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IMPLEMENTATION OF THE USA PATRIOT ACT: SECTIONS 201, 202, 223 OF THE ACT THAT ADDRESS CRIMINAL WIRETAPS, AND SECTION 213 OF THE ACT THAT ADDRESSES DELAYED NOTICE

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

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HOUSE OF REPRESENTATIVES

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IMPLEMENTATION OF THE USA PATRIOT ACT: SECTIONS 201, 202, 223 OF THE ACT THAT ADDRESS CRIMINAL WIRETAPS, AND SECTION 213 OF THE ACT THAT ADDRESSES DELAYED NOTICE

TUESDAY, MAY 3, 2005

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10 a.m., in Room 2141, Rayburn House Office Building, the Honorable Howard Coble (Chair of the Subcommittee) presiding.

Mr. COBLE. Good morning, ladies and gentlemen. At the outset I will apologize. I just told Mr. Scott and Mr. Beckert I have fallen victim to the April-May pollen attack. So pardon my raspy, gravelly voice, but we'll try to get through it

Today the Subcommittee on Crime, Terrorism, and Homeland Security will hold a hearing on criminal authorities for surveillance and search warrants. We are examining three sections of the PATRIOT Act that are sunsetting, and one section that is not, but has become controversial. Sections 201 and 202 of the PATRIOT Act create new wiretap predicates. Wiretap predicates are serious crimes enumerated in the Federal Criminal Code, but fall under one of the limited circumstances for which Congress authorized the use of a wiretap or electric surveillance.

Sections 201 and 202 in no way change the strict limitations on when wiretaps may be used, as Congress dictated in title III of the Omnibus Crime Control and Safe Streets Act of 1968. That Act outlines what is and what is not permissible with regard to wiretapping and electronic eavesdropping.

Title III restrictions go beyond fourth amendment constitutional protections and include a statutory suppression rule to exclude evidence that was collected in violation of title III. Section 223 of the PATRIOT Act added additional safeguards against abuse by amending the Federal Criminal Code to provide for administrative discipline of Federal officers or employees, as well as for similar actions to be brought against the United States for damages by a person aggrieved by such illegal disclosures.

Section 213 provides courts the discretion to delay notifying a suspect whose property is the target of a search. Some have deemed this section controversial, but I believe that any con-

troversy has been caused by inaccurate information. I realize that my view may not be shared by my good friend Mr. Barr, and perhaps others, but nonetheless, I'm concerned with the level of rhetoric that has been disseminated about this section, which has been a long-standing, vital tool for law enforcement.

Many in the public sector may be shocked to know that section 213 does not create a new title search warrant; rather, it merely standardized the special circumstances upon which a court may authorize delayed notice to a target of a search. Because of alarmist rhetoric in many cases by some, the public also may not be aware that courts have been authorizing delayed notice for search warrants for several decades. In fact, this section does not affect the standard that requires a judge to find probable cause of criminal activity prior to issuing a search warrant.

I would also like to note that the Administrative Office of the U.S. Courts found that in a 12-month period that ended in September of 2003, the Court, the Federal courts, handled 32,529 search warrants. While I don't have numbers for the same period for the number of times courts authorized delayed notice for those search warrants, I do have numbers for a similar duration of 14 months, between April of 2003 and July 2004. Over that period the number of times courts authorized delayed notice was 61. So 61 search warrants with delayed notice out of 32,000 plus comes to about, I think, .2 percent. These numbers are discussed in a Department of Justice April 4, 2005 letter, which, without objection, I would like to introduce into the record.

Throughout these hearings many have argued that the sunset provision of the act has required the Department to be on its best behavior for implementing the PATRIOT Act. I would like to point out that this section, sunset, has been used very rarely, and the inspector general for the Department of Justice has not found any abuse of this section or any other sections of the PATRIOT Act in the six reports it has sent to the Congress. So even without a sunset allegedly forcing the Department to behave, section 213 has not been abused. The Government and Federal judges in whom the authority rests under the statute appear to have judiciously used this provision.

Having said this, I look forward to hearing testimony from our panel, and I am now pleased to recognize the distinguished gentleman from Virginia, the Ranking Member, Mr. Bobby Scott.

Mr. SCOTT. Thank you, Mr. Chairman. And thank you for holding the hearing on these important sections.

We're considering section 213 of the USA PATRIOT Act, the infamous delayed notice or "sneak and peek" authority extended under the act. This lets police secretly go into someone's home or place of business to look around for evidence and not necessarily seize anything. In addition to the observations, pictures or other recordings such as CDs or floppy disks can be taken, and they can record things off of your computer. Under ordinary circumstances, notice of the search would be given through the officers showing up at your door to conduct the search. With sneak and peek, notice is not given until sometime after the search, such as when an arrest or physical seizure of property has taken place. Even before section

213, courts allowed sneak and peek searches, with probable cause and reasonable circumstances justifying the delayed notice.

The U.S. Supreme Court has not ruled on the sufficiency of sneak and peak warrants under the fourth amendment, but there have been several circuit court decisions, the second, fourth and ninth circuits, for example, and while these courts have not set a specific standard for such searches and notices, they have ruled that search and notice must be reasonable and should not exceed 7 days without additional reasonable foundation separate and apart from the original delay. Although this provision is not one of the sunsetted provisions under this PATRIOT Act, it is the provision of the act which has received the most congressional attention since its enactment.

Sneak and peak was not in the bill approved unanimously by this Committee in the weeks following 9/11, and during the last Congress the House actually passed by a wide margin an amendment to the Department of Justice appropriations denying the use of funds to implement any sneak and peek warrants. It did not pass the Senate, so it did not become law, but it did show by a wide margin that that amendment did pass the House.

Sneak and peek warrants are anathema to our traditions of privacy and notice under the fourth amendment.

Now, one of the problems with section 213 is that it does not set a time limit on how long the notice can be delayed. Another problem is this catch-all provision that allows the court to approve a sneak and peak warrant without there being really dire or exigent circumstances.

Under the court-approved sneak and peak warrants under section 213—under sneak and peak warrants before section 213, the warrants were approved only where it was deemed necessary to prevent such things as endangering life or physical safety, flight from prosecution, or destruction of evidence. Under section 213, an addition to these circumstances, a sneak and peak warrant can be issued to prevent a case from being, quote, otherwise seriously jeopardized or a trial from being unduly delayed.

Within the 155 sneak and peak warrants the Department of Justice concedes to have issued under section 213, recent information reveals that 92 of them have been under this catch-all provision. Of course, when the Department talks about section 213, as with all PATRIOT Act provisions, it talks about how important it is to protect us from terrorism. Yet it is clear that these extraordinary powers, such as sneak and peek, are used for more than just terrorism cases, and just how much more is one of the issues we need to explore. With this broad use, including the garden variety crimes, makes it even more imperative that we keep a close watch on these provisions.

So, Mr. Chairman, this is another situation where if we don't eliminate the extraordinary power for Government to pry into our private lives and affairs, we certainly ought to make sure that we structure that authority to ensure it is not the subject of abuse, or that the safeguards don't degrade over time. So I look forward to the testimony of our witnesses to see how we might accomplish that.

Mr. COBLE. I thank the gentleman from Virginia.

Lady and gentlemen, it is the practice of the Subcommittee to swear in all witnesses appearing before it, so if you all would please stand and raise your right hands.

[Witnesses sworn.]

Mr. COBLE. Let the record show that each of the witnesses answered in the affirmative.

We are blessed today, ladies and gentlemen, with a very fine panel. Our first witness is Mr. Michael J. Sullivan, United States Attorney for the District of Massachusetts. Mr. Sullivan has been active in instituting task forces that enable the Federal Government, along with State and local governments, to combat potential terrorist attacks.

Prior to serving as U.S. Attorney, Mr. Sullivan was a District Attorney of Plymouth County, and was a member of the Massachusetts House of Representatives. He is a graduate of Boston College and the Suffolk University School of Law.

Our second witness is Mr. Chuck Rosenberg, Chief of Staff to Deputy Attorney General James B. Comey. Mr. Rosenberg previously served as counsel to Attorney General John Ashcroft, and prior to that as counsel to FBI Director Mueller. Prior to joining the FBI, Mr. Rosenberg was an Assistant District Attorney. He is an alumnus of the Tufts University, Harvard University and the University of Virginia School of Law.

Our next witness is Ms. Heather Mac Donald, a John M. Olin Fellow at the Manhattan Institute and a contributing editor to City Journal. Prior to joining the Manhattan Institute, Ms. Mac Donald clerked for the Honorable Stephen Reinhardt, U.S. Court of Appeals for the Ninth Circuit, served as an attorney-advisor in the Office of the General Counsel of the U.S. Environmental Protection Agency, and served as a volunteer with the Natural Resource Defense Fund in New York City.

Ms. Mac Donald received her B.A. in English from Yale University, graduated summa cum laude with a Mellon fellowship to Cambridge University, where she earned an M.A. in English, and studied in Italy through a college study grant. She also is a graduate of Stanford University School of Law.

Our final witness is Mr. Bob Barr, the Honorable Bob Barr, represented the Seventh District of Georgia at the U.S. House of Representatives, and is an alum of this Committee. Good to have you back on the Hill, Bob.

Mr. BARR. Thank you, Mr. Chairman.

Mr. COBLE. He is the 21st Century Liberties Chair for Freedom and Privacy at the American Conservative Union, and provides advice to several organizations, including the ACLU.

Mr. Barr served as the United States Attorney for the Northern District of Georgia from 1986 to 1990, and he was also an official with the CIA and practiced law for many years. Now I don't have this in my statement, Mr. Barr, but if my memory serves correctly, you did your undergraduate work at USC, and was awarded a law degree from Georgetown.

Mr. BARR. The real USC.

Mr. COBLE. I was going to say in my district USC would be the University of South Carolina, but in your case it is, indeed, Southern California.

