to 1991 as an Attorney-Advisor in the Office of Legal Counsel in Washington, D.C. I am now back in private practice in Los Angeles, and I emphasize that the views I offer today are solely my own.

In evaluating whether current law provides appropriate tools for fighting terrorism, one must begin with the USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001). This landmark piece of legislation was passed in October 2001 by overwhelming bipartisan majorities in both houses — indeed, the vote in the Senate was a remarkable 98-1. Despite this broad consensus, some commentators have denounced the legislation as a grave threat to privacy and civil

liberties. In my view, these criticisms of the Act are not well-founded. On the contrary, the Act represents a measured, responsible, and constitutional approach to the threat of terrorist activities conducted in the United States and directed against American citizens.

In evaluating any legislation in this area, whether it be the Patriot Act or the proposed SAFE Act (S. 1709), there is, I think, general agreement that the goal must be to fashion appropriate tools to fight terrorism in a manner that preserves and enhances privacy. Beyond that overarching goal, I think that there is (or should be) general agreement on a number of specific principles that should guide the effort to achieve that goal:

- *Unwavering fidelity to the Constitution.* Privacy is a cherished American right. Among the various ways in which the Constitution protects that right, the Fourth Amendment specifically reaffirms the right of the people to be free from unreasonable searches of their "houses, papers, and effects." Our laws must scrupulously respect the limits established by the Constitution. As many have said, we have to think outside the box, but not outside the Constitution. But while the Constitution sets the minimum, our laws have long properly reflected the judgment that, from a policy perspective, there should be additional statutory protections for privacy. I do not question that judgment.

- *Privacy protection is not a zero-sum game.* Too often, the debate over the Patriot Act, as well as over other measures, has wrongly viewed the matter as some sort of zero-sum game. Some critics seem to operate from the implicit premise that *anything* that helps law enforcement is *necessarily* a reduction in civil liberties and a loss of freedom. This sort of thinking does not make much sense either from a law enforcement perspective or from a civil liberties perspective.

- *Not all privacy interests are the same.* Not all privacy interests are of the same magnitude, and it makes no policy sense to act as if they were. For example, some categories of information are more important and more sensitive than others. The fact that the supermarket club could maintain a computerized stockpile of information about my personal buying habits may raise a privacy concern, but it is not on the same level as someone eavesdropping on my phone conversations or reading my medical records. The nature and severity of the privacy intrusion at issue are certainly important factors to consider.

- *Privacy is not always the most important value.* It is essential to keep in mind that, while privacy is an important right, it is by no means the only important value. Human society, by its very nature, involves some loss of personal privacy. Competing concerns raised by new technology may also justify particular intrusions on privacy: no one can deny that airport inspections are essential to public safety, regardless of the cost to privacy.

- *If it's good enough for fighting the mob, it's good enough for fighting terrorism.* Any tool that is already available to fight any other type of crime — be it racketeering, drug trafficking, child pornography, or health care fraud — should be available for fighting terrorism. If the judgment has already been made that the tool is appropriate for fighting these other crimes, and that any privacy interests at stake must yield to that effort, then surely the tool should also be available to fight terrorism.

- *The law of inertia must not be a principle of privacy policy.* It does not make much sense to perpetuate outmoded ways of doing things simply because it has always been done that way. As times and technologies change, the judgments that are reflected in existing statutory rules may need to be re-evaluated.

- *The importance of technological neutrality.* In applying privacy principles to new and emerging technologies, an important benchmark is the concept of "technological neutrality." The idea is that, just because a transaction is conducted using a new technology, there should not have to be a loss of privacy when compared to similar transactions using older technologies. To use an example, the privacy protection for ordinary email should be roughly equivalent to that of an ordinary postal letter. Conversely, the emergence of new technologies should not provide criminals with new ways to thwart legitimate and legally authorized law enforcement action. Cyberspace must not be permitted to become a "safe haven" for criminal activity. The notion of technological neutrality takes into account both sides of the coin.

With these basic principles in mind, let me explain, using a number of examples, why I think the Patriot Act properly enhances the abilities of law enforcement in a manner that respects and preserves our freedoms, and why I think that the proposed SAFE Act does not strike the right balance.

- Section 215 of the Patriot Act enacted much-needed reforms to the provisions of the Foreign Intelligence Surveillance Act ("FISA") that govern the ability to obtain business records in connection with FISA investigations. Despite the stridency of some of the criticisms leveled at Section 215, the authority provided by this section is quite modest and, in my view, quite reasonable. For a very long time, grand juries have had very broad authority to obtain, by subpoena, records and other tangible items that may be needed during the course of a criminal investigation. Section 215 provides a narrow analog to such subpoenas in the context of certain intelligence investigations under FISA. Indeed, in many respects, Section 215 contains more protections than the rules governing grand jury subpoenas:

— A court order is required. 50 U.S.C. § 1861(c).

— The court is *not* merely a rubber-stamp, because the statute explicitly recognizes the court's authority to "modif[y]" the requested order. *Id.*, § 1861(c)(1).

— The section has a narrow scope, and can be used in an investigation of a U.S. person only "to protect against international terrorism or clandestine intelligence activities." *Id.*, § 1861(a)(1), (b)(2). It cannot be used to investigate domestic terrorism.

— The section provides explicit protection for First Amendment rights. *Id.*, § 1861(a)(1), (a)(2)(B).

Despite what some of its critics seem to imply, this narrowly drafted business records provision has no special focus on authorizing the obtaining of "library records." On the contrary, because the provision specifically forbids the use of its authority to investigate U.S. persons "solely upon the basis of activities protected by the first amendment to the Constitution," the provision does *not* authorize federal agents to rummage through the library records of ordinary citizens. Moreover, it would make no sense to create a carve-out for libraries from the otherwise applicable scope of Section 215: that would simply establish libraries and library computers as a "safe harbor" for international terrorists. (Section 5 of the SAFE Act, which would carve library computers out of the national security letter authority in 18 U.S.C. § 2709, suffers from a similar flaw.) Indeed, over the years, grand juries have, on appropriate occasions, issued subpoenas for library records in connection with ordinary criminal investigations. In my view, a sensible

privacy policy should allow an appropriately limited analog in the FISA context, and Section 215 is just that.

Section 4 of the SAFE Act would amend the FISA so that the authority conferred by Section 215 could only be exercised if "there are specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power." This is much too narrow a standard. Suppose that FBI agents suspected that an as-yet-unidentified individual foreign agent may have consulted certain specific technical titles on bomb-making or on nuclear power facilities, and they are informed that 5 persons have checked out those specific titles from public libraries in the relevant area and time period. Would Section 4 bar the agents from getting those records for all 5 persons? It would seem so. Under Section 4, it must be shown that "the person to whom the records pertain" is an agent of a foreign power, i.e., that the *individual* whose records are sought is a foreign agent. Because it cannot be said that there are "specific and articulable facts" to suspect *all 5 persons* who checked out the books as all being foreign agents (the most that can be said is that one of them may be), Section 4 would seemingly require more. Even if one were to agree that the general business records authority in Section 215 might benefit from greater reticulation in the contexts of particular types of records, this particular requirement seems too strict. Given the various safeguards already in place in Section 215, which adequately take account of the difference between investigations under FISA and ordinary criminal investigations, there is insufficient justification for a standard that is so much more demanding than the ordinary "relevance" standard that has long governed grand jury subpoenas in criminal investigations (some of which, like the Versace murder and Zodiac gunman investigations, did consult library records).

- Section 213 of the Patriot Act codifies long-standing authority to delay notification of the execution of a warrant. *See, e.g.*, *United States v. Villegas*, 899 F.2d 1324, 1337 (2d Cir. 1990). It does so with proper safeguards: the court must independently find "reasonable cause" to justify the delay; the court must set forth in the warrant the "reasonable period" for such delayed notice; and such a deadline may be extended only upon a subsequent finding by the court that "good cause" has been shown for the additional delay. 18 U.S.C. § 3103a(b). These stringent safeguards are entirely appropriate, but they are also entirely adequate. In particular, the revisions that would be made by Section 3 of the SAFE Act would be a serious mistake. There is no reason why delayed notice should not be authorized when notification could result in the intimidation of witnesses, the destruction of *other* evidence (i.e., evidence other than that described in the warrant), or the jeopardizing of an entire ongoing investigation. So long as the court has the ultimate ability, and the *independent* ability, to supervise and control the delay, immediate notification should not be required when such serious concerns are present. Indeed, Section 3 of S. 1709 would leave the law *worse* than it was before the Patriot Act.

- I also believe that the Patriot Act strikes the right balance on the subject of "roving wiretaps" under FISA and that the amendments that would be made by Section 2 of the SAFE Act are unwarranted.

Section 2 of the SAFE Act would amend Section 105 of FISA to provide, in effect, that an order authorizing electronic surveillance under FISA must *either* (1) specify the "identity of the target of electronic surveillance" or (2) specify "the nature and location of each of the facilities or places at which the electronic surveillance will be directed." To evaluate the

significance of this proposed new requirement, one needs to consider exactly how it would differ from the law as it stands today.

Under current law, a FISA order authorizing electronic surveillance only needs to *specify* the nature and location of each such facility or place "if known." 50 U.S.C. § 1805(c)(1)(B). Although current law thus dispenses with a *specification* requirement when the exact nature and location of the facilities or places are not known in advance, the existing version of Section 105(a)(3)(B) unambiguously states that an authorizing order may only be issued if, *inter alia*, "there is probable cause to believe that ... each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power." 50 U.S.C. § 1805(a)(3)(B). Reading these provisions together, it would seem clear that, even when it cannot be specified in advance what are the *particular* facilities and places that will be surveilled, the Government must nonetheless provide a sufficient description of the categories of facilities and places that will be surveilled (presumably by describing their connection to the target) so as to permit the court to make the finding that remains required by Section 105(a)(3)(B). The pertinent change made by the Patriot Act here was to eliminate the requirement that the authorizing order in all cases *specify* in advance those third parties (e.g., wire carriers) who were directed to supply assistance in carrying out the order. *See* Pub. L. No. 107-56, § 206 (amending 50 U.S.C. § 1805(c)(2)(B)). Instead, the Patriot Act states that, if the court finds that "the actions of the target of the application may have the effect of thwarting the identification of a specified person," the order may require the cooperation of other such persons who have not been specified. *Id.* This modest change makes perfect sense: the prior third-party-

assistance specification requirement had the very obvious potential to allow targets to defeat surveillance simply by changing, for example, from one cell phone to another.

Against this backdrop, the amendment that would be made by Section 2 of the SAFE Act seems quite significant. Section 2 appears to be clear in saying that, to avoid the advance specification requirement for "facilities and places," it is *not* enough to have a detailed "description of the target"; one must know "the *identity* of the target" (emphasis added). What this means is that, even though the Government could describe in great detail a particular agent of a foreign power of whom they are aware, if they can't identify the person, then FISA surveillance must be limited to only those physical facilities that can be specified in advance. Moreover, this would remain true even though the Government could show (as it is required by Section 105(a)(3)(B) to show) that there is probable cause that "each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used" by the target. The marginal effect of Section 2 would thus appear to be that, even though a "John Doe" foreign agent can be shown regularly to engage in the practice of moving from one disposable cell phone to another, the Government could not be authorized to continue to stay with him unless each such facility had been specified in advance in the order. It is hard to discern why such a rule would be desirable.

- The Patriot Act makes more technologically neutral the statutes governing pen registers — devices to capture routing and signaling information, but not content. *See* Pub. L. No. 107-56, § 216, 115 Stat. at 288-90. These laws now clearly apply to both electronic communications and telephonic communications. And to take account of the specific privacy concerns raised about the use of government-installed programs to implement such orders — I

am referring to the "Carnivore" debate — the Act provides for judicial oversight by requiring detailed reporting to the court whenever such a government-installed program is used to implement a pen/trap order involving electronic communications. 18 U.S.C. § 3123(a)(3). Section 6 of the SAFE Act would sunset this provision, which seems hard to justify. Why would we want to have a legal regime in which the addressing information on an email is treated differently from the addressing information on a postal letter? (Although that appears to be the intent of this sunset provision, it is not entirely clear that repealing Section 216, without more, will have that effect.)

- The Patriot Act eliminates unwarranted and irrational disparities in prior law, which afforded different levels of protection to similar things. For example, prior law (at least in the view of some courts) afforded different levels of protection to Internet communications based upon whether the person used a cable company, as opposed to a telephone company, to reach the Internet. This sort of disparate treatment violates the principle of technological neutrality and is very hard to justify under any rational theory of appropriate law enforcement. The Patriot Act fixes this. *See* Pub. L. No. 107-56, § 211, 115 Stat. at 283-84.

- The Patriot Act allows a single federal district court to issue an order authorizing the installation of a pen register or trap and trace device "anywhere within the United States." Pub. L. No. 107-56, § 216(b)(1), 115 Stat. at 288-89. In light of the inherently interstate nature of electronic communications, and the number of entities that may be involved in transmitting them, a nationwide scope makes perfect sense. And there is little gain, if any, from a civil

liberties perspective, in requiring the Government to incur the shoe leather costs of getting separate orders in multiple districts.[1]

- Similarly, the Patriot Act properly recognizes the inherently interstate nature of electronic communications by allowing nationwide service of search warrants for electronic evidence. *Id.*, § 220.

- Title III — the wiretap statute — sets forth a number of stringent requirements that must be met before a court may issue an order authorizing a wiretap. One of the requirements is that the investigation must involve an offense that is on Title III's list of offenses that are eligible for wiretapping. 18 U.S.C. § 2516. The Patriot Act modestly expands this list — which already includes a variety of serious offenses such as money laundering and bank fraud — to include six terrorism offenses, unlawful possession of chemical weapons, and computer fraud and abuse. Pub. L. No. 107-56, §§ 201, 202, 115 Stat. at 278. In adding these offenses to the list of those eligible to be investigated by wiretapping, the Act leaves unchanged the full panoply of substantive protections provided by Title III. Moreover, the notion that there is a rational and defensible privacy interest in precluding wiretapping to investigate *terrorism* — while permitting it to be used to investigate, say, bribery in sports contests — is very difficult to

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[1] Some critics have complained that giving pen/trap orders nationwide scope confers too much discretion and opens up possibilities for serious abuse. These criticisms are unfounded. Businesses upon whom pen/trap orders are served, if they are not already "specifically named" in the order, are entitled to request that the government "provide written or electronic certification that the order applies" to them. 18 U.S.C. § 3123(a)(1). Additionally, the Act states that providers or other persons who "furnish[] facilities or technical assistance" in the execution of such orders "shall be reasonably compensated for such reasonable expenditures incurred in providing such facilities or assistance." Pub. L. No. 107-56, § 222, 115 Stat. at 292-93.

defend. Law enforcement should have at least the same tools to fight terrorism that it has to fight organized crime.