Now I have not talked to Mr. Delahunt. Mr. Delahunt, would you like to introduce Mr. Sullivan furthermore?

Mr. DELAHUNT. Of course. I had the pleasure to serve with Mr. Sullivan for—I think our terms overlapped as district attorneys in Massachusetts for maybe a year or two, and he was coming along just fine, Mr. Coble. And then, of course, he won the approval of the President and has served well in the U.S. Attorney's Office. And I want to welcome you, Mike, to this hearing.

And I also have to acknowledge our former colleague and friend Bob Barr, who we served together for—how many years was it, Bob?

Mr. BARR. It seems like about 40 or 50, but a little bit less than that.

Mr. DELAHUNT. That's my memory, too. While we had some disagreements in terms of a number of issues, we also shared, you know, a consensus on some significant issues, particularly in the course of the Committee's proceedings dealing with the PATRIOT Act. And I think it really reflected well on the full Committee that at least the first version of the PATRIOT Act—and Bob Barr had much to do with that final result in a piece of legislation I think we all took great pride in. And I remember, of course, serving with Bob Barr during the impeachment proceedings; again, we had disagreements, but he is a man of keen intellect, and I consider Bob a friend.

Mr. COBLE. Thank you, Mr. Delahunt.

Mr. Delahunt knows this, and this has absolutely nothing to do with the PATRIOT Act, but I am a long-time Celtic and Patriot fan, however, I did not cheer for the Patriots when they beat the Carolina Panthers in the Super Bowl several years ago.

Mr. SCOTT. Mr. Chairman, I would like to say a word about our former colleague, too, because when we went through the PATRIOT Act originally, we had some late nights—many of us worked late nights to try to get that into a form that we could come to some agreement on, and Mr. Barr was one of those that spent as many late nights and long meetings as anybody else. And as the gentleman from Massachusetts has indicated, we put together a package that passed this Committee unanimously, and the gentleman from Massachusetts has also put that in historic context. That was just a few months after the impeachment process where this Committee in some view did not distinguish itself in terms of partisan cooperation, but coming up with a version of the USA PATRIOT Act that passed this Committee unanimously, I think, was quite a feat. Unfortunately, somewhere been the Committee and the floor our good work got lost, but Mr. Barr was one of those that worked long and hard to try to come together.

Mr. COBLE. I want the record to show that I earlier told Mr. Barr that we miss him on the Hill—I don't want to be the only guy here not praising Mr. Barr.

Folks, it's good to have you all with us. We also have been joined by the distinguished gentleman from Ohio Mr. Chabot. Good to have you here with us today.

Mr. CHABOT. Thank you, Mr. Chairman.

Mr. COBLE. Folks, we try on this Subcommittee to operate under the 5-minute rule, as you all have been previously notified. The

panels that appear before you all, when the amber light appears, the ice on which you are skating is becoming thin, you have a minute to go; and then when the red light appears, your time has expired. So if you could stay within the 5-minute time frame, we would be appreciative.

Mr. Sullivan, why don't you kick it off.

TESTIMONY OF THE HONORABLE MICHAEL J. SULLIVAN, UNITED STATES ATTORNEY, DISTRICT OF MASSACHUSETTS

Mr. SULLIVAN. Thank you very much, Mr. Chairman. And thank you for your support of both the New England Patriots and the Boston Celtics. I want the record to reflect I'm also a fan of the Patriots and the Celtics and the Boston Red Sox, and certainly the Boston Bruins.

Mr. Chairman, Ranking Member Scott, Members of the Subcommittee, my good friend Mr. Delahunt, I want to thank you for the invitation to appear before you today to discuss several important provisions of the USA PATRIOT Act. I want to address sections 201 and 202 of the act which provide law enforcement with the ability to use preexisting wiretap authorities to investigate certain crimes that terrorists are likely to commit, such as those involving weapons of mass destruction, material support to terrorists and foreign terrorist organizations, and important cybercrime and cyberterrorism offenses. I will also address section 223.

All three of these sections are currently scheduled to sunset at the end of 2005. If section 201 and 202 are allowed to sunset, we will lose valuable tools that allow law enforcement to investigate a full range of terrorism-related crimes. Paradoxically, these tools would be unavailable in criminal investigations and offenses involving chemical weapons, cyberterrorism, and weapons of mass destruction, but would be available to investigate traditional crimes such as drug offenses, mail fraud and passport fraud. This would be a senseless approach because it's absolutely vital that the Justice Department have all the appropriate tools at its disposal to investigate terrorism crimes.

I'm here to ask you to make permanent sections 201 and 202, and also 223 of the USA PATRIOT Act.

In the criminal law enforcement context, Federal investigators have long been able to obtain court orders to intercept wire communications and oral communications to investigate numerous criminal offenses listed in the Federal wiretap statute. The list of offenses include traditional crimes including drug crimes, mail fraud and passport fraud. Prior to the enactment of the USA PATRIOT Act, however, certain extremely serious crimes that terrorists are likely to commit were not among them. This prevented law enforcement authorities from using many forms of electronic surveillance to investigate these criminal offenses. As a result, law enforcement could obtain, under appropriate circumstances, a court order to intercept foreign communications in a passport fraud investigation, but not a criminal investigation of terrorists using chemical weapons or murdering a United States national abroad.

Section 201 of the USA PATRIOT Act ended this anomaly in the law by amending the criminal wiretap statute when Congress added the following terrorism-related crimes to the list of wiretap

predicates: chemical weapons offenses, murders and other acts of violence against United States nationals occurring outside of the United States, the use of weapons of mass destruction, violent acts of terrorism transcending national borders, financing transactions with countries that support terrorism, and material support for terrorists and terrorist organizations. There are also two other offenses that Congress subsequently added to the list.

Section 201 of the USA PATRIOT Act preserved all of the preexisting standards in the wiretap statute.

Just as many traditional terrorism-related offenses were not listed as wiretap predicates before the passage of the USA PATRIOT Act, neither were many important cybercrime or cyberterrorism offenses, offenses concerning which law enforcement must remain vigilant and prepared in the 21st century. Section 202 of the USA PATRIOT Act eliminated this anomaly by allowing law enforcement to use preexisting wiretap authorities to investigate felony offenses under the Computer Fraud and Abuse Act, and brought the criminal code up to date with modern technology.

As with section 201, section 202 of the USA PATRIOT Act preserved all the preexisting standards in the wiretap statute. If section 202 were allowed to expire, then investigators will not be able to obtain wiretap orders to investigate many important cybercrime and cyberterrorism offenses, resulting in a criminal code that is dangerously out of date compared to modern technology.

As for section 223, a person now harmed by willful violation of the criminal wiretap statute or improper use and disclosure of information contained in the Foreign Intelligence Surveillance Act may now file a claim against the United States for at least $10,000 in damages, plus costs. Most everyone who has reviewed this section agrees it is a valuable tool and should be renewed.

I want to thank you again for the opportunity to discuss section 201, 202 and 223 of the USA PATRIOT Act. These provisions are critical to the Department's efforts to protect Americans from terrorism. From my experience as a prosecutor, I know firsthand how valuable wiretaps are to investigations and prosecution of serious criminal offenses. There is no logical reason why these valuable tools should not be extended to law enforcement to protect our citizens from terrorism-related offenses as well.

I would be happy to answer any questions you may have.

Mr. COBLE. Thank you, Mr. Sullivan.

[The prepared statement of Mr. Sullivan follows:]

PREPARED STATEMENT OF MICHAEL SULLIVAN

MICHAEL SULLIVAN
UNITED STATES ATTORNEY
DISTRICT OF MASSACHUSETTS
PREPARED REMARKS FOR THE
SUBCOMMITTEE ON CRIME, TERRORISM , AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
MAY 3, 2005

I. Introduction

Mr. Chairman, Ranking Member Scott, and Members of the Subcommittee, thank you for the invitation to appear before you today to discuss several important provisions of the USA PATRIOT Act. I will address sections 201 and 202 of the Act, which provide law enforcement with the ability to use pre-existing wiretap authorities to investigate certain crimes that terrorists are likely to commit, such as those involving weapons of mass destruction, material support to terrorists and foreign terrorist organizations, and important cybercrime and cyberterrorism offenses. I also will address section 223, which allows an individual whose privacy is violated to sue the United States for money damages if its officers or employees disclose sensitive information without authorization. All three of these sections are currently scheduled to sunset at the end of 2005. If sections 201 and 202 are allowed to sunset, we will lose valuable tools that allow law enforcement to investigate a full range of terrorism-related crimes. Paradoxically, these tools would be unavailable in criminal terrorism investigations of offenses involving chemical weapons, cyberterrorism, or weapons of mass destruction, but would be available to investigate traditional crimes such as drug offenses, mail fraud, and passport fraud. This would be a senseless approach. Because it is absolutely vital that the Justice Department have all appropriate tools at its disposal to investigate terrorism crimes, I am here today to ask you to make permanent sections 201 and 202 of the USA PATRIOT Act. In addition, if section 223 were allowed to

expire, then individuals whose privacy might have been violated through the use of these tools would be denied an important avenue for redress.

II. Section 201

In the criminal law enforcement context, federal investigators have long been able to obtain court orders to intercept wire communications (voice communications over a phone) and oral communications (voice communications in person) to investigate numerous criminal offenses listed in the federal wiretap statute. The listed offenses include traditional crimes, including drug crimes, mail fraud, and passport fraud. Prior to the enactment of the USA PATRIOT Act, however, certain extremely serious crimes that terrorists are likely to commit, such as those involving chemical weapons, the killing of United States nationals abroad, the use of weapons of mass destruction, and the provision of material support to foreign terrorist organizations, were not among them. This prevented law enforcement authorities from using many forms of electronic surveillance to investigate these serious criminal offenses. As a result, law enforcement could obtain, under appropriate circumstances, a court order to intercept phone communications in a passport fraud investigation, but not a criminal investigation of terrorists using chemical weapons or murdering a United States national abroad.

Section 201 of the USA PATRIOT Act ended this anomaly in the law by amending the criminal wiretap statute. It added the following terrorism-related crimes to the list of wiretap predicates: 1) chemical weapons offenses; 2) murders and other acts of violence against United States national occurring outside the United States; 3) the use of weapons of mass destruction; 4) violent acts of terrorism transcending national borders; 5) financial transactions with countries that support terrorism; and 6) material support of terrorists and terrorist organizations. There

were also two other offenses that were subsequently added to this list which included bombings of places of public use, government facilities, public transportation systems, and infrastructure facilities, and financing of terrorism.

Section 201 of the USA PATRIOT Act preserved all of the pre-existing standards in the wiretap statute. For example, law enforcement still must apply for and receive a court order; establish probable cause to believe an individual is committing, has committed, or is about to commit a particular predicate offense; establish probable cause to believe that particular communications concerning that offense will be obtained through the wiretap; and establish that "normal investigative procedures" have been tried and failed or reasonably appear to be unlikely to succeed or are too dangerous.

Since the enactment of the USA PATRIOT Act, Justice Department investigators have utilized Section 201 to investigate, among other things, potential weapons of mass destruction offenses as well as the provision of material support to terrorists. In total, as of March 10, 2005, the Department utilized section 201 on four occasions. These four uses occurred in two separate investigations. One of those cases involved an Imperial Wizard of the White Knights of the Ku Klux Klan who attempted to purchase hand grenades for the purpose of bombing abortion clinics and was subsequently convicted of numerous explosives and firearms charges.

Section 201 is extremely valuable to the Justice Department's counterterrorism efforts because it enables criminal investigators to gather information using this crucial technique, subject to all of the requirements of the wiretap statute, when investigating terrorism-related crimes, and ensuring that these offenses are thoroughly investigated and effectively prosecuted. If wiretaps are an appropriate investigative tool to be utilized in cases involving bribery, gambling, and

obscenity, then surely investigators should be able to use them when investigating the use of weapons of mass destruction, chemical weapons offenses, and other terrorism-related offenses.

III. Section 202

Just as many traditional terrorism-related offenses were not listed as wiretap predicates before the passage of the USA PATRIOT Act, neither were many important cybercrime or cyberterrorism offenses, offenses concerning which law enforcement must remain vigilant and prepared in the 21st Century. Therefore, once again, while criminal investigators could obtain wiretap orders to monitor wire and oral communications to investigate gambling offenses or other crimes, but they could not use such techniques in appropriate cases involving certain serious computer crimes. Section 202 of the USA PATRIOT Act eliminated this anomaly by allowing law enforcement to use pre-existing wiretap authorities to investigate felony offenses under the Computer Fraud and Abuse Act, and brought the criminal code up to date with modern technology.

As with section 201, section 202 of the USA PATRIOT Act preserved all of the pre-existing standards in the wiretap statute, ensuring that law enforcement still must apply and receive a court order; establish probable cause to believe an individual is committing or about to commit the predicate offense; establish probable cause to believe that particular communications about the offense will be obtained through the wiretap; and establish that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed or are too dangerous.

As of March 10, 2005, the Justice Department had used section 202 of the USA PATRIOT Act on two occasions. These two uses occurred in a computer fraud investigation that eventually broadened to include drug trafficking. If section 202 were allowed to expire, then investigators would not be able to obtain wiretap orders to investigate many important cybercrime and cyberterrorism offenses, resulting in a criminal code that is dangerously out of date compared to modern technology.

IV. Section 223

Prior to the enactment of the USA PATRIOT Act, individuals were permitted only in limited circumstances to file a cause of action and collect money damages against the United States if government officials unlawfully disclosed sensitive information collected through the use of court-approved investigative tools. For example, while those engaging in illegal wiretapping or electronic surveillance were subject to civil liability, those improperly disclosing information obtained from lawful pen register orders or warrants for stored electronic mail generally could not be sued. Section 223 of the USA PATRIOT Act remedied this inequitable situation by creating an important mechanism for deterring the improper disclosure of sensitive information and providing redress for individuals whose privacy might be violated by such disclosures.

Under section 223, a person harmed by a willful violation of the criminal wiretap statute or improper use and disclosure of information contained in the Foreign Intelligence Surveillance Act, [FISA] may file a claim against the United States for at least $10,000 in damages, plus costs. The section also broadened the circumstances under which administrative discipline may be imposed upon a federal official who improperly handled sensitive information by requiring the agency to initiate a proceeding in order to determine the appropriate disciplinary action.

To date, no complaints have been filed against Department employees pursuant to section 223. This is a reflection of the professionalism of the Department's employees as well as their commitment to the rule of law. Although there have been no allegations of abuse[s] under this section, it is important that section 223 remain in effect as it provides an important disincentive to those would unlawfully disclose intercepted communications. Most everyone who has reviewed this provision agrees that it is a valuable tool that should certainly be renewed. In addition, section 223 clearly demonstrates the PATRIOT Act's concern, not just the security of the United States, but also for the civil liberties of its citizens.

V. Conclusion

Thank you once again for the opportunity to discuss sections 201, 202, and 223 of the USA PATRIOT Act. These provisions are critical to the Department's efforts to protect Americans from terrorism. From my experience as a prosecutor, I know firsthand how valuable wiretaps are to the investigation and prosecution of serious criminal offenses. There is no logical reason why these valuable tools should not be extended to allow law enforcement to protect our citizens from terrorism-related offenses as well. I am happy to answer any questions you might have.

Mr. COBLE. And Mr. Rosenberg.

TESTIMONY OF CHUCK ROSENBERG, CHIEF OF STAFF TO DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. ROSENBERG. Thank you, Chairman Coble, Ranking Member Scott, Members of the Subcommittee, Mr. Delahunt and Mr. Chabot. It's a pleasure to be here today, and I appreciate the opportunity to speak to the Subcommittee about what I believe to be a very ordinary tool that has been gravely misunderstood and misperceived. I speak of section 213 of the PATRIOT Act, which codified and gave us a single uniform national standard for the execution of delayed notification searches.

Delayed notification searches are nothing new. I said they're rather ordinary; I should also say they're rather old, we've had them for decades. The authority to execute delayed notification searches dates back many, many years. Implicitly, a Supreme Court case in 1967, *Katz v. United States,* and more concretely, to a 1979 Supreme Court case which recognized that the fourth amendment does not require in all instances immediate notification of a search.

In the wake of that 1979 Supreme Court case, circuit courts throughout the country, in the second, in the fourth and the ninth circuit, had slightly varying standards on how you would obtain a delayed notification search, what was required, and how long the period of delay would be. And what this Congress gave us in section 213 again was a single standard, so there was uniformity through the country.

Let me clear up one large misperception. Under the fourth amendment, to execute a search warrant a Federal prosecutor, an agent, had to demonstrate to the satisfaction of a Federal judge probable cause; in other words, probable cause that the search would yield fruits of a crime, evidence of a crime. That was true before the PATRIOT Act, it is true now; nothing about the PATRIOT Act or section 213 changed that at all.

As well, prior to the PATRIOT Act, a Federal judge had to authorize a search warrant; whether it was with delayed notice or without, regardless, a Federal judge had to authorize it. That was true before the PATRIOT Act, that's true now. Nothing about that has changed.

To delay notice, however, you require something more, probable cause for the search, but for the delay you need to show reasonable cause that if you don't delay notification, that some adverse result would flow from that. There are five in the statute: that a life would be endangered, that there would be flight from prosecution, that evidence might be destroyed or tampered with, that potential witnesses could be intimidated, or that an investigation could be seriously jeopardized.

In all cases we need to demonstrate that to a Federal judge, and she needs to be satisfied that we have reasonable cause to delay the search. So without that, we can't delay. And that's what I want to be very clear about, Mr. Chairman, we must have permission of the court to act not just for the underlying search, but for the delay as well.

In all cases, in all cases, we still give notice, we must. It's required under the law. It's just a question of whether or not we may be able to delay that notice for some reasonable period of time.

We do not use this authority very often. Out of every 1,000 searches—and this is a rough average—we use it twice. That's about .2 percent. We use it when we need it. And, I submit, we use it judiciously and smartly and carefully, and, again, only with the authorization of a court. Nothing in the PATRIOT Act, nothing in section 213 removes the probable cause requirement. Nothing in the PATRIOT Act removes the requirement that a judge give us permission to delay notice.

I have a little bit of time left, but I don't want to use it all now. I will pass it along. I appreciate the opportunity to speak. I am happy to answer any questions you may have.

[The prepared statement of Mr. Rosenberg follows:]

PREPARED STATEMENT OF CHUCK ROSENBERG

STATEMENT OF

CHUCK ROSENBERG
CHIEF OF STAFF TO THE DEPUTY ATTORNEY GENERAL

BEFORE THE
SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

MAY 3, 2005

Good morning Chairman Coble, Ranking Member Scott, and Members of the Subcommittee. It is my pleasure to appear before you to discuss section 213 of the USA PATRIOT Act, relating to delayed-notice search warrants. This provision has been an invaluable tool in our efforts to prevent terrorism and combat crime.

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. Delayed-notice search warrants are a long-standing, crime-fighting tool upheld as constitutional by courts nationwide for decades. Such warrants were not created by the USA PATRIOT Act and had been regularly used prior to 2001 in investigations involving drugs, child pornography, and other criminal offenses. Section 213 simply established explicit statutory authority for investigators and prosecutors to ask a federal judge for permission to delay temporarily notice that a search warrant was executed. This statutory authority created a uniform standard for the issuance of these warrants, thus ensuring that delayed-notice search warrants are evaluated under the same criteria across the nation.