- The Patriot Act eliminates the anomalous disparity in prior law between the standards for obtaining stored email and those for obtaining stored voicemail. Under prior law, voicemail stored with a third party required a full-blown Title III order, but stored email (and voicemail on the criminal's home answering machine) could be obtained with a regular search warrant. Again, from a technological-neutrality perspective, this didn't make a lot of sense. The Patriot Act amends the law so that a search warrant will do in such cases. Pub. L. No. 107-56, § 209, 115 Stat. at 283.

- The Patriot Act further eliminates the loophole in prior law under which *hackers* were arguably protected by the wiretap law from law-enforcement monitoring authorized by the operators of the computers they invade. *Id.*, § 217.

These provisions of the Patriot Act — a statute passed by overwhelming bipartisan majorities in both houses — are just a few illustrations of how the Act properly updates the law while respecting and preserving our freedoms.

I would like to make one final point. Some have criticized that many of the Patriot Act's reforms are not specifically limited so as to apply only in terrorism cases. Once again, I think this criticism reflects a failure to appreciate what sensible policy in this area entails. For example, if the principle of technological neutrality makes general sense, there is no reason why it should be limited to terrorism cases. Is it a rational privacy policy to say that persons committing *bank fraud* should have a leg up over law enforcement if they use one communications technology rather than another? The fact that terrorism concerns motivated the

effort to fix the problem in this area does not mean that the problem should not be fixed in a comprehensive and rational manner.

In closing, the Patriot Act is an invaluable and landmark piece of legislation that has worked to protect American lives while preserving American liberties.

I would be pleased to answer any questions the Committee might have on this subject.

STATEMENT OF JAMES B. COMEY
DEPUTY ATTORNEY GENERAL
OF THE UNITED STATES
BEFORE THE
UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

"A Review of Counter-Terrorism Legislation and Proposals"

September 22, 2004

Good morning Chairman Hatch, Senator Leahy and Members of the Committee. Thank you for giving me the opportunity to appear before you today to discuss the vital tools of the PATRIOT Act and the efforts of the Department of Justice in the war on terror. I am grateful to you and to this Committee for your strong support of the Department of Justice. The Department has had many successes in the war on terror, in battling corporate fraud, in stemming violent gang and drug crime, and in preserving the civil rights and liberties of Americans. That success has come from the commitment of the people of the Department, from strong leadership and from your dedication to our cause.

Since assuming my current post, I've met with hundreds of the Department's employees to talk about their work and their efforts to help safeguard the lives and liberties of Americans. It's been said by many wiser than I that we live in challenging times. Fortunately, at the Department of Justice, our people are up to the challenge. They are simply the best of the best. These are people who chose public service and they are committed to serving the cause of justice.

The Department of Justice's number one priority continues to be the prevention, investigation, and prosecution of terrorist activities against U.S. citizens and U.S. interests. Following the tragedy of September 11, 2001, Congress overwhelmingly passed, and on October 26, 2001, the President signed, the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act" ("PATRIOT Act" or "Act"). This legislation provided our nation's law enforcement, national defense, and intelligence personnel with enhanced and vital new tools to prevent future terrorist attacks and bring terrorists and other dangerous criminals to justice. Three years have passed since the catastrophic attacks of September 11, 2001, but the danger is still clear. Survival and success in this very real war on terrorism demand that the Department of Justice continuously improve its capabilities to protect Americans. The United States of America is winning this war on terrorism with unrelenting focus and unprecedented cooperation. For example, the Department of Justice secured the convictions of nine individuals in the Virginia jihad case on terrorism-related charges, including conspiracy to levy war against the United States and conspiracy to provide material support to the Taliban and Lashkar-e-Taiba. As the Attorney General stated, "[those] convictions are a stark reminder that terrorist organizations are active in the United States. We will not allow terrorist groups to exploit America's freedoms for their murderous goals."

As our work continues, a debate also continues. Much of that debate surrounds civil liberties after September 11th -- and particularly the PATRIOT Act. People are curious about how the PATRIOT Act impacts them. That is in part why we are all here today – because as

Henry Clay once noted, "[t]here is nothing wrong with America that cannot be cured with what is right in America." Good people will always disagree about policy issues, particularly when they touch on the powers of government. Indeed, all citizens should question the power of government and demand explanations. But because I believe the PATRIOT Act is wholly constitutional and just plain smart, I feel strongly these tools should remain on the books for our prosecutors and agents to use. Having served as a prosecutor, I've used many of those tools and know how valuable they are. I firmly believe that if the American people understood how we use these important provisions, their reaction would be the reaction I've gotten all across the country, "I certainly would not want to take that out of America's toolbox."

What the PATRIOT Act did was to equip federal law enforcement and intelligence officials with the tools they needed to mount a seamless, coordinated campaign against our nation's terrorist enemies. The PATRIOT Act eased legal restraints that impaired law enforcement's ability to gather, analyze, and share critical terrorism-related intelligence information – the kind of information that is needed to prevent terrorist attacks from happening in the first place. The Act also enhanced America's criminal laws against terrorism and clarified that existing laws against terrorism apply to the new types of attacks planned by al Qaeda and other international terrorist organizations.

As I've discussed privately with a number of Senators and Members of Congress, the

PATRIOT Act did something absolutely critical to our national security: it broke down "the wall" between the intelligence analysts responding to al Qaida and other terrorist threats and criminal investigators responding to those same threats. That has changed our world and has made us immeasurably safer. The PATRIOT Act authorized government agencies to share intelligence so that a complete mosaic of information could be compiled to understand better what terrorists might be planning and to prevent attacks from happening. Prior law and policy sharply limited the ability of law enforcement and intelligence agents to share information, which severely hampered terrorism investigators' ability to "connect the dots." In fact, you had situations in which FBI criminal and intelligence investigators, working in the same building and on the same matters, couldn't share information with one another. The PATRIOT Act, however, brought down this "wall" and greatly enhanced foreign intelligence sharing among federal law enforcement and national security personnel, intelligence agencies, and other entities entrusted with protecting the nation from acts of terrorism. This increased ability to share information has been invaluable to the Department in terrorism investigations and has directly led to numerous arrests, prosecutions, and convictions in terrorism cases. In the last month, for example, the Department announced indictments in Dallas, Chicago, and Miami that were significantly aided by the information sharing changes of the PATRIOT Act.

The removal of the "wall" separating intelligence and law enforcement personnel also played a crucial role in the Department's successful dismantling of a Portland, Oregon terror cell, known as the "Portland Seven." Had it not been for the effective new tools of the PATRIOT

Act, this case may have been known as the "Portland One." Here's what happened: Members of this terror cell had attempted to travel to Afghanistan in 2001 and 2002 to defend the Taliban and al Qaeda by taking up arms against coalition forces. Utilizing sections 218 and 504 of the PATRIOT Act, however, the FBI was able to conduct FISA surveillance of one of the suspects. FBI agents learned that he had received orders from an international terrorist group to attack Jewish targets. Agents were able to share this information with prosecutors and keep them apprised of their surveillance activities. This gave prosecutors the confidence not to prematurely arrest the suspect while they continued to gather evidence on the other members in the terrorist cell. Ultimately, prosecutors were able to collect sufficient evidence to charge seven defendants. Six of the defendants were convicted and sentenced to prison terms ranging from three to eighteen years. These terrorists sit in prison cells today, and the PATRIOT Act helped us to put them there.

Section 213 of the PATRIOT Act codified and made nationally consistent an existing and important tool by expressly authorizing courts to issue delayed notification search warrants. Court-authorized delayed-notice search warrants are a vital aspect of the Justice Department's strategy of prevention - - detecting and incapacitating terrorists before they are able to strike. In some cases, if criminals are tipped off too early to an investigation, they might flee, destroy evidence, intimidate or kill witnesses, cut off contact with associates, take other action to evade arrest, or accelerate the execution of a terrorist plot. Under the Act, courts can delay notice only when immediate notification may result in death or physical harm to an individual, flight from

prosecution, evidence tampering, witness intimidation, or serious jeopardy to an investigation.

The Department uses section 213 to investigate a wide variety of serious crimes, including domestic and international terrorism, drug trafficking, organized crime and child pornography. Today, the Department is delivering to the House and Senate a report entitled, "Delayed Notice Search Warrants: a Vital and Time-Honored Tool for Fighting Crime." The report sets forth how delayed-notice search warrants actually work, why they are critical to the success of criminal investigations of all kinds, and what setbacks law enforcement would suffer if this well-established and important authority were limited or eliminated. Please let me bring two examples from our report to your attention.

First, in *United States v. Odeh*, a recent narco-terrorism case, a court issued a section 213 warrant to search the contents of an envelope that had been mailed to the suspect of an investigation. The search confirmed that the suspect was operating a hawala money exchange used to funnel money to the Middle East, including to an individual associated with someone accused of being an operative for Islamic Jihad in Israel. The delayed-notice provision allowed investigators to conduct the search without fear of compromising an ongoing wiretap on the suspect and several of his confederates. The suspect was later criminally charged and notified of the search warrant.

A delayed-notice warrant issued under section 213 was of tremendous value in Operation

Candy Box, a multi-jurisdictional Organized Crime and Drug Enforcement Task Force (OCDETF) investigation targeting a Canadian-based ecstasy and marijuana trafficking organization. In 2004, investigators learned that an automobile loaded with a large quantity of ecstasy would be crossing the U.S.-Canadian border en route to Florida. On March 5, 2004, after the suspect vehicle crossed into the United States near Buffalo, DEA agents followed the vehicle until the driver stopped at a restaurant just off the highway. Thereafter, one agent used a duplicate key to enter the vehicle and drive away while other agents spread broken glass in the parking space to create the impression that the vehicle had been stolen. A search of the vehicle revealed a hidden compartment containing 30,000 ecstasy tablets and ten pounds of high-potency marijuana. Because investigators were able to obtain a section 213 warrant, the drugs were seized, the investigation was not jeopardized, and over 130 individuals were arrested on March 31, 2004 in a two-nation crackdown. Without the delayed-notification search warrant, agents would have been forced to reveal the existence of the investigation prematurely, which almost certainly would have resulted in the flight of many of the targets of the investigation..

Section 215 of the PATRIOT Act allows the Foreign Intelligence Surveillance Court to order production of business records. Under long-standing authority, grand juries have issued subpoenas to many varieties of businesses, including libraries and bookstores, for records relevant to criminal inquiries. The PATRIOT Act authorized the FISA Court (or a designated magistrate) to issue similar orders in national security investigations. And while these judicial orders could be issued to bookstores or libraries, section 215 does not single them out (though,

historically, terrorists and spies *have* used libraries to plan and carry out activities that threaten our national security). In fact, obtaining business records is a long-standing law enforcement tactic. Grand juries have for years issued subpoenas to all manner of businesses, including bookstores and libraries, for records relevant to criminal inquiries. In the 1990 Zodiac gunman investigation, for example, a New York grand jury subpoenaed records from a library in Manhattan. Investigators believed that the gunman was inspired by an occult Scottish poet and wanted to determine who had checked out the poet's books. More recently, in 1997, in the Gianni Versace murder case, a Florida grand jury subpoenaed records from public libraries in Miami Beach.

The PATRIOT Act has also strengthened the nation's criminal laws against terrorism, providing prosecutors with a solid foundation to pursue what has become the Department's highest priority. A critical element in our battle against terrorism is to prevent the flow of money and other material resources to terrorists and terrorist organizations. By using the statutes Congress provided against material support of terrorism, the Department has successfully disrupted terrorist planning at the earliest possible stages, well before such violent plans can become reality. Utilizing the terrorist financing and material support provisions created by Congress, the Department has since 9/11 charged 84 individuals and has obtained 35 convictions or guilty pleas. In addition, using the material support statutes, the Department has obtained convictions yielding lengthy prison sentences, as in the case of Mohammed Hammoud, the main defendant in the Charlotte Hizballah case, who was ultimately sentenced to 155 years in federal

prison. (Also, please let me take the opportunity here to note that the Department testified last week before Senator Kyl's Subcommittee on Terrorism, Technology and Homeland Security in support of S. 2679, the "Tools to Fight Terrorism Act of 2004," which would, among other things, improve existing law by clarifying several aspects of the material support statutes.)

The PATRIOT Act also removed a number of significant legal obstacles that prevented law enforcement from effectively investigating terrorism and related criminal activity. It has greatly improved the Department's ability to disrupt, weaken, thwart, and eliminate the infrastructure of terrorist organizations, to prevent or thwart terrorist attacks, and to punish perpetrators of terrorist acts. In the past, investigators had to waste precious time petitioning multiple judges in multiple districts for search warrants. But speed can help save lives. That's why section 219 of the PATRIOT Act streamlined this process, making nationwide search warrants available to law enforcement in terrorism cases. Law enforcement already has used this authority on numerous occasions. For example, a noteworthy use of section 219 occurred during the anthrax investigations following 9/11, when FBI agents applied for a warrant to search the premises of America Media, Inc., in Boca Raton, Florida – the employer of the first anthrax victim. Using section 219, agents were able to obtain a search warrant from the federal judge in Washington, DC who was overseeing the wide-ranging investigation. Investigators saved valuable time by petitioning the federal judge who was most familiar with the pending case.

I would also like to discuss some of the critical protections for civil liberties encompassed

within the PATRIOT Act and long-standing law. The Act provides for ample judicial, congressional and public oversight to ensure that the civil rights and civil liberties of all Americans are protected. First, the PATRIOT Act preserves the historic role of America's courts by ensuring that the vital role of judicial oversight is not diminished. For example, the provision for delayed notice for search warrants requires a judge to approve not only the search -- but also the delay in notification. In addition, under the Act, investigators cannot obtain a FISA pen register to identify the phone numbers of a suspected terrorist's possible co-conspirators unless the prosecutor first applies for and receives permission from federal court. Furthermore, a court order is required to compel production of business records in national security investigations.

Second, the PATRIOT Act respects important congressional oversight by keeping in place important reporting requirements on the Department. In particular, semiannually the Attorney General is required to report to Congress the number of times section 215 has been utilized, in addition to the long-standing requirement to inform Congress concerning all electronic surveillance under the Foreign Intelligence Surveillance Act. Under Section 1001 of the PATRIOT Act, Congress receives a semiannual report from the Department's Inspector General detailing any abuses of civil rights and civil liberties by employees or officials of the Department of Justice. It is important to point out that just last week the Inspector General reported to Congress that, with the possible exception of one matter, "none" of the complaints alleging misconduct by Department employees are related to use of a provision of the PATRIOT Act. In fact, in all his reports since the time the PATRIOT Act was enacted, the Inspector

General has yet to report a single civil rights violation related to use of the Act.