As with 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 or items to be seized constitute evidence of a criminal offense. A delayed-notice warrant differs from an ordinary search warrant only in that the judge specifically authorizes that the law enforcement officers executing the warrant may wait for a court-authorized period of time before notifying the subject of the search that a search was executed. To be clear, section 213 still requires law enforcement to give notice in all cases that property has been searched or seized. It only allows for a delay in notice for a reasonable period of time—a time period defined by a federal judge—under certain clear and narrow circumstances.

Federal courts have consistently ruled that delayed-notice search warrants are constitutional and do not violate the Fourth Amendment. In *Dalia v. United States*, for example, the U.S. Supreme Court held that the Fourth Amendment does not require law

enforcement to give immediate notice of the execution of a search warrant.[1] Since *Dalia*, three federal courts of appeals have considered the constitutionality of delayed-notice search warrants, and all three have upheld their constitutionality.[2] To my knowledge, no court has ever held otherwise. Long before the enactment of the USA PATRIOT Act, it was clear that delayed notification was appropriate in certain circumstances; that remains true today. Section 213 of the USA PATRIOT Act simply resolved the mix of inconsistent rules, practices and court decisions varying from circuit to circuit, by mandating uniform and equitable application of this authority across the nation.

Under section 213, investigators and prosecutors seeking a judge's approval to delay notification must show that, if made contemporaneous to the search, there is reasonable cause to believe that notification might:

1. Endanger the life or physical safety of an individual;
2. Cause flight from prosecution;
3. Result in destruction of, or tampering with, evidence;
4. Result in intimidation of potential witnesses; or
5. Cause serious jeopardy to an investigation or unduly delay a trial.

It is only in these five narrow 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 often would be forced to make a difficult choice: delay the urgent need to conduct a search or conduct the search and prematurely notify 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.

It appears as though there is widespread agreement that delayed-notice search warrants should be available in four of the five circumstances listed above. If immediate notice would endanger the life or physical safety of an individual, cause flight from prosecution, result in the destruction of evidence, or lead to witness intimidation, a general consensus exists that it is reasonable and appropriate to delay temporarily notice that a search has been conducted. However, the remaining circumstance – serious jeopardy to an investigation – has been the source of some controversy and I therefore wish to discuss it in more detail.

If a federal judge concludes that immediate notice of a search might seriously jeopardize an ongoing investigation, the Department of Justice strongly believes that it is entirely appropriate that the provision of such notice be delayed temporarily. There are a

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[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

variety of ways in which immediate notice might seriously jeopardize an investigation, and investigators and prosecutors should not be precluded from obtaining a delayed-notice search warrant simply because their request does not fall into one of the other four circumstances listed in the statute.

A prime example of the importance of this provision occurred when the Justice Department obtained a delayed-notice search warrant for a Federal Express package that contained counterfeit credit cards. At the time of the search, it was important not to disclose the existence of this federal investigation, as this would have exposed a related wiretap that was targeting major drug trafficking activities.

A multi-agency Task Force was engaged in a lengthy investigation that culminated in the indictment of the largest drug trafficking organization ever prosecuted in the Western District of Pennsylvania. A total of 51 defendants were indicted on drug, money laundering and firearms charges, and its leaders received very lengthy sentences of imprisonment.

This organization was responsible for bringing thousands of kilograms of cocaine and heroin into Western Pennsylvania. Cooperation was obtained from selected defendants and their cooperation was used to obtain indictments against individuals in New York who supplied the heroin and cocaine. Thousands of dollars in real estate, automobiles, jewelry and cash were forfeited.

This case had a discernible and positive impact upon the North Side of Pittsburgh, where the organization was based. The DEA reported that the availability of heroin and cocaine in this region decreased as a result of the successful elimination of this major drug trafficking organization.

While the drug investigation was ongoing, it became clear that several of the conspirators had ties to an ongoing credit card fraud operation. An investigation into the credit card fraud led to the search of a Fed Ex package that contained fraudulent credit cards. Had notice of this search been given at the time of the search, however, the drug investigation would have been seriously jeopardized because an existing Title III wiretap would have been endangered. This is just one ordinary example of this extraordinarily important tool.

The use of a delayed-notice search warrant is the exception, not the rule. In total, the government has sought delayed-notification search warrants approximately 155 times under section 213 of the USA PATRIOT Act.[3] Law enforcement agents and

[3] This number was reported to the Committee in an April 4, 2005, letter from Assistant Attorney General William E. Moschella to Chairman Sensenbrenner. During preparation for this hearing, it has come to my attention that at least one United States Attorney's office misreported a number on its paper survey. That office, which reported five total uses of a delayed notice search warrant, in fact only used the authority twice. The other three uses were extensions that the office confused as additional uses. In light of this information, the Department is reviewing again the numbers provided in the April 4, 2005, letter and will provide additional information as soon as it is available. At this point, the Department believes that it may

investigators provide immediate notice of a search warrant's execution in the vast majority of cases. According to the 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—the Department used the section 213 authority approximately 60 times according to a Department survey. The Department therefore estimates that is seeks to delay notice with respect to less than 0.2% of all search warrants issued.

Last month, the Department supplemented earlier information made public regarding the use of section 213 by releasing information derived from a survey of all United States Attorneys' offices covering the period between April 1, 2003, and January 31, 2005. Nationwide, section 213 was used approximately 108 times over that 22-month period. Of those 108 times, the authority was exercised in less than half of the federal judicial districts across the country. Furthermore, the Department has asked the courts to find reasonable necessity for seizure in connection with a delayed-notification search warrant approximately 45 times. In every case where the Justice Department sought a delayed-notification search warrant during that period, a court has approved. It is possible to misconstrue this information as evidence that courts merely "rubber stamp" 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 seek court approval only in those rare circumstances—those that fit the narrowly tailored statute—when it is absolutely necessary and justified.

In sum, delayed-notice search warrants have been used for decades by law enforcement, but are used only infrequently and scrupulously—in appropriate situations where we can demonstrate reasonable cause to believe that immediate notice would harm individuals or compromise investigations, and even then only with a judge's express approval. Section 213 is a reasonable statutory codification of a long-standing law enforcement tool that enables us to better protect the public from terrorists and criminals while preserving Americans constitutional rights.

Mr. COBLE. Well, you and Mr. Sullivan have put Ms. Mac Donald and Mr. Barr under a bright light because you both beat the red light.

Ms. Mac Donald, you're on.

TESTIMONY OF HEATHER MAC DONALD, JOHN M. OLIN FELLOW, THE MANHATTAN INSTITUTE FOR POLICY RESEARCH

Ms. MAC DONALD. I'm going to be lean and mean, Mr. Chairman.

Thank you very much for inviting me today, I am honored to be testifying before you.

The PATRIOT Act has been subject to the most successful misinformation campaign in recent memory. From the day of its passage, it's been portrayed as a power grab by an Administration intent on trampling on civil rights. As I have debated the act across the country, I've been amazed by the amount of ignorance out there about it, and therefore I applaud the Committee for taking the time to set the record straight.

Now, I have observed four rhetorical strategies used to discredit the act, and I want to discuss them in the context of section 213, the delayed notification provision, because if you can discredit them in those—in that context, you have the key for undermining the entire anti-PATRIOT propaganda campaign.

The first strategy used by opponents of the act is to conceal legal precedent. Section 213, as we heard, allows the Government to delay notice of the search if notice would result in witness intimidation, evidence tampering or other adverse results. The section has been universally portrayed as a radical new power that will unleash Government tyranny. The gall of this claim astounds me, because, as Mr. Rosenberg explained, section 213 merely codifies two decades of judicial precedent. If delayed notice were the threat that it were made out to be, we would have heard about abuses by now. But as with every other section of the PATRIOT Act, the critics have been unable to bring forth a single example of abuse over not just 4 years of use, but two decades of delayed notice authority.

The second strategy used by PATRIOT Act opponents is what I call "hiding the judge." We never learn from the section 213 opponents that under it the Government can investigate a suspect and delay notice only if a judge gives permission. It's a Federal judge who decides whether delay is reasonable, not a law enforcement agent.

The third strategy against the PATRIOT Act, amending the statute. PATRIOT Act critics invariably imply under section 213 the Government can permanently conceal that a search has occurred. This charge rewrites the section which says that delay can only be temporary for a reasonable period of time.

Ultimately I've discovered what drives most critics of the act is a deep suspicion of Government secrecy in criminal or terror investigations. This is the fourth strategy, rejecting secrecy. Opponents of section 213 apparently believe that if the Government wants to search Muhammad Atta's hard drive, it should show up at his door and hand him a search warrant and say, "Oh, Mr. Atta, we would like permission, please, to search your computer." This line of attack shows a complete obliviousness to the distinction between an

after-the-fact criminal investigation and preemptive antiterror investigations.

In passing the PATRIOT Act, Congress recognized the urgency of moving law enforcement from a reactive to a preventative mode. Speed and secrecy are the essence of preventing terrorist attacks, and, indeed, in many criminal investigations as well.

There is one final fallacy that I want to quickly allude to which is being suspended in time. For critics of the PATRIOT Act, it is always 1968 when J. Edgar Hoover was indeed trampling on civil rights; but this line of reasoning ignores the massive sea change in law enforcement that has occurred since then. The FBI has internalized the rule of law and the norms of restraint. The biggest challenge we had before 9/11 was persuading our agents to use this power that was available to them.

In conclusion, section 213, like the rest of the PATRIOT Act, was a reasonable response to the new threat of catastrophic terrorism. It has not led to a single abuse of civil rights, and it should be renewed. Thank you.

Mr. COBLE. Thank you, Ms. Mac Donald.

[The prepared statement of Ms. Mac Donald follows:]

PREPARED STATEMENT OF HEATHER MAC DONALD

Thank you, Mr. Chairman and members of the Committee. My name is Heather Mac Donald. I am a senior fellow at the Manhattan Institute for Policy Research, a think tank in New York City. I have written extensively on homeland security for the *Washington Post,* the *Wall Street Journal*, the *Los Angeles Times,* and *City Journal,* among other publications. I appreciate the opportunity to testify today on this important topic.

The most powerful weapon against terrorism is intelligence. The United States is too big a country to rely on physical barriers against attack; the most certain defense is advanced knowledge of terrorist plans.

In recognition of this fact, Congress amended existing surveillance powers after 9/11 to ready them for the terrorist challenge. The signal achievement of these amendments, known as the Patriot Act, was to tear down the regulatory "wall" that had prevented anti-terrorism intelligence agents and anti-terrorism criminal agents from sharing information. The Patriot Act made other necessary changes to surveillance law as well: it extended to terrorism investigators powers long enjoyed by criminal investigators, and it brought surveillance law into the 21st century of cell phones and e-mail. Where the act modestly expands the government's authority, it does so for one reason only: to make sure that the government can gather enough information to prevent terrorism, not just prosecute it after the fact.

Each modest expansion of government power in the Patriot Act is accompanied by the most effective restraint in our constitutional system: judicial review. The act carefully preserves the traditional checks and balances that safeguard civil liberties; four years after its enactment, after constant monitoring by the Justice Department's Inspector General and a host of hostile advocacy groups, not a single abuse of government power has been found or even alleged.

This record of restraint is not the picture of the act most often presented in the media or by government critics, however. The Patriot Act has been the target of the most successful disinformation campaign in recent memory. From the day of its passage, law enforcement critics have portrayed it as an unprecedented power grab by an administration intent on trampling civil rights.

As lie after lie accumulated, the administration failed utterly to respond. As a result, the public is wholly ignorant about what the law actually does. Hundreds of city councils have passed resolutions against the act; it is a safe bet that none of them know what is in it. The Committee is to be congratulated for taking the time to get the truth out.

Though the charges against the Patriot Act have been dazzling in their number, they boil down to four main strategies. This morning, I would like to dissect those strategies, with particular reference to the most controversial section of the act: section 213. Section 213 allows the government to delay notice of a search, something criminal investigators have been allowed to do for decades. Discredit the anti-Patriot

Act strategies against section 213, and you have the key for discrediting them in every other context.

—STRATEGY #1: CONCEAL LEGAL PRECEDENT.

Here's how section 213 works: Let's say the FBI wants to plumb Mohammad Atta's hard drive for evidence of a nascent terror attack. If a federal agent shows up at his door and says: "Mr. Atta, we have a search warrant for your hard drive, which we suspect contains information about the structure and purpose of your cell," Atta will tell his cronies back in Hamburg and Afghanistan: "They're on to us; destroy your files—and the infidel who sold us out." The government's ability to plot out that branch of Al Qaeda is finished.

To avoid torpedoing preemptive investigations, Section 213 lets the government ask a judge for permission to delay notice of a search. The judge can grant the request only if he finds "reasonable cause" to believe that notice would result in death or physical harm to an individual, flight from prosecution, evidence tampering, witness intimidation, or other serious jeopardy to an investigation. In the case of Mohammad Atta's hard drive, the judge will likely allow a delay, since notice could seriously jeopardize the investigation, and would likely result in evidence tampering or witness intimidation.

The government can delay notifying the subject only for a "reasonable" period of time; eventually officials must tell Atta that they inspected his hard drive.

Section 213 carefully balances traditional expectations of notice and the imperatives of preemptive terror and crime investigations. That's not how left- and right-wing libertarians have portrayed it, however. They present Section 213, which they have dubbed "sneak-and-peek," as one of the most outrageous new powers seized by former Attorney General John Ashcroft. The ACLU's fund-raising pitches warn: "Now, the government can secretly enter your home while you're away . . . rifle through your personal belongings . . . download your computer files . . . and seize any items at will. . . . And, because of the Patriot Act, you may never know what the government has done."

Notice the ACLU's "Now." Like every anti-213 crusader, the ACLU implies that section 213 is a radical new power. This charge is a rank fabrication. For decades, federal courts have allowed investigators to delay notice of a search in drug cases, organized crime, and child pornography, for the same reasons as in section 213. Indeed, the ability to delay notice of a search is an almost inevitable concomitant of investigations that seek to stop a crime before it happens. But the lack of precise uniformity in the court rulings on delayed notice slowed down complex national terror cases. Section 213 codified existing case law under a single national standard to streamline detective work; it did not create new authority regarding searches. Those critics who believe that the target of a search should always be notified prior to the search, regardless of the risks, should have raised their complaints decades ago—to the Supreme Court and the many other courts who have recognized the necessity of a delay option.

Critics of Section 213 raise the spectre of widespread surveillance abuse should the government be allowed to delay notice. FBI agents will be rummaging around the effects of law-abiding citizens on mere whim, even stealing from them, allege the anti-Patriot propagandists. But the government has had the delayed notice power for decades, and the anti-Patriot demagogues have not brought forward a single case of abuse under delayed notice case law. Their argument against Section 213 remains purely speculative: It *could* be abused. But there's no need to speculate; the historical record refutes the claim.

—STRATEGY #2: HIDE THE JUDGE.

The most pervasive tactic used against the Patriot Act is to conceal its judicial review provisions.

The cascades of anti-section 213 vitriol contain not one mention of the fact that the FBI can only delay notice of a search pursuant to judicial approval. It is a federal judge who decides whether a delay is reasonable, not law enforcement officials. And before a government agent can even seek to delay notice of a search, he must already have proven to a judge that he has probable cause to conduct the search in the first place.

But the opponents suggest that under section 213, the government can unilaterally and for the most nefarious of purposes decide to conceal its investigative activities. Indeed, the ACLU implies that federal investigators can not only unilaterally delay notice, but can choose what and whether to search, without any judicial oversight: "Now, the government can . . . seize any items [from your home] at will," it blares. But section 213 allows a warrant to issue only if a judge finds a "reasonable

necessity" for it—the executive's arbitrary "will" has nothing to do with it. This is hardly a recipe for lawless executive behavior—unless the anti-Patriot forces are also alleging that the federal judiciary is determined to violate citizens rights. If that's what they mean, they should come out and say it.

—STRATEGY #3: AMEND THE STATUTE.

Anti-Patriot lore has it that section 213 allows the government to permanently conceal a search. The section "allows the government to conduct secret searches without notification," cries Richard Leone, president of the Century Foundation and editor of *The War on Our Freedoms: Civil Liberties in an Age of Terrorism.* This conceit rewrites the section, which provides only for a delay of notice, not its cancellation. A warrant issued under section 213 must explicitly require notice after a "reasonable" period of time. This key feature of the section is completely suppressed by the critics.

—STRATEGY #4: REJECT SECRECY.

Many of the attacks on the Patriot Act emanate from a single source: the critics do not believe that the government should ever act in secret. Recipients of document production orders in terror investigations—whether Section 215 orders or national security letters under the 1986 Electronic Communications Privacy Act—should be able to publicize the government's request, say the critics. If intelligence agents want to search a suspected cell's apartment, they should inform the cell members in advance to give them an opportunity to challenge the search. Time and again, law enforcement critics disparage the Foreign Intelligence Surveillance Court, because its proceedings are closed to the public.

This transparent approach may satisfy those on the left and right who believe that the American people have no greater enemy than their own government, but it fails to answer the major question: how would it possibly be effective in protecting the country? The Patriot Act critics fail to grasp the distinction between the prosecution of an already committed crime, for which probable cause and publicity requirements were crafted, and the effort to preempt a catastrophic attack on American soil before it happens. For preemptive investigations, secrecy is of the essence. Opponents of the Patriot Act have never explained how they think the government can track down the web of Islamist activity in public. Given the fact that section 213 and other sections are carefully circumscribed with judicial checks and balances, it is in fact the secrecy that they allow that most riles the opponents.

The recent history of government intelligence-gathering belies the notion that any government surveillance power sets us on a slippery slope to tyranny. There *is* a slippery-slope problem in terror investigations—but it runs the other way. Since the 1970s, libertarians of all political stripes have piled restriction after restriction on intelligence-gathering, even preventing two anti-terror FBI agents in the same office from collaborating on a case if one was an "intelligence" investigator and the other a "criminal" investigator. By the late '90s, the bureau worried more about avoiding a pseudo-civil liberties scandal than about preventing a terror attack. No one demanding the ever-more Byzantine protections against hypothetical abuse asked whether they were exacting a cost in public safety. We know now that they were.

The libertarian certainty about looming government abuse is a healthy instinct; it animates the Constitution. But critics of the Patriot Act and other anti-terror authorities ignore the sea change in law enforcement culture over the last several decades. For privacy fanatics, it's always 1968, when J. Edgar Hoover's FBI was voraciously surveilling political activists with no check on its power. That FBI is dead and gone. In its place arose a risk-averse and overwhelmingly law-abiding Bureau, that has internalized the norms of restraint and respect for privacy.

This respect for the law now characterizes intelligence agencies across the board. Lieutenant General Michael V. Hayden, the nominee for Principal Deputy Director of National Intelligence, told the Senate Select Committee on April 14 that the challenge for supervisors in the National Security Agency was persuading analysts to use all of their legal powers, not to pull analysts back from an abuse of those powers.

It is because of this sea-change in law enforcement culture that Patriot Act critics cannot point to a single abuse of the act over the last four years, and why they are always left to argue in the hypothetical.

In conclusion, the Patriot Act is a balanced updating of surveillance authority in light of the new reality of catastrophic terrorism. It corrects anachronisms in law enforcement powers, whereby health care fraud investigators, for example, enjoyed greater ability to gather evidence than Al Qaeda intelligence squads. It created no novel powers, but built on existing authorities within the context of constitutional

checks and balances. It protects civil liberties while making sure that intelligence analysts can get the information they need to protect the country. The law should be reenacted.

Mr. COBLE. Mr. Barr.