The PATRIOT Act fosters public oversight of the Department. In addition to the role of the Inspector General to review complaints alleging abuses of civil liberties and civil rights, the Act provides a cause of action for individuals aggrieved by any willful violation of Title III or certain sections of FISA. To date, no civil actions have been filed under this provision.

And just last month, the President went another step further and did even more. In keeping with one of the recommendations in the 9/11 Commission's report, he created the President's Board on Safeguarding Americans' Civil Liberties within the executive branch. It includes officials such as the new Privacy Officer and the Officer for Civil Liberties at the Department of Homeland Security. Because of the authorities held by the Board's members, such as the ability to bring charges against civil rights violators, the Board's members have the power to identify and address civil liberties problems quickly and decisively. And I am pleased to note that the President designated the Deputy Attorney General as the Chair of the new Board. I convened the Board for its first meeting earlier this month.

I believe that, having considered the tools used by law enforcement in the war on terror, one must conclude that enactment of the PATRIOT Act was not rushed; it actually came too late. As the Attorney General stated on November 8, 2001, the Department of Justice has been called to "the highest and most noble form of public service—the preservation of American lives and

liberty." Now, three years after the attacks of September 11, the Department continues to respond to this call with enthusiasm, and with a profound respect for this country's tradition of civil rights and liberties.

Mr. Chairman, thank you for holding this important hearing today. I hope that the work we do today, and the work that we will continue to do, will help the American people understand how vital the tools of the PATRIOT Act are in our efforts to root out terrorism and keep Americans safe.

I am pleased to answer any questions you may have. Thank you.

U.S. Department of Justice

Office of the Deputy Attorney General

Washington, D.C. 20530

July 6, 2004

The Honorable J. Dennis Hastert
Speaker
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

The Department of Justice is pleased to provide information about section 215 of the USA PATRIOT Act ("PATRIOT Act"), an important authority afforded to law enforcement and intelligence authorities when Congress overwhelmingly passed the Act almost three years ago. It is critical that Congress's decision whether to preserve this vital tool in the war on terror be informed by reason, rather than rhetoric. We would oppose any amendment that would unduly restrict our ability to compel the production of records relevant to sensitive national security cases.

Section 215 of the PATRIOT Act provides a useful tool for catching terrorists and spies by specifically authorizing the Foreign Intelligence Surveillance Court ("FISA court") to require a person or organization to produce "any tangible things" to investigators in international terrorism and espionage investigations. These are the same types of materials that prosecutors have long been able to obtain with grand jury subpoenas in criminal investigations. However, section 215 applies in a much narrower set of circumstances than do grand jury subpoenas. Section 215 can only be used "to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution." 50 U.S.C. § 1861(a)(1).

Further, contrary to misleading rhetoric about section 215, it does not empower FBI agents to obtain records without a court order. Rather, section 215 can be used to obtain documents only with an order from the FISA court. In no circumstance can agents use this authority unilaterally to compel anyone to turn over their records. Thus law enforcement's use of section 215 requires more scrutiny than grand jury subpoenas, which do not need to be approved in advance by a judge.

In addition to the requirement of FISA court approval, section 215 establishes other important safeguards. For instance, section 215 provides for thorough congressional oversight. On a semi-annual basis, the Attorney General is required to "fully inform" Congress of the number of times agents have sought a court order under section 215, as well as the number of times such requests were granted, modified, or denied during the preceding six month period. *See* 50 U.S.C. § 1862.

On September 18, 2003, the Attorney General declassified the fact that as of that date, section 215 of the PATRIOT Act had not been used. The fact that an authority may be used infrequently does not denigrate its importance; to the contrary, it is important that the authority exists for situations in which a section 215 order could be critical to the success of an investigation. Just as a police officer knows that his firearm may be invaluable in preventing crime, even if he cannot predict when he might need to draw it from his holster, section 215 provides investigators an authority they may find crucial to stop a terrorist plot.

Indeed, there are a number of situations in which the ability to access documents pursuant to a section 215 order could be critical to an international terrorism or espionage investigation, particularly in the early stages of an investigation when officers are trying to develop leads. For example, investigators might find important information about a terrorist's or spy's activities or contacts in employment or apartment leasing records, without which the investigation might run into a dead-end.

Section 215 has been attacked for its potential application to libraries, with some critics suggesting that libraries should be exempted from it or that the provision should be repealed altogether. These critics ignore statutory context, well-established grand jury practice, and the reality of the terrorist threat. First, although a section 215 order could be issued to a bookstore or library if it possessed records relevant to an espionage or international terrorism investigation, the provision does not single them out or even mention them. And such an order would require court approval in any event, ensuring an independent check on law enforcement.

Second, libraries and bookstores have never been exempt from similar investigative authorities. Prosecutors have always been able to obtain records for criminal investigations from bookstores and libraries through grand jury subpoenas. For instance, in the 1997 Gianni Versace murder case, a Florida grand jury subpoenaed records from public libraries in Miami Beach. Similarly, in the 1990 Zodiac gunman investigation, a grand jury in New York subpoenaed library records after investigators came to believe that the gunman was inspired by a Scottish occult poet and wanted to learn who had checked out that poet's books.

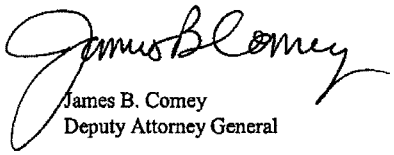
Finally, bookstores and libraries should not be carved out as safe havens for terrorists and spies. We know, for example, that spies have used public library computers to do research to further their espionage and to communicate with their co-conspirators. For example, Brian Regan, a former TRW employee working at the National Reconnaissance Office, who recently

was convicted of espionage, extensively used computers at five public libraries in Northern Virginia and Maryland to access addresses for the embassies of certain foreign governments. FBI agents watched his use of the computers over his shoulder, then used the web browser's "back" button to view the web pages he visited. Though the Regan prosecution did not involve the use of section 215, this evidence was important during his trial.

Simply put, section 215 of the PATRIOT Act provides law enforcement an important tool for investigating and intercepting terrorism, and at the same time establishes robust safeguards to protect law-abiding Americans. We hope this information assists you as you decide whether to preserve fully the Government's ability to prosecute the war on terror.

Thank you for the opportunity to present our views. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,



James B. Comey
Deputy Attorney General

Office of the Deputy Attorney General
Washington, D.C. 20530

November 4, 2004

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

On September 22, 2004, I testified before your committee regarding the Justice Department's use and implementation of the USA PATRIOT Act. Thank you for the opportunity to testify. I believe our discussion elevated the dialogue regarding the important tools given to federal law enforcement in the Patriot Act. I sincerely hope that you and the other Members of the Committee found the hearing useful as well.

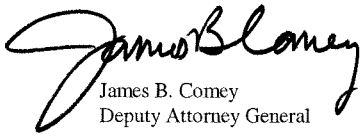
I reviewed my testimony and wish to clarify one statement. During the hearing, I stated, "[W]e investigate a lot of innocent people and we don't want them smeared. We also investigate a lot of guilty people; we don't want them to know we are coming." I think that statement could be misconstrued if taken out of context, so please permit me to explain.

We take seriously the prosecutorial, investigative, and preventive authorities entrusted to us. Through our investigative agencies, we conduct thousands of investigations each year. In any criminal investigation, it is vital that our agents and prosecutors act quickly and pursue diligently information of potential criminal or terrorist activity.

On occasion, investigatory leads leave us with insufficient grounds for prosecution or turn out to be groundless. In these cases, we quickly close an investigation and redirect our limited and valuable resources to other matters. That is why we proceed with caution and discretion in our work and why tools such as non-disclosure orders and delayed notification search warrants are so important. It is also why the Department routinely refuses to confirm or deny the existence of ongoing investigations and refuses to identify individuals who are subjects or targets of grand jury inquiries.

Mr. Chairman, I appreciate being able to present this additional information. With your approval, I ask that this letter be made a part of the hearing record. If I can be of further service to you or Members of the Committee, please do not hesitate to call on me.

Sincerely,



James B. Comey
Deputy Attorney General

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

February 23, 2004

The Honorable Orrin G. Hatch
Chairman
Senate Committee on the Judiciary
104 Hart Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

We write to request that you schedule a hearing in the Judiciary Committee as soon as possible on S. 1709, the Security and Freedom Ensured (SAFE) Act, a narrowly-tailored, bipartisan bill that would amend several provisions of the USA PATRIOT Act (P.L. 107-56). We would also like to take this opportunity to respond to concerns the Justice Department has raised regarding the SAFE Act.

We voted for the PATRIOT Act and believe now, as we did then, that the PATRIOT Act made many reasonable and necessary changes in the law. However, the PATRIOT Act contains several provisions that create unnecessary risks that the activities of innocent Americans may be monitored without adequate judicial oversight.

This concern is shared by a broad coalition of organizations and individuals from across the political spectrum. In fact, 257 communities in 38 states—representing approximately 43.5 million people—have passed resolutions opposing or expressing concern about the PATRIOT Act. Groups as politically diverse as the ACLU and the American Conservative Union have also endorsed changes in the law.

In his State of the Union address, the President called for reauthorization of the PATRIOT Act. Given the bipartisan concerns about the most controversial provisions of the law, however, this will not happen unless these provisions are revisited. Congress, in fact, made oversight of the PATRIOT Act implicit by sunsetting over a dozen sections of the bill at the time of its passage.

S. 1709, the SAFE Act, was drafted with this oversight in mind. It was drafted to clarify and amend in a minor way the PATRIOT Act's most troubling provisions so that whole or even piecemeal repeal of the law would be unnecessary. It was drafted to safeguard the liberties of law-abiding citizens while preserving the law enforcement authorities essential to a successful war on terror.

The Administration unfortunately has threatened to veto the SAFE Act. The Justice Department argues that the SAFE Act would "eliminate" some PATRIOT tools and "make it even more difficult to mount an effective anti-terror campaign than it was before the PATRIOT Act was passed."

We respectfully disagree with the Justice Department's objections to our reasoned and measured effort to mend the PATRIOT Act. The SAFE Act neither repeals any provision of the PATRIOT Act, nor impedes law enforcement's ability to investigate terrorism by amending pre-PATRIOT Act law. Rather, the SAFE Act retains the expanded powers created by the PATRIOT Act while restoring important checks and balances on powers including roving wiretaps, "sneak and peek" warrants, compelled production of personal records, and National Security Letters.

Roving Wiretaps

The SAFE Act would place reasonable checks on the use of roving wiretaps for intelligence purposes. Normally, when the government seeks a warrant authorizing a wiretap, its application must specify both the target (the individual) and the facilities (the telephone or computer) that will be tapped. Roving wiretaps, which do not require the government to specify the facilities to be tapped, are designed to allow law enforcement to track targets who evade surveillance by frequently changing facilities. Before the PATRIOT Act, roving wiretaps were only permitted for criminal, not intelligence, investigations. The PATRIOT Act authorized the FBI to use roving wiretaps for intelligence purposes for the first time.

Using roving wiretaps for intelligence purposes is important. Unfortunately, the PATRIOT Act did not include sufficient checks to protect innocent Americans from unwarranted government surveillance. Under the PATRIOT Act, the FBI is not required to determine whether the target of the wiretap is present at the place being wiretapped, as it is for criminal wiretaps.

The Intelligence Authorization Act of 2002 made another dramatic change in the law. The FBI is now permitted to obtain a "John Doe" roving wiretap for intelligence purposes, an authority not authorized in any other context. A "John Doe" roving wiretap does not specify the target of the wiretap or the place to be wiretapped. In other words, the FBI can obtain a wiretap without saying whom they want to wiretap or where they want to wiretap.

The Justice Department defends this authority by noting that even if the target of the wiretap is not identified, a description of the target is required. The law does not require the description to include any specific level of detail, however. It could be as broad as, for example, "white man" or "Hispanic woman." Such a general description does not adequately protect innocent Americans from unwarranted government surveillance.

The SAFE Act would retain the PATRIOT Act's authorization of roving wiretaps for

intelligence purposes but impose reasonable limits on this authority. Law enforcement would be required to ascertain the presence of the target before beginning surveillance and identify either the target of the wiretap or the place to be wiretapped. The FBI would not be able to obtain "John Doe" roving wiretaps, thereby ensuring that the government does not surveil innocent Americans who are not the target of the wiretap.

The Justice Department argues that "John Doe" roving wiretaps are necessary because there may be circumstances where the government knows a target's physical description but not his identity. If the government is tracking a suspect closely enough to utilize a wiretap, it is unlikely his or her identity will be unknown to them. In this unusual circumstance, the SAFE Act would permit the issuance of a "John Doe" wiretap which would not identify the target but rather the facilities to be wiretapped. If the government wished to obtain a roving wiretap, they could do so by identifying the target. It is important to note that the government is not required to identify the target by his or her actual name. The government, for example, could identify the target by an alias. This level of detail should be required to make clear who is being targeted to prevent innocent people with no relationship to the target from being spied upon.

"Sneak and Peek" Searches

The SAFE Act would impose reasonable limits on the issuance of delayed notification (or "sneak and peek") search warrants. A sneak and peek warrant permits law enforcement to conduct a search without notifying the target until sometime after the search has occurred. The Justice Department argues that sneak and peek warrants for physical evidence "had been available for decades before the PATRIOT Act was passed," but such warrants were never statutorily authorized before the passage of the PATRIOT Act. Too, though some courts have permitted sneak and peek warrants in limited circumstances, the Supreme Court has never ruled on their constitutionality.

In codifying sneak and peek warrants, Section 213 of the PATRIOT Act did not adopt limitations on this authority that courts had recognized. For example, courts have required a presumptive seven-day limit on the delay of notice. Section 213 requires notice of the search within "a reasonable period," which is not defined. According to the Justice Department, this has resulted in delays of up to 90 days, and of "unspecified duration lasting until the indictment was unsealed."

Section 213 authorizes issuance of a sneak and peek warrant where it finds that providing immediate notice of the warrant would have an "adverse result," as defined by 18 U.S.C. Section 2705. Section 2705, which allows delayed notice for searches of stored wire and electronic communications, defines adverse result very broadly, including any circumstances "otherwise seriously jeopardizing an investigation or unduly delaying a trial." This catch-all provision could arguably apply in almost every case. A sneak and peek search of a home involves a much greater degree of intrusiveness than a seizure of wire or electronic communications, so this broad standard for delaying notice is inappropriate. Section 213 also does not limit delayed notification warrants to terrorism

investigations, and unlike many surveillance-related PATRIOT Act provisions, does not sunset.

Last year, an overwhelming majority in the House of Representatives voted to repeal Section 213. The SAFE Act would not go nearly this far. It would place modest limits on the government's ability to obtain sneak and peek warrants, while still permitting broad use of this authority.