TESTIMONY OF THE HONORABLE BOB BARR, FORMER MEMBER OF CONGRESS, ATLANTA, GEORGIA

Mr. BARR. Thank you very much, Mr. Chairman. And the fact that you're here today, despite some medical problems, is a very loud tribute to your concern for the Constitution and for open and objective and extensive debate on important constitutional issues such as those included in these sections in the USA PATRIOT Act. And I personally very much appreciate your being here and holding this hearing, as well as the other Members of the Committee. And, I appreciate very much their very kind words for my former service on this very Subcommittee that I consider one of the high points in my public career. I very much appreciate them being here today and conducting these hearings.

I do have, Mr. Chairman, a fairly extensive set of written remarks which I have sent to the Subcommittee, and ask that they be included in the record of these proceedings.

Mr. COBLE. Without objection.

Mr. BARR. What I'd like to do in the few minutes allowable for opening statements, Mr. Chairman, is put this in historical context, do away with some of the hyperbole and misplaced facts of the prior witness, and let the Subcommittee know what it is that I and a number of others from across the ideological spectrum, who care just as much as all of the witnesses here today and as Members of this Subcommittee about the Constitution, exactly what it is that we're proposing and what we're not proposing.

The issue, Mr. Chairman, of notice for searches goes back long before the last couple of decades; it goes back even long before our own Constitution, including its Bill of Rights, was adopted. It goes back at least 300 years before our Constitution. The notice that—or the principle that notice should be given before the sovereign could invade a man's castle, in the words of James Otis, was something very sacrosanct, a notion that the privacy of that dwelling—and the notion that before that the Government could invade that dwelling, or later that business, and gather evidence against that or another person without giving notice was very much important and I think is engrained in the fourth amendment.

Indeed, no less a constitutional scholar than Justice Clarence Thomas recognized recently that the notice provision is indeed an important underpinning of the reasonableness basis for the fourth amendment.

So the notion that we're talking about some radical concept here that would harm our Nation when we're talking about the norm being notice is not radical at all; it is very consistent with a long history both of the philosophy underlying our Bill of Rights as well as judicial interpretations thereof.

The courts, as has been correctly stated by prior witnesses, have never held that noticeless searches are per se okay. Quite the contrary. In the two instances in which courts of appeal, the second and ninth circuit, have ruled on the issue of noticeless searches,

they simply address the issue of the reasonableness of the delay in the notice. And indeed, the Supreme Court has not ruled on this issue. In the Delia case, 1979, that was simply a case not involving a search for or a seizure of evidence, but simply that in the case where the Government wished to properly place a listening device, a bug, in a location, it made no sense for the Government to announce that it was doing that. That's very different from a search and seizure of evidence.

What exactly is it that the USA PATRIOT Act did in its section 213? For the very first time in our Nation's history, it established a legal basis on which the Government could, in defined circumstances, execute a warrantless search, a so-called sneak and peek search. I, and most others who find some fault with that provision, don't contest that basic premise. Yes, there are instances in which the Government needs to conduct a search without providing contemporaneous notice; but we do believe that those circumstances ought to be very carefully limited to ensure that they remain very much, both in principle and in practice, not the norm, but the exception to the general rule. And we also believe that there needs to be defined limitations in terms of time for the execution of noticeless searches and seizures of evidence.

Therefore, what we are proposing, because section 213 is deficient in both of those two areas—it provides no definitive endpoint for a warrant noticeless search, and it provides a sort of general catch-all phrase that to deny the Government the use of a noticeless search would unduly delay the trial—that's not an appropriate constitutional basis on which to take away that important right for notice, Mr. Chairman. Therefore, what we are proposing is not the preposterous hypothetical that the previous witness indicated of having to tell Muhammad Atta that the Government is there to look at his hard drive. Nobody reasonably is proposing that, and the organizations with which I work are not. What we are simply doing, Mr. Chairman, is taking the existing framework in section 213 and providing a change in only two areas, one, a definitive endpoint for the noticeless search, with extensions; and secondly—and this is most important, I think, Mr. Chairman—I apologize for going on just slightly longer than the time, but this is most important—we clearly recognize that in those instances in which to deny the Government the ability to conduct a noticeless search would seriously harm the national security, yes, the Government ought to be able to proceed. And the Safe Act provision, which we commend to this Subcommittee and which some Members, Mr. Conyers and Mr. Flake, I believe, are already cosponsors, does that.

It does not take away, we are not proposing to take away, the section 213 authority, we are simply proposing that there be some definitive limitations, and that the general catch-all phrase be limited so that it clearly allows, in national security cases, but doesn't become simply a bureaucratic tool for the Government to use.

Mr. COBLE. I thank the gentleman.

[The prepared statement of Mr. Barr follows:]

PREPARED STATEMENT OF THE HONORABLE BOB BARR

Chairman Coble, Ranking Member Scott, Members of the Subcommittee, thank you again for inviting me to testify on the PATRIOT Act. You deserve applause for your oversight today.

The results of the debate over the extension of the PATRIOT Act's more intrusive provisions will define this Congress in our Nation's history. Will Congress correct some of the provisions that were hastily passed just days after the tragic attacks of 9/11 and bring the statute back in line with the command our nation's charter, our Constitution? Will Congress adopt safeguards to properly focus our law enforcement efforts on terrorists rather than ordinary Americans?

I am here today because I am confident that, working together, we can do just that and honor both the letter and the spirit of our Fourth Amendment freedoms by bringing the PATRIOT Act back in line with the Constitution.

My name is Bob Barr. From 1995 to 2003, I had the honor to represent Georgia's Seventh District in the United States House of Representatives, serving that entire period with many of you on the House Judiciary Committee.

From 1986 to 1990, I served as the United States Attorney for the Northern District of Georgia after being nominated by President Ronald Reagan, and was thereafter the president of the Southeastern Legal Foundation. For much of the 1970s, I was an official with the CIA.

I currently serve as CEO and President of Liberty Strategies, LLC, and *Of Counsel* with the Law Offices of Edwin Marger. I also hold the 21st Century Liberties Chair for Freedom and Privacy at the American Conservative Union, consult on privacy issues with the American Civil Liberties Union, and am a board member of the National Rifle Association.

I am also the Chairman of a new network of primarily conservative organizations called Patriots to Restore Checks and Balances, which includes the American Conservative Union, Eagle Forum, Americans for Tax Reform, the American Civil Liberties Union, Gun Owners of America, the Second Amendment Foundation, the Libertarian Party, the Association of American Physicians and Surgeons, and the Free Congress Foundation.

You have asked me to testify today about sections 201, 202, 223, and 213 of the PATRIOT Act. I will focus the bulk of this testimony on section 213, the "sneak and peek" provision, and reserve some brief comments on the other provisions at the end of this written statement.

Section 213 of the PATRIOT Act authorizes "sneak and peek," or "delayed notice," search warrants in all criminal cases—without limitation to cases involving terrorism or a foreign agents—where the federal government says notice of the search warrant would result in destruction of evidence, the endangerment of an individual's life or physical safety, flight from prosecution, intimidation of a witness, or serious jeopardy to a criminal investigation. The Act sets no limit on the length of time such a search of a person's home or business can be kept secret. Section 213 is not subject to sunset this year but should be amended and should be given a new sunset as amended, if it is not repealed.

I have grave concerns about covert searches of people's homes or businesses in general and about the design of this statute in particular. I would hope the Members of the Judiciary Committee would agree with me on one fundamental premise of American law. The idea of strangers, including government agents, secretly entering the privacy of our homes and examining our personal possessions is a threat to the fundamental freedoms our Fourth Amendment was written to protect.

Secret searches of American homes and businesses must not be allowed to become routine. They must be closely circumscribed. Although one might imagine a rare circumstance where a short delay in notice might be compelling and even pass scrutiny under the Fourth Amendment, secret searches should not be allowed to become a garden-variety tool of law enforcement. The PATRIOT Act, however, permanently enshrined secret searches of American homes and businesses in our law under the guise of anti-terrorism efforts.

As members of the House Judiciary Committee, you know well that the House Judiciary Committee's original marked-up version of the PATRIOT Act did not include statutory authority for secret criminal searches, although the Administration had asked for it. The "sneak-and-peek" provision was imposed on you by the Senate at the last minute in a substitution of the bill this Committee produced. Respectfully, I believe this addition to the bill was a serious mistake, but there was no time then to correct it. There is time now.

Giving federal law enforcement statutory authority for secret criminal search warrants in ordinary criminal cases has nothing to do with "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism," as the PATRIOT Act was pitched to the American people. We all know that. As the American people have come to understand that, they too have expressed strong reservations about the use of such extraordinarily intrusive and secretive powers, especially where such searches are not used to obstruct terrorist attacks.

If Congress chooses to continue to give statutory authority for these covert-entry, delayed-notification searches, they should be carefully limited to ensure that what should be the rarest of exceptions does not become the rule. The PATRIOT Act, however, has inadequate controls. And, even though the sneak and peek authority is not set to sunset by the end of the year, I urge you to support the addition of sound and modest checks on the use, and also against the abuse, of this secret search authority.