The SAFE Act would still authorize a sneak and peek warrant in a broad set of specific circumstances: where notice of the warrant would endanger the life or physical safety of an individual, result in flight from prosecution, or result in the destruction of or tampering with the evidence sought under the warrant. Importantly, it would eliminate the catch-all authorization of sneak and peek authority in any circumstances "otherwise seriously jeopardizing an investigation or unduly delaying a trial." It would require notification of a covert search within seven days, but would authorize unlimited additional seven-day delays so long as any circumstance that would justify a delay of notice continues to exist. According to the Justice Department, "the most common period of delay" under Section 213 is seven days, so a seven-day limit with court-authorized extensions is not overly onerous but would prevent abuse.

The Justice Department states that the SAFE Act imposes restrictions on the issuance of sneak and peek warrants that could tip off terrorists, and "thus enable their associates to go into hiding, flee, change their plans, or even accelerate their plots." To the contrary, the SAFE Act would authorize issuance of a sneak and peek warrant in all of these circumstances. If notice of the warrant could lead terrorists or their associates to hide or flee, a court could delay notice to prevent flight from prosecution. If notice of the warrant could lead terrorists or their associates to change or accelerate their plots, a court could delay notice to prevent the resulting danger to life or physical safety. The Constitution protects the sanctity of our homes, and we should only allow this sanctity to be breached in such serious circumstances.

Compelled Production of Personal Records

The SAFE Act would place reasonable checks on the government's authority to compel production of library and other personal records. Section 215 of the PATRIOT Act permits law enforcement to obtain such records without individualized suspicion and with minimal judicial oversight. Before the PATRIOT Act, FISA authorized the FBI to seek a court order for the production of records from four types of businesses: common carriers, public accommodations facilities, physical storage facilities, and vehicle rental facilities. In order to obtain such records, the FBI was required to state specific and articulable facts showing reason to believe that the person to whom the records relate was a terrorist or a spy. If a court found that there were such facts, it would issue the order.

Under FISA as modified by Section 215, the FBI is authorized to compel production of "any tangible things (including books, records, papers, documents, and other items)" not

just records, from any entity, not just the four types of businesses previously covered. The FBI is only required to certify that the records are "sought for" an international terrorism or intelligence investigation, a standard even lower than relevance. The FBI need not show that the documents relate to a suspected terrorist or spy. If the FBI makes the required certification, the court no longer has the authority to examine the accuracy of the certification or ask for more facts to support it; the court "shall" issue the order. Defenders of Section 215 frequently assert that the issuance of an order for records requires court approval, but this type of court approval amounts to little more than a rubber stamp. The PATRIOT Act gives the government too much power to seize the personal records of innocent Americans who are not suspected of involvement in terrorism or espionage.

The SAFE Act retains the PATRIOT Act's expansion of the business records provision to cover "any tangible things" and any entity. It would reinstate the pre-PATRIOT Act standard for compelling production of business records, which requires individualized suspicion. The FBI would be required to certify that there are specific and articulable facts giving reason to believe that the person to whom the records relate is a terrorist or a spy. A court would be required to issue the order if it found that there are such facts. The SAFE Act would thus prevent broad fishing expeditions, which waste scarce government resources, are unlikely to produce useful information, and can infringe upon privacy rights.

The Justice Department argues that this standard is inappropriate because it is higher than the relevance standard under which federal grand juries can subpoena records. This ignores some crucial distinctions. The recipient of a grand jury subpoena can challenge the subpoena in court and tell others, including those whose records are sought, about the subpoena. In contrast, the recipient of a Section 215 subpoena cannot challenge the subpoena in court and is subject to a gag order. The scope of a federal grand jury is limited to specific crimes, while an intelligence investigation is not so limited.

Finally, it is very important to note that, in the more than two years since the passage of the PATRIOT Act, Section 215 has never been used. If the authority has never been used during this time of great national peril, it is difficult to understand how imposing some reasonable checks on it could cripple the war on terrorism. Indeed, the government offers no examples, real or imagined, in which the SAFE Act's revisions of Section 215 would hinder counterterrorism efforts.

National Security Letters

The SAFE Act would impose reasonable limits on the issuance of National Security Letters (NSLs). Section 505 of the PATRIOT Act allows the FBI to use NSLs to obtain personal records without individualized suspicion. An NSL is a document signed by an FBI agent requiring disclosure of financial, credit and other personal information and requiring the recipient not to disclose the request to the individual whose records are being sought. It does not require judicial or grand jury approval.

Before the PATRIOT Act, the FBI could issue an NSL to obtain records from a wire or electronic communication service provider by certifying that it had reason to believe that the person to whom the records relate is a terrorist or a spy. The approval of FBI headquarters was required.

Section 505 of the PATRIOT Act allows the FBI to issue an NSL simply by certifying that the records are "sought for" a terrorism or intelligence investigation, regardless of whether the target is a suspect. Headquarters approval is no longer required. Unlike many other surveillance-related PATRIOT Act provisions, the expanded NSL authority does not sunset.

The SAFE Act would retain the PATRIOT Act's lower standard for the issuance of NSLs and its delegation of issuing authority to field offices. It would simply clarify that a library is not a "wire or communication service provider," which from the plain meaning of the words, it is not. The FBI could still obtain information regarding e-mails or other communications that took place at libraries by issuing an NSL to the library's wire or communication service provider.

The Justice Department states that the SAFE Act would "extend a greater degree of privacy to activities that occur in a public place than to those taking place in the home." We disagree. The SAFE Act would simply ensure that the FBI issues the NSL to the service provider, which is the appropriate recipient, rather than a community library, which is ill-equipped to respond to such a request.

Expanding the Sunset Clause

The SAFE Act would expand the sunset clause of the PATRIOT Act to ensure Congress has an opportunity to review provisions of the bill that greatly expand the government's authority to conduct surveillance on Americans. Many of the PATRIOT Act's surveillance provisions sunset on December 31, 2005. The SAFE Act would sunset four additional surveillance provisions: Sections 213, 216, 219, and 505.

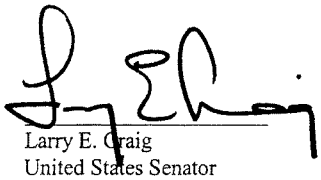
We have already discussed Sections 213 (sneak and peek warrants) and 505 (national security letters). Section 216 allows the use of surveillance devices known as pen registers and trap and trace devices to gather transactional information about electronic communications (e.g., e-mail) if the government certifies the information likely to be gathered is "relevant" to an ongoing criminal investigation. The information the government gathers is "not to include the contents" of communications, but content is not defined. Section 219 permits a federal judge in any district in the country in which "activities related to terrorism may have occurred" to issue a nationwide search warrant in a terrorism investigation. The target of such a search warrant has no ability to challenge the warrant in their home district. The SAFE Act would simply give Congress an opportunity to assess the effectiveness of these four provisions before deciding whether or not to reauthorize them.

The Justice Department argues that Congress should not expand the sunset to these authorities because they will all be needed by the FBI for "the foreseeable future." Even if this is true, it is no reason not to give Congress the chance to review the usefulness of these powers. If they are needed for the fight on terrorism, we will surely renew them.

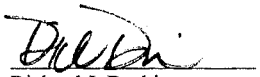
Throughout American history, during times of war, civil liberties have been restricted in the name of security. We therefore have the responsibility to proceed cautiously. During the Civil War, President Lincoln suspended habeas corpus, and during World War II, President Roosevelt ordered the detention of Japanese Americans in internment camps. We must be vigilant in our defense of our freedoms. But we also must ensure that law enforcement has sufficient authority to combat the grave threat of terrorism. We must strike a careful balance between the law enforcement power needed to combat terrorism and the legal protections required to safeguard American liberties. That is what the SAFE Act would do.

While we are disappointed that the Administration has expressed disagreement with the SAFE Act, we view this as an opportunity for increased public discussion of one of the most important issues of our day. Accordingly, we request that you schedule a hearing on the SAFE Act as soon as possible. Thank you for your time and consideration.

Sincerely,



Larry E. Craig
United States Senator



Richard J. Durbin
United States Senator

CC: The Honorable Patrick Leahy, Ranking Member, Committee on the Judiciary
The Honorable Bill Frist, Majority Leader
The Honorable Tom Daschle, Minority Leader

DRUG ENFORCEMENT ADMINISTRATION

OFFICE OF NATIONAL DRUG CONTROL POLICY

July 6, 2004

The Honorable J. Dennis Hastert
Speaker
United States House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

Because court-authorized delayed-notice search warrants are such an important tool in combating narcotics trafficking, we write to express our concern regarding the misconceptions surrounding this important law-enforcement tool. We appreciate the resources and authority Congress has provided us over the years to disrupt the market for illegal drugs. We believe that proposals to repeal or limit law enforcement's ability to utilize court-authorized delayed-notice search warrants would be a step in the wrong direction and would seriously impair our efforts to combat drug trafficking. This issue is of such importance that last year the Attorney General indicated that the President's senior advisors would recommend that he veto legislation that would have eliminated the availability of this tool. We have enclosed a copy of that letter for your review.

Delayed-notice search warrants have received increased public attention in the past two years, since enactment of the USA PATRIOT Act. Section 213 of the USA PATRIOT Act established a national standard for when a judge, in issuing a search warrant, may authorize law enforcement to delay notice to the person whose property is to be searched. This letter explains the legal standards underpinning the use of this tool and explains how it has helped in actual investigations in which the inability to delay notice might have resulted in drugs reaching our neighborhoods or jeopardized the arrest of dangerous drug dealers.

First, the authority to delay notice of a search or seizure is not a new authority, nor was it created when Congress overwhelmingly passed the USA PATRIOT Act. The Supreme Court has long held that the Fourth Amendment does not require law enforcement to give immediate notice of the execution of a search warrant. In 1967, for example, the Supreme Court held that "officers need not announce their purpose before conducting an otherwise [duly] authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence." *Katz v. U.S.*, 389 U.S. 347 (1967). In yet another case, the Court emphasized "that covert entries are constitutional in some circumstances, at least if they are made pursuant to a warrant." In fact, the Court

stated that an argument to the contrary was "frivolous." *Dalia v. U.S.*, 441 U.S. 238 (1979). And judges across the country were issuing delayed-notice search warrants long before the USA PATRIOT Act was enacted.

Second, under section 213, federal judges can authorize delayed notice only if there is "reasonable cause" to believe that immediate notification may: 1) result in death or physical harm to an individual; 2) result in flight of a suspect; 3) result in destruction of or tampering with evidence; 4) result in witness intimidation; or 5) seriously jeopardize an investigation or unduly delay a trial. Prior to enactment of the USA PATRIOT Act, every circuit that had addressed the question of delayed-notice warrants had held that they could be issued if there was good reason for doing so, but each court had articulated the applicable standard a little differently, and no circuit had set forth an exhaustive list of the circumstances that constituted good reason for delaying notice. The USA PATRIOT Act established a consistent nationwide standard for authorization of delayed-notice warrants.[1]

Third, no search warrant can be issued unless the judge finds probable cause sufficient to lead a reasonably prudent person to believe that a criminal offense has been committed and that the property to be searched for or seized constitutes evidence of that criminal offense.[2] This standard reflects the Fourth Amendment's requirement that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fourth, and this is widely misunderstood, section 213 requires law enforcement to give notice, in every case, that property has been searched or seized. Section 213 simply allows law enforcement agents – with court approval – to temporarily delay giving the required notification. Under section 213, every person who is the subject of a search warrant must be informed of the search, and it is only in limited circumstances, with prior judicial approval, that notice of the search or seizure is delayed.

Finally, like so many other sections of the USA PATRIOT Act, section 213 is a traditional law enforcement tool that can be used to investigate all kinds of federal crimes, not just terrorism. Delayed-notice search warrants have always been, and continue to be, used for traditional law enforcement. The cases discussed below, for example, are not terrorism cases; they involve illegal drugs. Therefore, if Congress were to curtail section 213 or the use of delayed-notice warrants, it would impact not only terrorism investigations (both domestic and international) but also law enforcement's ability to investigate and prevent other serious crimes, including drug trafficking and organized crime.

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[1] The current standard is the well-known "reasonable cause" standard and is consistent with pre-USA PATRIOT Act caselaw for delayed notice of warrants. *See, e.g., U.S. v. Villegas*, 899 F.2d 1324, 1337 (2d Cir. 1990) (government must show "good reason" for delayed notice of warrants).
[2] *Dumbra v. U.S.*, 268 U.S. 435 (1925); 18 U.S.C. § 3103a(b).

For example, the use of a delayed-notice search warrant was of tremendous value in *Operation Candy Box*, a multi-jurisdictional Organized Crime and Drug Enforcement Task Force (OCDETF) investigation targeting a Canadian-based ecstasy and marijuana trafficking organization. In *Operation Candy Box*, investigators learned that an automobile loaded with a large quantity of ecstasy would be crossing the U.S.-Canadian border en route to Florida.

After the suspect vehicle crossed into the U.S. near Buffalo, DEA agents followed the vehicle until the driver stopped at a restaurant. Thereafter, one agent, with specific court authority, used a duplicate key to enter the vehicle and drive away while other agents spread broken glass in the parking space in order to create the impression that the vehicle had been stolen. A search of the vehicle revealed a hidden compartment containing 30,000 ecstasy tablets and ten pounds of high-potency marijuana. Because a judge issued a delayed-notice search warrant at the investigators' request, the drugs were seized, the investigation was not jeopardized, and over 130 individuals were arrested three weeks later. But for the delayed-notice search warrant, however, agents would have been forced to prematurely reveal the existence of the investigation, which would have almost certainly resulted in the flight of many of the investigation's targets.

In another OCDETF case, DEA agents in California, with judicial authorization, intercepted wire communications of a target and discovered that a load of heroin was to be delivered to a particular residence. The DEA obtained judicial authorization to use a delayed-notice warrant to search the targeted residence. While they were able to seize a quantity of heroin, the load for which they were searching had not yet arrived. Had the agents been required to notify the target at the time they entered the premises and seized his illegal drugs, the target and his co-conspirators would have been tipped off to the investigation, which would almost certainly have prompted the principals to cancel the delivery of the primary load of heroin and scatter. Instead, the delayed-notice search warrant allowed the investigation to continue until the following week, when agents were able to seize 54 pounds of heroin[3] and arrest the main targets of the investigation.