Section 213 of the PATRIOT Act, as codified at 18 U.S.C. § 3103a (2004), contains at least two fundamental flaws. First, it fails to set a statutory time limit on secret searches. The statute requires notice of the execution of a sneak and peek warrant within a "reasonable period of its execution," but sets no time limit on when such notice is required.[1]

From the outset, critics of the PATRIOT Act have warned that such open-endedness would result in these warrants being used to justify the indefinite delay of notice. Attorney General Gonzales recently testified that at least six of the secret searches that have been authorized under section 213 were authorized to be secret indefinitely, even though the Department has simultaneously said that a secret search under section 213 cannot be kept secret forever. The Attorney General has also testified that the "average" length of time a search is kept secret is between 30 and 90 days, but the government has not shared the details of most of its secret searches with the American people and has shared only limited information about a few carefully selected ones it wanted to discuss.[2]

The indeterminateness allowed by the statute as it currently exists is directly contrary to the rulings in the only two circuit courts to fully consider the issue of a lower court authorizing criminal search warrants with delay in notification allowed before the PATRIOT Act.[3] In the first such case, a circuit court held 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 a time should not exceed seven days except upon a strong showing of necessity."[4]

The only other circuit court to consider a lower court-approved delay in notice of a search, the Second Circuit, insisted on a specific time period for notice of a secret search, holding that notice could be delayed for only seven days unless there were fresh showings of cause for extensions.[5] Prior to the PATRIOT Act and since it passed, the Supreme Court has not issued any decisions endorsing the constitutionality of secret criminal search warrants, except in the limited context of warrants authorizing the installation of devices (i.e., bugs) for audio surveillance specifically authorized by statute, a decision the Department wrongly relies on as authority for its position that the Court has approved "sneak and peek" searches for general purposes.[6]

The idea that giving an American citizen notice that their home or business is being searched by the police is central both to the spirit and to the letter of the Constitution. Indeed, the principle that law enforcement should "knock and announce" their presence before executing a search warrant was well entrenched in the common law by the time of the Constitution's ratification, going back perhaps an additional 300 years before the American Revolution.[7]

Notably, the dreaded general warrants or "writs of assistance" wielded by the British crown's customs inspectors in colonial America actually "required that notice be given before entry was made, and reported instances of [their] use included notice."[8] These searches were reviled not because they were conducted covertly under cover of night, but because they did not require any particularity or probable cause before issuance. The Supreme Court has relied on the original intent of the Framers in deciding that notice of a search is a basic aspect of whether a search is "reason-

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[1] 18 U.S.C. § 3103a(b)(3).

[2] *Oversight of the USA Patriot Act: Hearing Before the Senate Judiciary Committee,* 109th Cong. (2005) (Attorney General Gonzales Responding to Senator Feingold).

[3] Stephen D. Lobaugh, Congress's Response to September 11: Liberty's Protector, *1 Geo. J.L. & Pub. Pol'y 131, 143* (Winter 2002) (stating, "The Supreme Court has not ruled on the constitutionality of "sneak-and-peek" searches, and only two United States Courts of Appeals have heard such cases."). A third case, *United States v. Simons,* 206 F.3d 392 (4th Cir. 2000), relied upon by the Justice Department did not involve a criminal search warrant that the issuing judge approved be kept secret at the time the warrant was executed and the lower court ultimately found that law enforcement did not deliberately disregard the rules in failing to leave notice of the warrant.

[4] *United States v. Freitas,* 800 F.2d 1451, 1456 (9th Cir. 1986).

[5] *United States v. Villegas,* 899 F.2d 1324, 1339 (2nd Cir. 1990).

[6] *Dalia v. United States,* 441 U.S. 238 (1979).

[7] Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 4.8(a) (4th ed. 2004).

[8] *Id.*

able," as expressly required by the Constitution. In *Wilson v. Arkansas,* Justice Thomas wrote for a unanimous court that the "common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment."[9]

Accordingly, the scope of permissible delay under section 213 of the PATRIOT Act is far broader than that contemplated by the appellate courts that examined sneak and peek authority prior to the PATRIOT Act. As such, supporters of modest PATRIOT Act reform have asked that Congress precisely delimit the period of delay. The bipartisan SAFE Act would create a time limit for the secrecy of such searches. The SAFE Act limits the initial period of delay to seven days, and allows that period to be renewed for good cause (for additional seven-day periods in the House version, and for 21-day periods in the Senate version). I commend Congressmen Flake and Conyers for co-sponsoring this legislation.

I would note that the notice, or knock and announce, principle has been allowed by the courts to give way to countervailing law enforcement interests in extraordinary circumstances, which leads me to the second fundamental flaw of section 213. The operative word here is extraordinary, something that the PATRIOT Act ignores by authorizing secrecy under circumstances that too many criminal cases might meet. This flaw is more substantively dangerous than the open-ended notice provision of section 213 because it telegraphs to law enforcement agents that they can relatively easily get approval for a secret search.

Specifically, 18 U.S.C. § 3103a(b)(1), enacted by the PATRIOT Act, requires an agent seeking a sneak and peek warrant to show that notice would have an "adverse result" as defined by 18 U.S.C. § 2705, to include destruction of evidence, danger to a person, flight from prosecution, witness tampering or "otherwise seriously jeopardizing an investigation or unduly delaying a trial." Leaving aside the issues of whether secret searches should be allowed generally in cases far afield from terrorism, the fifth provision—the catch-all exception—is the most problematic.

Congress should eliminate the catch-all exception and circumscribe section 213. On the evening before the Senate Judiciary Committee's first hearing in preparation for the sunsets debate, the Justice Department released new statistics showing a marked increase in the use of these secret searches. This, by the way, is another reason Congress should impose a sunset on section 213 so that it will not become a permanent fixture in our criminal system, and also give the Executive Branch some incentive to account for its use of this extraordinary power.

Between November 2001 and April 2003, the authorities used section 213 of the PATRIOT Act 47 times, a rate of 2.7 a month. Between April 2003 and January 2005, they requested and executed 108, a rate of 4.7 a month. At the Senate Judiciary Committee hearing, Chairman Specter disclosed that in a closed-door briefing DOJ admitted that 92 of the 155 sneak and peek searches that have been authorized since the PATRIOT Act have been under the vague "catch all" section, that there is "reasonable cause to believe that providing immediate notification of the execution of the warrant may" jeopardize an investigation.[10] That's nearly 60% of the time.

The use of the catch-all will undoubtedly grow dramatically as the spotlight on the PATRIOT Act begins to fade. Arguably law enforcement could claim immediate notice of a search would jeopardize an investigation in many, perhaps most, criminal cases. Notably, agents have never been turned away in a request for a sneak and peek warrant.

One must recall exactly what happens when federal agents use section 213. The government obtains a search warrant that allows agents to break into a private residence, enter under cover of darkness, conduct an extensive search of the premises, retain digital or paper files, document the search with photographs, seize tangible property like DNA, and then leave.

In testimony before the Senate Select Committee on Intelligence, Attorney General Gonzales recently selected example of where the catch-all definition of "adverse result" was used to secure a sneak and peek warrant.[11] Although the scenario was ostensibly meant to illustrate the need for retaining the open-ended justification for sneak and peek warrants, I believe it actually showcased the problem with this provision:

In this case, the Justice Department obtained a delayed-notice search warrant for a Federal Express package that contained counterfeit credit cards. At the time of the search, it was very important not to disclose the existence of the federal investigation,

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[9] 514 U.S. 927 (1995).

[10] *Oversight of the USA Patriot Act, supra* note 3.

[11] *The USA Patriot Act of 2001: Hearing Before the United States Senate Select Committee on Intelligence,* 109th Cong. (2005) (testimony of Attorney General Alberto Gonzales).

as this would have exposed a related Title III wiretap that was ongoing for major drug trafficking activities.

An organized crime/drug enforcement task force, which included agents from the DEA, the IRS, the Pittsburgh Police Department and other state and local agencies was engaged in a multi-year investigation that resulted in the indictment of the largest drug trafficking organization ever prosecuted in the Western District of Pennsylvania.

While the drug trafficking investigation was ongoing, it became clear that several leaders of the drug trafficking conspiracy had ties to an ongoing credit card fraud operation. An investigation into the credit card fraud was undertaken and a search was made of a Federal Express package that contained fraudulent credit cards.

Had notice of the Federal Express search tied to the credit card fraud investigation been immediately given, it could have revealed the ongoing drug trafficking investigation prematurely, and the drug trafficking investigation might have been seriously jeopardized. Even modest delay would not have been available if this provision of Section 213 were deleted.

I would urge the Members of the Subcommittee to question the Attorney General at more length about this example.

First, I think it notable that this case does not involve terrorism at all. Although the Justice Department continues to argue that those of us who voted for the PATRIOT Act knew full well that this was an omnibus crime measure, not just a terrorism bill, I think that is disingenuous. Attorney General Ashcroft was quite clear in his admonitions that delay on passage of the PATRIOT Act would lay the blame for any future *terrorist* attack on our heads. Yet, as we saw in the Justice Department's field report on the use of section 213, released in September 2004, it appears that the government is using delayed-notification search warrants *primarily* in criminal cases.[12]

Second, I do not see how this example bolsters the case for retaining the catch-all definition of "adverse result" for sneak and peek warrants. Could the agents in this case have made a solid argument that notice of the search would have resulted in the destruction of evidence, flight from prosecution, or intimidation of persons or witnesses? If so, they could still have obtained a delay under more exacting rules. If not, what did they believe would be the result of providing notice?

Fixing this failing in section 213 is not difficult. The SAFE Act, in both the Senate and the House, would remove the catch-all provision. I urge the Subcommittee to support this modest improvement to the PATRIOT Act.

Finally, I would note the increasing use of sneak and peek searches. One of the primary reasons we insisted on including sunset provisions in the PATRIOT Act was out of fear that by breaking down checks and balances on government authority, we would encourage "mission creep" and the use of these broadened authorities in contexts far afield from counter-terrorism.

And, while I acknowledge the Justice Department's argument that the use of delayed-notification search warrants only represents a small fraction of the tangible searches conducted by federal authorities annually, I fear my concerns are not assuaged. Sneak and peek warrants are inherently problematic. They do not give you a chance to examine the warrant before execution for mistakes or to challenge it.

While I think anyone knowledgeable about the practical nature of law enforcement, criminal investigation and counter-terrorism can contemplate the need for this special power under very special circumstances, the PATRIOT Act really threatens to make what should be an extraordinary power an ordinary power. And for that reason, I ask you to support at least the modest changes to the language of the law embodied in the SAFE Act.