In yet another case in California, drug investigators successfully used a delayed-notice search warrant in a case involving methamphetamine. In that case, investigators wanted to intercept the shipment of a 22-liter flask and heating mantle, which the perpetrators had ordered for their methamphetamine lab. With judicial authorization, investigators clandestinely placed a tracking device in the shipment so they could track the items. The tracker worked, and investigators eventually took down a lab that was in the process of cooking about 12 pounds of methamphetamine.[4] Obviously, if the agents had been required to give notice at the time the tracking device was installed, the

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[3] 54 pounds of heroin equals approximately 4,898,640 dosage units.
[4] 12 pounds of methamphetamine equals approximately 1,088,640 dosage units.

investigation would have ended immediately and the perpetrators might have succeeded in distributing more than a million dosage units of the drug on American streets.

As these examples demonstrate, judicially approved delayed-notice search warrants can be a critical component of a drug investigation. The element of surprise and the confidentiality of surveillance are critical tools to the Drug Enforcement Administration. If criminals are tipped off to an investigation too early, they could flee, destroy evidence, intimidate or kill witnesses, cut off contact with associates, or take other action to evade arrest. Judicially approved delayed-notice search warrants help protect the lives of witnesses and law enforcement officers, preserve valuable evidence, and keep drugs off the streets. If legislation presented to the President includes a provision that forces the courts to allow notice to the criminals before a search warrant is executed, DOJ and ONDCP would continue to recommend that the President veto the bill.

Our agents are on the front lines every day in the fight to disrupt the market for illegal drugs. If Congress repeals section 213, it will make that fight much tougher. Repeal or modification of section 213 could force prosecutors and law enforcement agents to face a difficult and dangerous quandary – whether to make an arrest of a drug "mule," and in so doing sacrifice the possible arrest of the drug "kingpin," or to allow drugs to make it to the street while the investigation of the drug kingpin continues. We should empower law enforcement to more effectively combat drug trafficking, not take away the valuable tools they currently have, and have had for decades, for doing so. Delayed-notice search warrants are an appropriate and crucial authority for law enforcement, available only with judicial permission and subject to Fourth Amendment standards, that must be retained if we are to continue to disrupt the market for illegal drugs.

We appreciate your consideration of our views. The Office of Management and Budget has advised that there is no objection to the submission of this letter from the standpoint of the Administration's program.

Sincerely,

Karen Tandy
Administrator
Drug Enforcement Administration

John Walters
Director
Office of National Drug Control Policy

News From:

U.S. Senator
Russ Feingold

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Statement of U.S. Senator Russ Feingold
At the Senate Judiciary Committee Hearing on
"A Review of Counter-Terrorism Legislation and Proposals, including the USA PATRIOT Act and the SAFE Act"

September 22, 2004

Mr. Chairman, thank you for holding this hearing on the SAFE Act. I am hopeful that this hearing will be the beginning of a long overdue, full and open debate on the USA PATRIOT Act and sensible proposals to protect our freedom and privacy, such as the SAFE Act.

It is absolutely critical that this Committee have a full, honest debate about the PATRIOT Act, a law that may be the most controversial act of Congress in recent years. The independent, bipartisan 9/11 Commission called for "a full and informed debate on the Patriot Act" and Commissioners Lee Hamilton and Slade Gorton underscored this recommendation when they testified before this Committee in August.

For too long, the Administration has tried to avoid having a real debate on the parts of the law that trouble so many Americans. Instead, the Administration has ridiculed those with legitimate concerns or talked about provisions in the Act that are not controversial. And on those few occasions when Administration officials actually address the specific provisions and specific concerns that I and my colleagues have cited, they frequently distort what the law actually says. I hope that the Administration will take the advice of the 9/11 Commission and finally begin a good faith dialogue on the PATRIOT Act, and I hope it begins today.

As I indicated when I voted against the PATRIOT Act in October 2001, I support most of the provisions in the bill. I continue to think that it contained many prudent and necessary measures to protect our nation against terrorism. But I voted against the bill because certain provisions went too far. Those provisions included the expanded so-called "sneak

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and peek" power, the provision granting government access to library and personal records, and the roving wiretaps provision. I believed these provisions threatened fundamental constitutional rights and protections. I am very pleased that a growing number of my colleagues from both sides of the aisle who voted for the bill now agree with me that these provisions should be amended.

I was very pleased to join my colleagues Senator Craig and Durbin as an original cosponsor of the SAFE Act. The SAFE Act amends a limited number of provisions of the PATRIOT Act in order to protect our civil liberties. It does not repeal any portion of the Act. The powers contained in each of the amended provisions remain available to help protect our nation against terrorism. But the SAFE Act strengthens the role of the courts as a check on the executive branch, a role that unfortunately was diminished by the PATRIOT Act. The SAFE Act makes important modifications to enhance judicial review of the FBI's roving wiretap and so-called "sneak and peek" search powers.

The SAFE Act also restores meaningful judicial oversight to the FBI's ability to obtain business records under Section 215. Prior to the PATRIOT Act, investigators had to state, in their application to the court, that the records sought pertained to a suspected terrorist or spy. But the PATRIOT Act greatly expanded this power, so that investigators are no longer limited to records that relate to suspected terrorists or spies. Now, the government need only state that the records are "sought for" a counter-intelligence or international terrorism investigation. This standard is so low that it could allow the FBI to engage in fishing expeditions for information on people who are not suspected terrorists or spies. The provision also prevents judges from reviewing any facts to determine whether the scope of the request is reasonable. The SAFE Act corrects these problems by simply re-inserting the pre-PATRIOT Act standard to ensure that a judge's role as a check on the executive branch is real and effective.

During the last year, the Administration has repeatedly claimed that Section 215 is already tailored to terror suspects. It is not. I am glad that the Administration seems to agree with me in principle that Section 215 should be focused on suspected terrorists, not innocent Americans. Now, let's have the law match the intent. That is precisely what the SAFE Act would do.

Mr. Chairman, I cannot emphasize enough that the SAFE Act is a reasonable and bipartisan proposal. We are not seeking to repeal the PATRIOT Act or to stop the government from doing its vital job of protecting our nation and tracking down suspected terrorists. We simply want to add sensible safeguards to protect the privacy and civil liberties of Americans who have no connection to terrorism at all.

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News from . . .

Senator Dianne Feinstein

of California

FOR IMMEDIATE RELEASE:
Wednesday, September 22, 2004

Contact: Howard Gantman
or Scott Gerber 202/224-9629
http://feinstein.senate.gov/

Senator Feinstein Calls for Careful Congressional Oversight of the Patriot Act

Washington, DC *– In a statement entered in to the record of a Judiciary Committee Hearing, U.S. Senator Dianne Feinstein (D-Calif.) today called the USA Patriot Act "a major step forward," but urged Congress to rigorously review the government's anti-terror efforts, especially the sixteen provisions of the Patriot Act which are scheduled to sunset in December 2005. The following is the text of Senator Feinstein's statement:*

"I want to begin by thanking Chairman Hatch for calling this hearing today on the USA-Patriot Act and the SAFE Act. I believe it is critical that Congress in general, and this Committee specifically, forcefully engage in oversight over the implementation of the USA-Patriot Act. I would also like to welcome our distinguished panels, including by colleagues Senators Durbin and Craig, as well as Deputy Attorney General James Comey. I would also like to welcome our third panel, including Congressman Barr and Mr. Collins. I look forward to your testimony.

The USA-Patriot Act is one of the most consequential laws that have been passed by the Congress. In many respects it made fundamental, and I believe much needed, changes in the authorities given to our intelligence and law enforcement agencies to prevent, and if necessary respond to, terrorism.

I have been very clear since before September 11th 2001: I believe that we face a dangerous and insidious enemy who will stop at nothing to attack and kill Americans. Al Qaeda terrorists, and those groups who share their fanatical and violent views, must be the focus of our intelligence, law enforcement, military and diplomatic efforts. To accomplish that aim we need to ensure that the legal authorities available are adequate and appropriate to meet this need.

In retrospect, I am increasingly convinced that the USA-Patriot Act represents a major step forward, and is symbolic of what can be accomplished by bipartisanship in the Congress, and hard work alongside the Executive Branch. But major steps in law present dangers. Sweeping revisions need to be carefully monitored, examined and re-examined. We need to thoughtfully and rigorously assess whether the laws we have passed accomplish our intentions.

The USA-Patriot Act is just such a law. In fact, sixteen of the more than one hundred fifty provisions of the act were of such concern that we subjected them to sunset provisions. These sunset clauses were designed to ensure that we carefully looked at each of those provisions and made sure they were working right, accomplished the goals we set, and were being properly and appropriately implemented. Importantly, we set the expiration time for December 2005, to ensure that we did not find our careful review caught up in the Presidential election.

So I want to emphasize the importance of this Committee carefully and continually reviewing all of the USA-Patriot Act provisions, including the sunset provisions, and today's hearing is a step towards fulfilling that responsibility.

Last week I raised some concerns about the Department of Justice's willingness to work with the Congress to facilitate that oversight. I have asked the Department of Justice to complete a 'comprehensive assessment' of the sixteen sunsetting provisions so we can be as informed as possible about both the pros and cons of each provision. I understand that they are working now to provide that assessment. Similarly, I asked that the Department advise me about the use of Section 215 of the USA-Patriot Act, the so-called 'library provision,' and I have been provided some information, in classified form, in response to my request.

I hope that we can proceed in this fashion, with the Department of Justice working together with Congress to ensure that we can fulfill our responsibility to provide effective oversight, and where necessary, take corrective measures.

I would also like to commend Senators Durbin, Craig and Feingold, who have taken the lead in crafting the other bill we will discuss today – 'The Security and Freedom Ensured Act of 2003,' usually called the SAFE Act. This effort, much like the legislation put forward by Senator Kyl which was the subject of last week's hearing, is a commendable and important effort to begin the process of refining and sharpening the provisions of the USA-Patriot Act.

I hope that we can continue to work together in this manner – carefully considering changes, expansion or limitation of the existing law, or even some new law. I look forward to our distinguished panels, and thank you in advance for your contribution."

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GRAND LODGE
FRATERNAL ORDER OF POLICE®
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Washington, DC 20002
Phone 202-547-8189 • FAX 202-547-8190

CHUCK CANTERBURY
NATIONAL PRESIDENT

JAMES O. PASCO, JR.
EXECUTIVE DIRECTOR

6 July 2004

The Honorable J. Dennis Hastert
Speaker of the House
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I am writing on behalf of the membership of the Fraternal Order of Police to advise you of our strong opposition to any amendment to H.R. 4754, the appropriations measure for the Departments of Commerce, Justice, State and the Judiciary, which is scheduled to be considered on the House floor this week, that would prohibit the use of appropriated funds to ask a court to delay notice of a search warrant under 18 USC 3103a(b).

Section 3103a(b), adopted as Section 213 of the USA PATRIOT Act, allows courts to authorize investigators to give delayed notice that a search warrant has been executed in certain narrow circumstances. Delayed notice under Section 213 can only be used when immediate notification may result in endangering the life of an individual, flight from prosecution, destruction or tampering with evidence, intimidation of potential witnesses, or seriously jeopardizing an investigation or delaying a trial. Law enforcement has had this legal authority for years, and the courts have consistently held that the Fourth Amendment does not require law enforcement to give immediate notice of the execution of a search warrant. However, because of differences between jurisdictions, the law was a mix of inconsistent standards that varied widely across the country. Section 213 resolved this problem by establishing a uniform statutory standard.

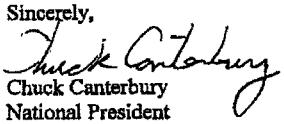
Section 213 is an important law enforcement tool that the Department of Justice has used sparingly, but to great effect. For example, in Operation Candy Box, a multi-jurisdictional Organized Crime and Drug Enforcement Task Force (OCDETF) investigation targeting a Canadian-based ecstasy and marijuana trafficking organization, the Department obtained a delayed notification search warrant to interdict a large quantity of narcotics crossing the U.S.-Canadian border en route to Florida. After the suspect vehicle crossed into the U.S. near Buffalo, Drug Enforcement Administration (DEA) agents followed the vehicle until the driver stopped at a restaurant just off the highway. Thereafter, one agent used a duplicate key to enter the vehicle and drive away while other agents spread broken glass in the parking space in order to create the impression that the vehicle had been stolen. A search of the vehicle revealed a hidden compartment containing 30,000 ecstasy tablets and ten pounds of high-potency marijuana. Because investigators were able to obtain a delayed notification search warrant, the drugs were

seized, the investigation was not jeopardized, and over 130 individuals were arrested on 31 March 2004. Without the delayed notification search warrant, however, agents would have been forced to prematurely reveal the existence of the investigation, which would have almost certainly resulted in the flight of many of the targets of the investigation.

We strongly urge the rejection of any amendment that would prohibit the use of this important law enforcement tool.

On behalf of the more than 318,000 members of the Fraternal Order of Police, thank you in advance for your attention to our concerns on this issue. Please do not hesitate to contact me, or Executive Director Jim Pasco, through our Washington office if we can provide you with any additional information or assistance on this matter.

Sincerely,



Chuck Canterbury
National President

cc: The Honorable C.W. "Bill" Young, Chairman, House Committee on Appropriations
The Honorable David R. Obey, Ranking Member, House Committee on Appropriations
The Honorable Frank Wolf, Chairman, House Subcommittee on Commerce-Justice-State, Committee on Appropriations
The Honorable Jose E. Serrano, Ranking Member, House Subcommittee on Commerce-Justice-State, Committee on Appropriations

Statement of Chairman Orrin G. Hatch
Before the Senate Judiciary Committee
Hearing on

"A REVIEW OF COUNTER-TERRORISM LEGISLATION AND PROPOSALS, INCLUDING THE USA PATRIOT ACT AND THE SAFE ACT"

Good morning and welcome to today's hearing. This Committee must be vigilant in overseeing the legal tools Congress gives the federal government to protect the American public from acts of terrorism.

Senator Leahy, the Ranking Democratic Member of the Committee, and I—along with all of the members of the Judiciary Committee—have worked together in a bipartisan fashion to review the adequacy of the legal tools available in the war against terror. During the 108th Congress, the Senate Judiciary Committee has remained active in its oversight and evaluation of terrorism issues. We have held over 25 terrorism-related hearings this Congress.

We have just marked the third anniversary of the September 11th attacks on our country. That somber anniversary and the recently released 9/11 Commission Report remind us all that the stakes in this war on terror are immense, and that the enemy we face is ruthless and evil. We are also reminded that the terrorist threat to our country is as real today as it was in September 2001. Failure to grasp this reality would be a dangerous misunderstanding of our enemies' plans.

Only weeks ago, we all witnessed the horror of parents in Beslan, Russia, who rushed to a school only to learn that their children were being held hostage. Later, watching some of the children—clad only in their underwear—escape death, seeing the covered bodies of the many who could not escape, and viewing the stunning videotape of the terrorists who flaunted explosives before their helpless victims, provided an unfiltered view of the inhumane enemy we face.

While we cannot be ruled by our fears, events like these must never be far from our minds as we carry out our oversight of the war on terror. We must do all we can to make sure that we do not face another September 11th attack or Beslan-like tragedy in this country.

The USA PATRIOT Act has been one of the key legislative tools in our fight against terrorism. As the 9/11 Commission Report noted:

> "Many of the act's provisions are relatively noncontroversial, updating America's surveillance laws to reflect technological developments in a digital age. Some executive actions that have been criticized are unrelated to the Patriot Act. The provisions in the act that facilitate the sharing of information among intelligence agencies and between law enforcement and intelligence appear, on balance, to be

beneficial. Because of concerns regarding the shifting balance of power to the government, we think that a full and informed debate on the Patriot Act would be healthy."

I hope today's hearing advances this debate in a constructive fashion.

As we examine the PATRIOT Act and the proposals to alter it, I frequently look to see if the tools we seek in the war on terror are already available in the narcotics or organized crime contexts.

For example, the criminal law has long permitted investigators to obtain business records by grand jury subpoena if the records may be relevant to a criminal investigation. The PATRIOT Act adopted a similar relevance standard for investigators who seek records via a FISA court order in terrorism cases. One proposal we will hear about today, the SAFE Act, would require a higher standard in terrorism cases.

To obtain business records, the SAFE Act would require the government to show specific and articulable facts to believe that the person to whom the records pertain is a foreign power or agent of a foreign power, a much higher standard than showing the records may be relevant to an investigation.

I am skeptical about efforts to impose a greater burden on the government in terrorism cases than in less serious criminal cases. It seems to me that we should not make it any harder to go after suspected terrorists than after suspected drug dealers.

Another example we will hear about today is delayed notification search warrants. Delayed notice warrants have been allowed in criminal cases for at least 15 years. The PATRIOT Act codified this authority, permitting delay if the government satisfies an Article III judge that delay is necessary in enumerated instances.

The SAFE Act would forbid delay in some circumstances previously allowed by the courts, including those instances where notice would result in the intimidation of witnesses or would seriously jeopardize an investigation. Again, I am highly skeptical about the need to limit the use of tools that have been available to criminal investigators for years. If delayed notification warrants are good enough for drug dealers, white collar criminals, and organized crime syndicates, I will have to be convinced that they should not apply to terrorism investigations.

As we move forward, many issues must be weighed:

- How best to preserve our traditional civil rights while strengthening our ability to disrupt terrorist plots;
- Whether we should reconcile our mass transportation laws to ensure that terrorists who may attack a train are treated the same as those who may attack a school bus;

- Whether our laws adequately punish those who possess missile systems designed to destroy aircraft; and

- Whether we should update a host of other terrorism laws.

In all these areas, we must remain innovative in examining our terrorism laws and stay a step ahead of the terrorists.

Let me be clear, I do not question the motives of anyone who wants to alter the PATRIOT Act. However, I disagree with the facts cited to support many of the changes that have been advocated to date. I am especially skeptical about changes that would leave our counter-terrorism investigators less well equipped than their criminal counterparts.

I look forward to hearing from our witnesses on how we continue to move forward to achieve our shared goal of making America safer while retaining our cherished civil liberties.

ORRIN G. HATCH, UTAH, CHAIRMAN

CHARLES E. GRASSLEY, IOWA
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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

September 22, 2004

The Honorable John Ashcroft
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

RE: Department of Justice Involvement in 2004 Elections

Dear Attorney General Ashcroft,

I'm writing to express my deep concern about the article in the September 20th New Yorker by Jeffrey Toobin, entitled, "Poll Position, Is the Justice Department Poised to Stop Voter Fraud – or to Keep Voters From Voting?" The article suggests that one of the Department's most important and historically significant functions, the protection and enhancement of citizens' voting rights, has been undermined and perverted for partisan political purposes. The article asserts that:

- the Department has been putting more emphasis on so-called voting "integrity" efforts – a euphemism and cover for attempts to harass and deter minority voters on a pretext of "anti-fraud" challenges – rather than its traditional and vital focus on voter "access" issues;

- the Civil Rights Division's voting rights activities are being led by a partisan, non-confirmed newcomer to the Division, whose involvement in voting activities includes an article urging aggressive efforts to "purge" election lists (apparently the impetus for the notoriously erroneous disenfranchisement of thousands of Florida voters in 2000), participation for the Bush campaign in the 2000 Florida recount battle, and a speech in which he suggested that the Department cease its crucial involvement in voter access efforts and restrict itself to "integrity" activities;

- important actions of the Division under the Voting Rights Act have had partisan motivation, including stalling the Mississippi redistricting plan long enough for a partisan default plan to go into effect, and approving the unprecedented Texas redistricting plan, against the advice of the career lawyers; and

- the Department has turned the respected and non-political Honors program for hiring career attorneys into a vehicle for placing ideological and political partisans in permanent jobs, especially in the Civil Rights Division.

What the Department does on voting rights and the way it does it can have substantial impact on the ability of voters, especially less-sophisticated voters, to have the fullest possible unhindered access to the polls.

In view of the serious problems in the 2000 election, it would be a major scandal if the current Department of Justice, in any way participated in, or failed to stop efforts of any kind to discourage or harass those whose voting rights it has a responsibility to protect. The Department must make sure that it maintains both the reality and the appearance of being a genuine instrument of justice between now and November 2, and in any critical period thereafter. In light of the seriousness of this issue, I request that you provide the following as soon as possible:

1. assurances that you have investigated these concerns and have either determined that each allegation is false or have taken steps to see that any inappropriate or partisan action has been terminated, and that those responsible have been appropriately disciplined and removed from further voting rights responsibilities;

2. copies of all current instructions, staffing orders, and other plans for the Department's election day, and pre- and post-election day, activities;

3. a clear and detailed description of Mr. von Spakovsky's line and staff assignments and actual responsibilities, and his past and contemplated role in the voting-related activities of the Department, the Division, and the Voting Rights Section;

4. a clear and detailed description showing who is the decision-maker on voting access and voting rights issues on a day-to-day basis;

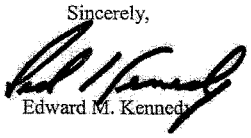
5. a statement as to whether the White House is directly or indirectly involved in setting the Department's voting rights priorities or assignments, and whether the Department is refusing to act when state authorities are alleged to have engaged in harassment or other improper activities in the guise of "anti-fraud" or "integrity" inquiries;

Because this matter is so serious and because, as we learned in 2000, retrospective investigations or action cannot provide adequate remedies, I am directing a copy of this letter to Inspector General Fine. I request that he conduct an immediate investigation of the relevant activities and personnel to assure that any inappropriate conduct has been terminated, and that he issue public reports as appropriate both before and after Election Day.

As always, I appreciate your prompt attention to these concerns and I look forward to your timely response.

With respect and appreciation,

Sincerely,



Edward M. Kennedy

cc: Deputy Attorney General James B. Comey, Assistant Attorneys General R. Alexander Acosta, William Moschella, Inspector General Glenn A. Fine

February 26, 2004

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Greenwich, Connecticut

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Manhattan Beach, California

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Wallingford, Pennsylvania

Executive Director
Nancy E. Tate

TO: Members of the U.S. Senate

FROM: Kay J. Maxwell, President

RE: Support the SAFE Act, S. 1709

The League of Women Voters believes that basic civil liberties must be preserved and protected as the nation seeks to guard against terrorism and other threats to national security. We therefore ask that you support and sponsor S. 1709, the SAFE Act (Security and Freedom Ensured Act of 2003), sponsored by Senator Larry Craig (R ID) and Senator Richard Durbin (D IL).

For the past 84 years, members of the League have been steadfast in their conviction that the need to protect against security threats to America must be balanced with the need to preserve the very liberties that are the foundation of this country. There are fundamental principles that guard our liberty -- from independent judicial review of law enforcement actions to prohibitions on indiscriminate searches -- that must be preserved.

League members are particularly concerned about the impact of the Patriot Act, passed hurriedly by Congress in 2001. The proposed SAFE Act would address some of the most problematic provisions of the Patriot Act. The new legislation would limit so-called "sneak and peek" searches, which allow secret warrants, to specific instances where there is a risk of flight or danger to life or physical safety. The SAFE Act would also increase reporting on the use of "sneak and peek" searches, thereby allowing for more meaningful oversight on the use of such searches.

In addition, S. 1709 would limit law enforcement requests for business records by requiring evidence that the records relate to a foreign power or an agent of a foreign power, and are not merely part of a "fishing expedition." Finally, the SAFE Act would extend the sunset provisions of the Patriot Act to include the sections on "sneak and peek" warrants and national security letters.

These are challenging times for all Americans. We recognize that there are real and serious terrorist threats. The League believes that the SAFE Act would preserve broad authority for law enforcement officials to combat terrorism. At the same time, it would protect innocent Americans from unrestricted government surveillance. The League of Women Voters urges you to sponsor and support S. 1709.

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Statement of Senator Patrick Leahy
Hearing of the Senate Judiciary Committee on
"A Review of Counter-Terrorism Legislation and Proposals,
Including the USA PATRIOT Act and the SAFE Act"
Wednesday, September 22, 2003

Let me open by relating my respect and admiration for Senator Durbin and Senator Craig. The Senators from Illinois and Idaho have shown great resolve and tenacity since the introduction of S.1709, the Safety and Freedom Ensured Act (SAFE Act). They have been vocal proponents for thoughtful change to the PATRIOT Act and have identified sections of that law that deserve vigorous debate, particularly with regard to Section 215 of the PATRIOT Act and National Security Letters. I commend them and look forward to hearing from them as witnesses today.

I believe that the Attorney General should be appearing before us today, not least because of his oversight obligation to his former colleagues here. Instead we see him appearing at press conferences and announcements of superceding indictments and read about his travel to Bellagio and Lake Como near that beautiful portion of northern Italy from which my Italian grandparents emigrated. He seems to have time for almost everything else but for appearing before this oversight Committee of the Congress and answering our questions. As the members of the Committee know, the Attorney General's chronic scarcity before this Committee also touches on the concerns about oversight issues raised by the 9-11 Commission.

That said, I do welcome Deputy Attorney General Comey and look forward to hearing his views of the SAFE Act. I am also interested to hear his response to rising public concern over the fact that the Bush Administration continually calls for more Government power while leaving many available authorities under-utilized. And there is the matter of establishing a real civil liberties protection board to serve as a watchdog on the agencies of the Executive Branch.

Today's hearing is an important one. The Durbin-Craig SAFE Act is a substantive bill that merits our attention. But this hearing is also significant because this is the first full Committee hearing on these matters since the release of the 9-11 Commission Report.

The 9-11 Commission wrote that the burden of proof for retaining a particular governmental power should be on the Executive. It stated that the Executive must explain how the power granted in the PATRIOT ACT "actually materially enhances security," whether there is "adequate supervision of the Executive's use of those powers to ensure protection of civil liberties," and "that there are adequate guidelines and oversight to properly confine its use." I hope the Justice Department is prepared to respond to questions on this topic.

The hard truth is that, even as we marked the third anniversary of the September 11 attacks twelve days ago, we have yet to see basic accountability for those tragic events. Vice President Cheney recently spoke of the likelihood that terrorist attacks would occur if a Democrat were elected President. He told supporters that terrorists will strike again "if we make the wrong choice" on Election Day. I find this remark not only irresponsible and outrageous -- not only another example of fear-mongering by this Administration -- but incredibly ironic, given that it was made by the top administration official who was in the White House on September 11, 2001. It was made by one of the top officials of an Administration that has yet to accept any responsibility for what occurred on September 11 or for the failures in the three years that have followed to capture Osama bin Laden. Instead, this Administration has squandered the unity of the American people and our international allies by deviating from the fight against terrorism by choosing instead to topple the regime of Saddam Hussein. The reckless partisan remarks by the Vice President apparently signaled a new wave of anti-patriotic personal attacks. In just the last few days the Republican Speaker of the House and the Republican candidate for the Senate in South Dakota have followed Mr. Cheney's lead.

The facts are that the Bush Administration had resisted this Committee's efforts to examine what led to the tragedy, resisted creation of a Department of Homeland Security, resisted formation of the 9-11 Commission, resisted the efforts of the 9-11 Commission while it was carrying out its task, and continues to resist important recommendations of the 9-11 Commission. Regarding the topic of today's hearing, the Administration has done little but resist oversight of the PATRIOT Act's implementation despite bipartisan concerns. This is squarely at odds with type of oversight the 9-11 Commission implored us to conduct. Chairman Kean said in a recent House hearing, "There is probably no substitute for the oversight of the [congressional] committees." In the same breath, he argued for vigorous oversight "to make sure that the public can be assured" that the PATRIOT Act is being used properly.

A Republican-led Congress is not helping fulfill our oversight responsibilities. Representative Conyers and I have been trying for the past two months without success to get our Republican Committee counterparts to sign a letter – a simple letter – asking for updated information from the Department on implementation issues of the PATRIOT Act including the use of National Security Letters and delayed notice warrants.

Recognizing that some of the most controversial provisions of the PATRIOT Act will "sunset" at the end of 2005, the 9-11 Commission recommended a healthy debate over any extension of those provisions next year. I drafted the sunset provision with Congressman Dick Armey. I also introduced another sunset bill to ensure that Congress actively engages in effective oversight and reconsiders all of the more controversial provisions of the PATRIOT Act.

For months now, the President and some Republican members have called for engrafting new provisions onto the PATRIOT Act that themselves will require thoughtful consideration. The American people will rightly ask us why we would consider expanding subpoena power on the one hand, while the Executive rarely uses alternative information-gathering tools that are currently available to them.

When the Attorney General used to appear before this Committee he would seek to preempt this Committee from fulfilling its oversight responsibilities by suggesting that anyone who asked questions was giving aid and comfort to the enemy. That posture has been taken to new depths recently by Mr. Cheney and others. In fact, for Senators not to serve as a check on the overreaching of the Executive Branch would be to sacrifice protection of our basic freedoms and a shirking of our responsibility.

The Attorney General also liked as a rhetorical device to say that no one had challenged the Government's use of authority and no court had found the Government had overreached. Perhaps he chose not to be with us today because the list of reversals of the Government's policies and practices has become so extensive over the last couple of months and years. From the Department's involvement in rewriting our country's adherence to the Geneva Convention and the Convention Against Torture, which contributed to the breakdown at the Abu Ghraib prison and elsewhere, to the Supreme Court's rejection of the Administration's Guantanamo practices, there is much that needs attention and correction.

Indeed, the Justice Department has accumulated one loss after another in terrorism cases. In recent weeks, we have witnessed the unraveling of the Department's first post-September 11 prosecution of a terrorist sleeper cell in Detroit. This followed on the heels of a growing list of losses and questionable cases, including the wrongful arrest of a Portland attorney based on a fingerprint mismatch; the acquittal of a Saudi college student who was charged with providing material support to terrorists; the release on bail of two defendants in Albany, N.Y., after the government admitted having mistranslated a key piece of evidence – the evidence referred to one defendant as "brother," not "commander," as originally represented; and the Supreme Court's repudiation of the Administration's claim that it can hold citizens indefinitely as "unlawful combatants," without access to counsel or family.

The fact is, there have been only a few real victories in cases that have brought terrorism charges since September 11, and these have been overshadowed by seemingly half-hearted prosecutions. Justice Department officials say their record since the 2001 attacks reflects a successful strategy of catching suspected terrorists before they can launch deadly plots, even if that involves charging them with lesser crimes.

I certainly will not contest that lesser crimes are being charged. According to the Transactional Records Access Clearinghouse (TRAC), of the approximately 184 cases disclosed as "international terrorism" matters, 171 received a sentence of one year or less. But is that making us safer? What exactly happens to a suspected terrorist who spends six months in prison and then is deported to his country of origin in the midst of a war that has no end in sight? Does it really squelch deadly plots?

The Administration has yet to answer pointed questions about the deportation of Nabil al-Marabh to Syria, a nation that is a state sponsor of terrorism. Al-Marabh was at one time Number 27 on the FBI's list of Most Wanted Terrorists, and experienced prosecutors wanted to indict him. Why was he released? According to court records, Al-Marabh shared an address with defendants in the Detroit case who are now facing only document fraud charges. What is going on here?

We all await the Government's disposition on the Hamdi case. Will the Justice Department release and send to Saudi Arabia someone they said was so dangerous that he had to be held for years in a military stockade and could not be allowed to consult with a lawyer?

If the Attorney General had been willing to join us, I might have had a chance to ask him about his frightening announcement from Moscow of the arrest of Jose Padilla -- as if the Government had miraculously averted a nuclear device from being detonated in our heartland. As Mr. Comey represented to the federal courts a few months ago, the Government no longer even contends that Mr. Padilla was engaged in a "dirty bomb" plot and we have yet to see criminal charges against him, and I hope that we will. The Attorney General always finds time to announce allegations and dangers to frighten the American people but never seems to have time to be accountable when those specters prove false, when criminal cases can not be made, or when the Government has overreached or when innocent Americans have been unfairly accused.

Before Congress considers granting the Government more powers to add to the federal arsenal, we must determine the status of things under the PATRIOT Act. Which tools are actually being used, and how are they working? Which tools are subject to abuse, and which need to be modified? I hope that we can start getting some of those answers today so that we will be in position to act in a timely fashion next year.

# # # # #

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 8, 2004

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Sensenbrenner:

In anticipation of the U.S. House of Representative's consideration of an amendment that would prevent the Justice Department from obtaining records from public libraries and bookstores under section 215 of the USA PATRIOT Act, your staff has recently inquired about whether terrorists have ever utilized public library facilities to communicate with others about committing acts of terrorism. The short answer is "Yes."

You should know we have confirmed that, as recently as this past winter and spring, a member of a terrorist group closely affiliated with al Qaeda used internet services provided by a public library. This terrorist used the library's computer to communicate with his confederates. Beyond this, we are unable to comment.

We hope this information is useful to you and your colleagues as you consider amendments relating to the USA PATRIOT Act.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

SEP 22 2004

The Honorable J. Dennis Hastert
Speaker
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

On July 13, 2004, the Department provided you with a copy of a recent report entitled "Report From The Field: The USA PATRIOT Act at Work." We are pleased to provide you with the enclosed supplemental report, "Delayed Notice Search Warrants: A Vital and Time-Honored Tool for Fighting Crime." This report highlights the importance and successful use of delayed notice search warrants. The report also addresses unwarranted concerns that have been raised regarding the constitutionality of this law enforcement technique that has been recognized and upheld by the courts for more than three decades.

The USA PATRIOT Act has been invaluable to the Department of Justice's efforts to prevent terrorism and make America safer while at the same time preserving civil liberties. By passing the USA PATRIOT Act, Congress provided law enforcement and intelligence authorities with important new tools needed to combat the serious terrorist threat faced by the United States. Specifically, the Act enhanced the federal government's ability to share intelligence, strengthened the criminal laws against terrorism, removed obstacles to investigating terrorists, and updated the law to reflect new technologies used by terrorists.

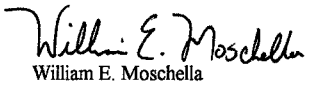
During the early stages of criminal investigations, including terrorism investigations, keeping the existence of an investigation confidential can be critical to its success. To keep from tipping off suspects, in appropriate circumstances the government can petition a court to approve a delayed-notice search warrant, and thus avoid tipping off the suspect to the existence of a criminal or terrorist investigation. A delayed-notice warrant is exactly like an ordinary search warrant in every respect except that law enforcement agents are authorized by a judge to temporarily delay giving notice that the search has been conducted. The USA PATRIOT Act established a uniform nationwide standard for use of delayed-notice search warrants to ensure an even handed application of Constitutional safeguards to all Americans. Unfortunately, the public debate about how delayed-notice warrants work and why investigators need them has featured a great deal of misinformation.

Along with the other materials the Department has provided to Congress, we hope this report will serve to be informative to you and your constituents about the truth regarding our efforts in the war on terror, and our ever present battle against violent crime and drugs. It is vital that Congress act on the basis of facts rather than fictions. To that end, the Department is fully committed to providing Congress with the information it needs to inform its deliberations.

The progress made by the Department to date in the war against terrorism would not have been possible without the tools and resources provided by Congress. The Department is grateful for the strong support it has received from Congress and looks forward to working closely with Congress to ensure that the key tools contained in the USA PATRIOT Act do not expire at the end of 2005.

If we can be of further assistance regarding this or any other matter, please do not hesitate to contact this office.

Sincerely,



William E. Moschella
Assistant Attorney General

Enclosure

U.S. Department of Justice

DELAYED NOTICE SEARCH WARRANTS:
A VITAL AND TIME-HONORED TOOL FOR FIGHTING CRIME

SEPTEMBER 2004

Delayed-Notice Search Warrants: A Vital and Time-Honored Tool for Fighting Crime

Introduction

During the early stages of criminal investigations, including terrorism investigations, keeping the existence of an investigation confidential can be critical to its success. Tipping off suspects to the fact that they are under investigation could cause them to flee prosecution, destroy evidence, intimidate or kill witnesses or, in terrorism cases, even accelerate a plot to carry out an attack.

One vital tool for avoiding the harms caused by premature disclosure is the delayed-notice search warrant. A delayed-notice warrant is exactly like an ordinary search warrant in every respect except that law enforcement agents are authorized by a judge to temporarily delay giving notice that the search has been conducted.

Although delayed-notice warrants are a decades-old law enforcement tool, they have received increased attention since the USA PATRIOT Act established a uniform nationwide standard for their use. Unfortunately, the public debate about how delayed-notice warrants work and why investigators need them has featured a great deal of misinformation.

This paper explains how delayed-notice warrants actually work, why they are critical to the success of criminal investigations of all kinds, and what setbacks law enforcement would suffer if this well-established and important authority were limited or eliminated. It also details the time-honored judicial doctrine authorizing delayed notice in certain circumstances, as well as the USA PATRIOT Act's role in harmonizing standards for using delayed-notice warrants. Finally, to demonstrate the importance of delayed-notice warrants in real-world law enforcement, this paper highlights some post–USA PATRIOT Act investigations in which delayed-notice warrants were vital to the investigations' success.

The Need for Delayed-Notice Search Warrants

In the vast majority of cases, law enforcement agents provide immediate notice of a search warrant's execution. However, if immediate notice were required in *every* case, agents would find themselves in a quandary in certain sensitive investigations: how to accommodate both the urgent need to conduct a search and the equally pressing need to keep the ongoing investigation confidential. Consider, for example, a case in which law enforcement received a tip that a large shipment of heroin was about to be distributed and obtained a warrant to seize the drugs. To preserve the investigation's confidentiality and yet prevent the drugs' distribution, investigators would prefer to make the seizure appear to be a theft by rival drug traffickers. Should investigators be forced to let the drugs hit the streets because notice of a seizure would disclose the investigation and destroy any

chance of identifying the drug ring's leaders and dismantling the operation — or to make the alternative choice to sacrifice the investigation to keep dangerous drugs out of the community? What if immediate notice would disclose the identity of a cooperating witness, putting that witness in grave danger?

This dilemma is especially acute in terrorism investigations, where the slightest indication of government interest can lead a loosely connected cell to dissolve, only to re-form at some other time and place in pursuit of some other plot. Should investigators who receive a tip of an imminent attack decline to search the suspected terrorist's residence for evidence of when and where the attack will occur because notice of the search would prevent law enforcement agents from learning the identities of the remainder of the terrorist's cell, leaving it free to plan future attacks?

Fortunately, because delayed-notice search warrants are available in situations such as these, investigators do not have to choose between pursuing terrorists and criminals and protecting the public safety. Like any other search warrant, and as required by the Fourth Amendment, a delayed-notice search warrant is issued by a federal judge upon a showing of probable cause that the property to be searched for or seized constitutes evidence of a criminal offense. A delayed-notice warrant differs from an ordinary search warrant only in that the judge specifically authorizes the law enforcement officers executing the warrant to wait for a limited period of time before notifying the subject of the search that the warrant has been executed.

Delayed-Notice Search Warrants: A Longstanding Law Enforcement Tool

Delayed-notice search warrants are nothing new. Judges around the country have been issuing them for decades in circumstances where there are important reasons not to provide immediate notice that a search has been conducted. Such warrants have been squarely upheld by courts nationwide in a variety of contexts — from drug trafficking investigations to child pornography cases.

Long before enactment of the USA PATRIOT Act, the Supreme Court expressly held in *United States v. Dalia* that covert entry pursuant to a judicial warrant does not violate the Fourth Amendment, rejecting the argument that it was unconstitutional as "frivolous."[1] Since *Dalia*, three federal courts of appeals have considered the constitutionality of delayed-notice search warrants, and all three have upheld them.[2] In 1986, in *United States v. Freitas*, the Ninth Circuit considered the constitutionality of a search warrant allowing surreptitious entry to ascertain the status of a methamphetamine laboratory without revealing the existence of the investigation. While the court ruled that the covert search was permissible, it further held that the warrant's failure to specify when notice must be given was impermissible. The court set as a standard that notice

[1] *See Dalia v. United States*, 441 U.S. 238 (1979); *see also Katz v. United States*, 389 U.S. 347 (1967).
[2] *See United States v. Freitas*, 800 F.2d 1451 (9th Cir. 1986); *United States v. Villegas*, 899 F.2d 1324 (2d Cir. 1990); *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000).

must be given within "a reasonable, but short, time" and ruled that that period could not exceed seven days absent "a strong showing of necessity."

Four years later, the Second Circuit reached a similar conclusion but articulated a different standard. In *United States v. Villegas*, the court considered the permissibility of a search warrant authorizing delayed notice of the search of a cocaine factory because the primary suspect's coconspirators had yet to be identified. The court held that delay is permissible if investigators show there is "good reason" for the delay. The Second Circuit agreed with the Ninth Circuit that the initial delay should not exceed seven days but allowed for further delays if each is justified by "a fresh showing of the need for further delay."

In 2000, in *United States v. Simon*, a decision that stemmed from a warrant to seize evidence of child pornography, the Fourth Circuit also ruled that delayed notification was constitutionally permissible. In that decision, though, the court ruled that a 45-day initial delay was constitutional.

In short, it was clear long before the USA PATRIOT Act that judges have the authority to authorize some delay in giving the notice of a search warrant's execution that is required by Rule 41 of the Federal Rules of Criminal Procedure — but the law governing issuance of delayed-noticed warrants was a mix of inconsistent rules, practices and court decisions varying from jurisdiction to jurisdiction.

Section 213 of the USA PATRIOT Act

In enacting the USA PATRIOT Act, Congress recognized that delayed-notice search warrants are a vital aspect of the Justice Department's strategy of prevention — detecting and incapacitating terrorists, drug dealers and other criminals before they can harm our nation. Section 213 of the Act, codified at 18 U.S.C. § 3103a, created an explicit statutory authority for investigators and prosecutors to ask a court for permission to delay temporarily notice that a warrant has been executed.

As discussed above, section 213 did not create delayed-notice search warrants, which have been issued by judges on their own authority for years. In fact, in a Texas drug-trafficking investigation, a court that had authorized a delayed-notice search warrant before enactment of the USA PATRIOT Act authorized a further delay of notification after enactment of the USA PATRIOT Act without modifying the procedure or justification for doing so.

Nor did section 213, as some critics have claimed, expand the government's ability to use delayed-notice warrants or authorize law enforcement to search private property without any notice to the owner. Rather, section 213 merely codified the authority that law enforcement had already possessed for decades and clarified the standard for its application. By doing so, the USA PATRIOT Act simply established a uniform national standard for the use of this vital crime-fighting tool.

Under section 213, delayed-notice warrants can be used only upon the issuance of an order from an Article III court, and only in extremely narrow circumstances. A court may allow law enforcement to delay notification only if the judge has reasonable cause to believe that immediate notification would result in danger to the life or physical safety of an individual, flight from prosecution, destruction of or tampering with evidence, intimidation of potential witnesses, or other serious jeopardy to an investigation or undue delay of a trial.[3] As such, section 213 provides greater safeguards for Americans' civil liberties than did the hodgepodge of pre-USA PATRIOT Act standards for delaying notice, which did not uniformly constrain judges' discretion as to what situations justified delays.

In no case does section 213 allow law enforcement to conduct searches or seizures without giving notice that the property has been searched or seized. Rather, section 213 expressly *requires* notice to be given, and merely allows agents, with a judge's approval, to delay notice temporarily for a "reasonable period" of time specified in the warrant. No delay beyond this specified time is allowed without further court authorization.

Section 213 also prohibits delayed-notice seizures where searches will suffice. The provision expressly requires that any warrant issued under its authority must prohibit the seizure of any tangible property or communication unless the court finds there is "reasonable necessity" for the seizure.

Important Real-World Benefits of Delayed-Notice Warrants

Delayed-notice warrants issued under section 213 over the course of the last three years have been invaluable in actual law enforcement investigations of crimes ranging from drug trafficking and money laundering to international terrorism. Although some of its uses cannot be discussed publicly because they have occurred in ongoing investigations or involve classified information, this section provides a number of examples of section 213's use that demonstrate just how vital the authority codified there is to effective law enforcement.

I. Terrorism Investigations

Delayed-notice warrants have played critical roles in a number of investigations of the activities of terrorists and their supporters in the United States.

Examples:

- In *United States v. Odeh*, a narco-terrorism case, a court issued a section 213 warrant to search an envelope mailed to a target of the investigation. The search confirmed that the target was operating an

[3] *See* 18 U.S.C. § 2705(a)(2).

illegal money exchange to funnel money to the Middle East, including to an associate of an apparent Islamic Jihad operative in Israel. The delayed-notice provision allowed investigators to conduct the search without compromising an ongoing wiretap on the target and several confederates. In May 2003, the target was notified of the search warrant's execution and charged.

- In a Chicago-area investigation in the spring of 2003, a court-authorized delayed-notice search warrant allowed investigators to gain evidence of a plan to ship unmanned aerial vehicle (UAV) components to Pakistan, but to gain that evidence without prompting the suspects to flee. The UAVs at issue would have been capable of carrying up to 200 pounds of cargo, potentially explosives, while guided out of line of sight by a laptop computer. Delayed notice of a search of email communications provided investigators information that allowed them to defer arresting the main suspect, who has since pleaded guilty, until all the shipments of UAV components had been located and were known to be in Chicago.

II. Drug Investigations

The usefulness of delayed-notice search warrants is not limited to terrorism investigations. In fact, they have been particularly useful in the investigation of drug conspiracies because drug-trafficking operations often involve tenuous connections among participants that dissolve at the slightest hint of an investigation, as well as evidence that is quickly and easily destroyed and cooperating witnesses who are placed at great risk if the existence of an investigation is disclosed.

Examples:

- A delayed-notice warrant issued under section 213 was of tremendous value in Operation Candy Box, a multi-jurisdictional Organized Crime and Drug Enforcement Task Force (OCDETF) investigation targeting a Canadian-based ecstasy and marijuana trafficking organization. In 2004, investigators learned that an automobile loaded with a large quantity of ecstasy would be crossing the U.S.-Canadian border en route to Florida. On March 5, 2004, after the suspect vehicle crossed into the United States near Buffalo, DEA agents followed the vehicle until the driver stopped at a restaurant just off the highway. Thereafter, one agent used a duplicate key to enter the vehicle and drive away while other agents spread broken glass in the parking space to create the impression that the vehicle had been stolen. A search of the vehicle revealed a hidden compartment containing 30,000 ecstasy tablets and ten pounds of high-potency marijuana. Because investigators were able to obtain a delayed notification search warrant, the drugs were seized, the investigation was not jeopardized, and over 130 individuals were later arrested on March 31, 2004 in a two-nation crackdown. Without the delayed-notification search

warrant, agents would have been forced to reveal the existence of the investigation prematurely, which almost certainly would have resulted in the flight of many of the targets of the investigation.

- In 2002, as part of a massive multi-state investigation of methamphetamine trafficking, the DEA learned that suspects were preparing to distribute a large quantity of methamphetamine in Indianapolis. Openly seizing the drugs would have compromised an investigation reaching as far as Alabama, Arizona, California and Hawaii; not seizing the drugs would have resulted in their distribution. With a court's approval, DEA agents searched the stash location and seized 8.5 pounds of methamphetamine without providing immediate notice of the seizure. In the wake of the drugs' disappearance, two main suspects had a telephone conversation about the disappearance that provided investigators further leads, eventually resulting in the seizure of fifteen more pounds of methamphetamine and the identification of the other members of the criminal organization. More than 100 individuals have been charged with drug trafficking as a part of this investigation, and a number have already been convicted.

- During an investigation into a nationwide organization that distributed cocaine, methamphetamine, and marijuana, the court issued a delayed notice warrant to search a residence in which agents seized more than 225 kilograms of drugs. The organization relied heavily on the irregular use of cell phones and usually discontinued use of particular cell phones after a seizure of drugs or drug proceeds, hampering continued telephone interception. Here, however, interceptions after the delayed-notice seizure indicated that the suspects believed that other drug dealers had stolen their drugs. None of the telephones intercepted was disposed of, and no one in the organization discontinued use of telephones. The delayed-notice seizure enabled the government to prevent sale of the seized drugs without disrupting the larger investigation.

- In 2002, DEA agents in California were intercepting wire communications of an OCDETF target who was distributing heroin and discovered that a load of heroin was to be delivered to a particular residence. Using a delayed notification search warrant, agents entered the residence. While they were able to seize a quantity of heroin, the load for which they were searching had not yet arrived. Had agents left notice at that point that law enforcement had entered the residence, the load would not have been delivered and the principals involved in the drug conspiracy would have scattered. A delayed-notice warrant, however, permitted the investigation to continue until the following week, when agents were able to seize 54 pounds of heroin and arrest the main targets of the investigation.

- In California, investigators successfully utilized a delayed-notification search warrant in a case involving methamphetamine. In that case, the perpetrators had ordered a 22-liter flask and heating mantle for their methamphetamine lab, and investigators wanted to intercept the shipment and place a beeper inside to track the items. The tracker worked, and investigators eventually took down a lab in the process of cooking about 12 pounds of methamphetamine. Had agents given notice at the time the beeper was installed, the investigation would have ended immediately.

III. Investigations of Other Serious Crimes

Delayed-notice warrants have also played critical roles in investigations of a variety of other serious criminal activities.

Examples:

- During the investigative phase of what became a major drug prosecution in Pennsylvania, investigators using a wiretap learned of a counterfeit credit card operation. At prosecutors' request, the court issued a delayed-notice search warrant for a package of counterfeit cards scheduled for delivery to the business of one of the drug suspects. This successful search enabled investigators to secure evidence of the credit card fraud and to notify banks that certain accounts had been compromised — but to do so without immediately disclosing to the suspects either the existence of the wiretap or the investigation itself. Delaying notification of the warrant's execution allowed for immediate action to prevent possible imminent harm from the credit card counterfeiting scheme while maintaining the temporary confidentiality of the drug investigation, which was not yet ripe for disclosure. As a result, prosecutors were able to secure multiple convictions in both the drug prosecution and the credit card prosecution.

- A delayed-notice search warrant allowed agents investigating an international money laundering operation to secure evidence of the conspiracy without jeopardizing their investigation. An extensive network of perpetrators was laundering more than $20 million per year in proceeds from a black market peso exchange operating in New York, Miami and Colombia, Israeli drug trafficking, and California-based tax evasion. Before the investigation was made public, investigators learned that the main suspect was shipping a large volume of cash from Miami to New York. The court approved a delayed-notice warrant, which allowed agents to photograph the money — memorializing its existence for use in prosecuting the conspiracy — without compromising the confidentiality of the ongoing investigation.

Conclusion

Both before and after the enactment of section 213 of the USA PATRIOT Act, immediate notice that a search warrant has been executed has been standard procedure. As has always been the case, delayed-notice warrants are used infrequently and judiciously — only in appropriate situations where immediate notice likely would harm individuals or compromise investigations, and even then only with a judge's express approval. As demonstrated by the examples above, however, the ability to delay notice that a search or seizure has taken place is invaluable when those rare situations arise. The investigators and prosecutors on the front lines of fighting crime and terrorism should not be forced to choose between preventing immediate harm — such as a terrorist attack or an influx of illegal drugs — and completing a sensitive investigation that might shut down the entire terror cell or drug trafficking operation. Thanks to the long-standing availability of delayed-notice warrants in these circumstances, they do not have to make that choice.

RESOLUTION IN SUPPORT OF THE PATRIOT ACT

Whereas, the National Association of Police Organizations represents over 236,000 rank-and-file law enforcement officers and 2,000 police unions throughout the United States, and

Whereas, Law Enforcement Officers from Massachusetts to California and from Alaska to Florida are intimately involved with all the law enforcement agencies that are actively and aggressively fighting the war against domestic and international terrorism, and

Whereas, our Law Enforcement Officers are daily involved in the full range of anti-terrorist activities, from intelligence gathering and processing, to state-wide and regional planning, to in-depth preparation for first responder responsibilities, and

Whereas, the PATRIOT Act was crafted with a view to balancing the personal rights of our citizens with the need to be able to effectively and efficiently gather and process vital information from her-to-fore untapped and masked sources, here and broad, and

Whereas, Section 224 of the PATRIOT Act, without action by the Congress to the contrary, will cease to be in existence on December 31, 2005, and

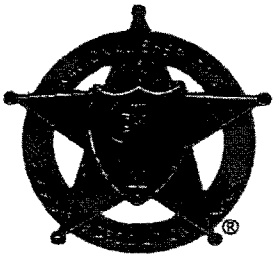
Whereas, Section 224 includes some of the most important provisions of the Act, including provisions covering wiretapping and information sharing, intelligence gathering and surveillance, and many other tools so critical to the war on terrorism, and

Whereas, Senator Joh L. Kyl of Arizona has introduced S. 2476, the purpose of which is to repeal the sunsets in the PATRIOT Act and make all provisions permanent,

Now, therefore let it be resolved by the National Association of Police Organizations, on behalf of its 236,000 rank-and-file members, that we commend Senator Kyl for his leadership, strongly support S. 2476 and urge the Congress of the United States to pass this legislation to ensure that all law enforcement has the necessary authorities to protect citizens from terrorist activity.

Approved this 7th day of August, 2004

NATIONAL SHERIFFS' ASSOCIATION



Resolution

2004-1

SUPPORT OF THE USA PATRIOT ACT

WHEREAS on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens by foreign terrorists; and

WHEREAS these cowardly acts rendered it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

WHEREAS the Congress passed the USA PATRIOT Act (PL 107-56) on October 25, 2001 with wide, bipartisan margins and President George W. Bush signed the Act into law the following day; and

WHEREAS the USA PATRIOT Act has strengthened the nation's criminal laws against terrorism; and

WHEREAS the USA PATRIOT Act has enhanced the capacity of law enforcement to gather and analyze intelligence on terrorist activity; and

WHEREAS the USA PATRIOT Act has helped law enforcement defend against the sophisticated tactics used by modern terrorists by updating the law to reflect new technologies and new threats; and

WHEREAS the USA PATRIOT Act has accomplished these goals without altering the tangible legal protections that exist to preserve the privacy of law-abiding citizens; and

WHEREAS the Congress, in performing its constitutional role of oversight, found no instance of any abuses of the Patriot Act and in fact has praised the Justice Department for its efforts to fight terrorism and defend the lives and liberties of the American people; now

THEREFORE, BE IT RESOLVED, that the National Sheriffs' Association supports the President of the United States and Congress in their work to defend the homeland against further terrorist attacks; and

BE IT FURTHER RESOLVED, that the National Sheriffs' Association earnestly and resolutely supports the USA PATRIOT Act as necessary and vital to the preservation of American civil liberties in a way that is respectful of the legal and constitutional safeguards of those liberties.

NATIONAL TROOPERS COALITION

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Whereas, The National Troopers Coalition represents over 40,000 Troopers and Highway Patrolmen throughout the continental United States, and

Whereas, State Police and Highway Patrol Departments from Maine to Mexico and from Alaska to Florida are intimately involved with all the law enforcement agencies that are actively and aggressively fighting the war against domestic and international terrorism, and

Whereas, our State Troopers and Highway Patrolmen are daily involved in the full range of anti terrorist activities, from intelligence gathering and processing, to state-wide and regional planning, to in-depth preparation for first responder responsibilities, and

Whereas, the Patriot Act, brought forth by the President of the United States and embraced by the U.S. Congress, was a broad and far-reaching enhancement of the ability of law enforcement to better do its job against terrorism, and

Whereas, the Patriot Act was crafted with a view to balancing the personal rights of our citizens with the need to be able to effectively and efficiently gather and process vital information from here-to-fore untapped and masked sources, here and abroad, and

Whereas, Section 224 of the Patriot Act, without action by the Congress to the contrary, will cease to be in existence on December 31, 2005, and

Whereas, Section 224 includes some of the most important provisions of the Act, including provisions covering wiretapping and information sharing, intelligence gathering and surveillance, and many other tools so critical to the war on terrorism, and

Whereas, Senator Jon L. Kyl of Arizona has introduced S. 2476, the purpose of which is to repeal the sunsets in the Patriot Act and make all provisions permanent,

Now, therefore let it be resolved by the National Troopers Coalition, on behalf of its 40,000 members, that we commend Senator Kyl for his leadership, strongly support S. 2476 and passionately urge the Congress of the United States to pass this legislation to ensure that all law enforcement has the necessary authorities to protect its citizens from terrorist activity.

Signed this 9B day of June, 2004 by

Casey Perry

Casey Perry, Chairman

SUPPORT YOUR STATE TROOPERS
REPRESENTING OVER 40,000 TROOPERS SERVING 230 MILLION AMERICANS

Pennsylvania Chiefs of Police Association

RESOLUTION

WHEREAS, the Pennsylvania Chiefs of Police Association supports the President of the United States and Congress in their work to defend the homeland against terrorist attacks; and

WHEREAS, the cowardly acts of treacherous violence committed against the United States on September 11, 2001, rendered it both necessary and appropriate that the United States exercise its right to self defense and to protect US citizens both at home and abroad; and

WHEREAS, Congress passed, and the President signed in to law the US Patriot Act to provide the law enforcement and intelligence community with the tools necessary to fight and win the war on terrorism; enhancing the capacity of law enforcement to gather and analyze intelligence on terrorist activity; and

WHEREAS, the US Patriot Act took the walls that had prevented the law enforcement and intelligence communities from sharing information to prevent terrorist attacks; helped law enforcement defend against the sophisticated tactics used by modern terrorists and criminals by updating the law to reflect new technologies and new threats; and removed gaps that had previously made it more difficult to investigate terrorist crimes and other crimes, all without altering the legal protections that exist to preserve the privacy of law abiding citizens;

NOW, THEREFORE, BE IT RESOLVED, that the Pennsylvania Chiefs of Police Association earnestly and resolutely supports the US Patriot Act as necessary and vital to the preservation of American Civil Liberties in a way that is respectful of the legal and constitutional safeguards of those liberties.

Upon motion duly made and seconded, this resolution is adopted this 14th day of July, 2004, Resolution 04-02.

Edward W. Carroll, Jr.
President

Dear Senator. Durbin,

I'm writing to you because I know that you are working on the recommendations of the 9/11 Commission, and you have worked on legislation to protect civil liberties. I have concerns that the recommendations of the 9/11 Commission might be encumbered by amendments designed to extend or expand the Patriot Act. Our family lost a son/brother in the World Trade Center on 9/11 and we support the position of the Family Steering Committee for the 9/11 Commission. We want the Congress to stand firm in protecting the guarantees of the Bill of Rights and other Amendments to the Constitution, which protect citizens from government intrusion into our private lives. Please do not allow this legislation to be used to expand the Patriot Act.

Sincerely,

Patricia J. Perry
Mother of NYPD Officer John William Perry, Esq.

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