Additionally, I would note the there is incomplete information about how this power has been used. We know it has been used at least 155 times as of this January. What we do not know, and what the government isn't telling the Judiciary Committee or the American people, is:

- how many times section 213 has been used in terrorism cases, as opposed to more ordinary crimes;
- how many times it has been used against citizens, versus foreign suspects;
- how many times the secret warrants have led to prosecutions or convictions and how many of those were in terrorism cases; and
- what happens to the contents of such secret searches (taking photos of people's homes, copies of their computers or their even their DNA samples) if no charges are brought.

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[12] DEPARTMENT OF JUSTICE, DELAYED NOTIFICATION SEARCH WARRANTS: A VITAL AND TIME-HONORED TOOL FOR FIGHTING CRIME, Sept. 2004.

I will now turn briefly to the other sections that are a subject of this hearing.

Section 223, which provides a civil remedy for victims of unlawful government surveillance, is a common-sense privacy protection measure and should be renewed. However, victims of secret surveillance abuse will often not know of such abuse and, as a result, the usefulness of section 223 is limited. Nevertheless, while it may be rare for an innocent person to discover they have been the victims of unlawful government surveillance, in such cases there should be a remedy, and section 223 provides one. It should be made permanent.

Sections 201 and 202 of the PATRIOT Act added new terrorism-related crimes to the list of criminal wiretapping predicates under Title III. While any expansion of federal wiretapping powers must give small government conservatives some pause, I personally regard these provisions of the PATRIOT Act as mainly beneficial to law enforcement and not unduly intrusive on the privacy of the American people. Title III requires a court order from a regular federal district court based on probable cause of crime, the time-honored Fourth Amendment standard that is lacking in surveillance orders approved by the special court that administers the Foreign Intelligence Surveillance Act (FISA). As a result, Title III surveillance is much less susceptible to abuse than FISA surveillance. The new wiretapping predicates listed in sections 201 and 202 are serious federal crimes. In my personal opinion, Congress should make sections 201 and 202 permanent.

I look forward to your questions. Thank you.

Mr. COBLE. I thank all of the Members.

Now, folks, we apply the 5-minute rule to ourselves as well, so if you all could keep your responses as tersely as possible, that way we can cover more ground.

And, Mr. Sullivan—strike that.

We have been joined by the distinguished gentleman from California. Dan, good to have you with us. No one else is here.

Mr. Sullivan, if section 201 of the USA PATRIOT Act is allowed to expire, is it true that criminal investigators could obtain a court-ordered wiretap to investigate mail fraud and obscenity offenses on the one hand, but not offenses involving weapons of mass destruction? Is that correct?

Mr. SULLIVAN. That's a correct statement, Mr. Chairman.

Mr. COBLE. That was a rhetorical question. I thought that was right. Do you want to elaborate just a minute on it?

Mr. SULLIVAN. Well, certainly. Congress essentially has provided a number of predicate offenses in which electronic surveillance would be allowed. The circumstances of section 201 included offenses that traditionally terrorists have used prior to the passage of section 201, and the Government was not permitted to essentially use electronic surveillance for those particular offenses.

Mr. COBLE. Thank you, sir.

Mr. Barr, your distinguished tenure as U.S. Attorney in Georgia, at any time did you or any of your assistants file an application for a delayed notification of a search warrant?

Mr. BARR. I don't recall specifically, Mr. Chairman. It wouldn't surprise me if there were circumstances such as many of those very appropriate examples laid out in the former—the current Attorney General's testimony and the report submitted to the Congress. It wouldn't surprise me if my office did under such circumstances as those. I don't specifically recall any instances, Mr. Chairman.

Mr. COBLE. I thank you.

Mr. Rosenberg, section 213 requires that notice be given to those against whom a search warrant was executed within a reasonable amount of time. Now I've known that as few days as 7, and I think 180 at one point. Comment what, in your opinion, is reasonable and how oftentimes a judge might come to that conclusion.

Mr. ROSENBERG. Thank you Mr. Chairman for the question. That is a very fact-specific inquiry.

In every case we go to the judge, and we ask her for what we believe we need in a particular investigation, whether it's drugs or mob or child pornography. So 7 days may well be all we need in a particular case, and all we get. In another case it may be 3 weeks or 2 months. And so each time we will go to the judge and attempt to demonstrate not just probable cause for the search, but reasonable cause for the delay based on the facts and circumstances.

Mr. COBLE. I thank you.

Ms. Mac Donald, I am told—and I have not seen it—but I am told that the ACLU has run a television advertisement claiming that section 213 of the USA PATRIOT Act allows law enforcement to search homes, "without notifying us." Now, are you familiar with that ad?

Ms. MAC DONALD. Well, that sounds very similar to a written copy that they produced soon after the PATRIOT Act was passed.

Mr. COBLE. And if, in fact, that was disseminated, I believe that would be an inaccurate description of section 213; would it not?

Ms. MAC DONALD. It's a classic example, Chairman, of the strategies used against the act to rewrite it, to amend the statute by saying—ignoring the fact that a judge has to approve delayed notice, and the fact that notice is only delayed, it is not a permanent condition that the Government is asking for.

Mr. COBLE. I thank you.

Bob, I think I have one—time for one more question.

In your testimony, Mr. Barr, you briefly mention that you support making permanent sections 201 and 202, and 223 of the PATRIOT Act. Explain to us why you are comfortable with that position.

Mr. BARR. Thank you, Mr. Chairman.

With regard to section 201 and 202, which simply add new or added new terrorism-related requirements to the list of criminal wiretapping predicates under title III, I think, the offenses that have been and would continue to be included if that provision is extended are appropriate.

We also understand, of course, as this Committee does, that title III includes within its provisions many safeguards on the extent to which and the way in which a title III wiretap, so to speak, is carried out. So there are plenty of safeguards in the statute already.

Section 223, which provides a civil remedy for victims of unlawful Government surveillance, I think, is a common-sense privacy measure that should be renewed. And I think there is also—Congress acted correctly initially. We've looked at those, I'm sure the Subcommittee and the full Committee will look carefully at them, and we have no problem with those being reauthorized.

Mr. COBLE. Thank you. My time has expired.

The gentleman from Virginia.

Mr. SCOTT. Thank you.

Ms. Mac Donald, I was intrigued with your use of the word "propaganda" because we've been having some trouble trying to get some straight answers from some of the other witnesses, and there is exaggeration of some of the provisions. We haven't discussed this provision today, but the FISA wiretaps and some of the expanded

powers under the Foreign Intelligence Surveillance Act, everybody comes and testifies without exception about the use in terrorism, terrorism, terrorism. And it is almost like pulling teeth to try to get them to acknowledge that FISA is not just terrorism; in fact, it can be used even if crimes are not involved, if it's involving generic foreign intelligence, conduct of foreign affairs.

And when you talk about hiding the judge, they say, yes, but we have to get probable cause. And then you say, probable cause of what? You don't have to find probable cause of a crime, just probable cause that the person you're starting the wiretap with is an agent of a foreign government. There doesn't have to be any crimes involved.

So I agree with you that there is a lot of misinformation, and I appreciate your testimony today.

Let me ask you a specific question. You indicated, I think, that you could not have one of these secret searches where the delay is permanent, where it is an indefinite secret; is that your testimony? Did the Attorney General say that six of the secret searches were authorized by a court to be secret indefinitely?

Ms. MAC DONALD. I'm not aware of that. There are possibilities for continuing delay; but again, that is a fact-based determination, and I think that——

Mr. SCOTT. It could be permanent, you may never know. You may never know.

Ms. MAC DONALD. In a completely hypothetical scenario, I suppose, if you have an ongoing investigation——

Mr. SCOTT. Let's ask Mr. Rosenberg. Any cases where the search—where the court has authorized an indefinite secret?

Mr. ROSENBERG. To my knowledge, Mr. Scott, if you're talking about delayed notice searches apart from FISA, notice is always given, always. Now, the investigation may run a long time——

Mr. SCOTT. Indefinitely.

Mr. ROSENBERG. Well, no, not indefinitely, a long time. And at the end of that time——

Mr. SCOTT. You're not aware of any cases where the court has authorized an indefinite secret?

Mr. ROSENBERG. Well, let me say it this way: At the end of the investigation, notice will be given. Now, there may be a case——

Mr. SCOTT. Or, as a matter of fact, the end of the war on terrorism. That's when enemy combatants get out of jail.

Mr. ROSENBERG. There may be a case where a judge leaves it open and requires the assistant United States attorney to come back, and often we do. Often we come back and ask for permission again.

Mr. SCOTT. Well, we will get more specific information on these six cases.

Mr. Rosenberg, when you use the word "judge," are you using United States district court judge and United States magistrate interchangeably?

Mr. ROSENBERG. Yes, sir.

Mr. SCOTT. Okay. When you go to get one of these warrants, does the U.S. Attorney or an assistant U.S. Attorney go, or does the FBI go by itself?

Mr. ROSENBERG. That practice will vary. In the Eastern District of Virginia, where I was an assistant U.S. Attorney, both in Norfolk and Alexandria, the practice was typically—and I believe in Alexandria all the time—for the assistant U.S. Attorney to accompany the agent to the magistrate judge's chambers when the warrant was sworn out.

Mr. SCOTT. In the normal search you have some checks and balances. You have to announce so the person being searched has an opportunity to contest it. If it is overly broad, they can comment on that, and if it's out of bounds, they can—you're subject to the exclusionary rule. If you have several searches, and only one of them produces any evidence, what is the sanction against not notifying those for whom you're not using evidence?

Mr. ROSENBERG. Well, let me just pick at one part of the premise. Delayed notification searches are normal searches, they just have delayed notice. But in all cases, Mr. Scott, in all cases, if there is a criminal proceeding—and often there is at the end—then the subject of the search can challenge it in all the ways——

Mr. SCOTT. If there is no criminal proceeding, if you didn't find anything in the search——

Mr. ROSENBERG. Then, for instance, under rule 41 of the Federal Rules of Criminal Procedure, the subject of the search can move for the return of his property.

Mr. SCOTT. If there is nothing to return. Well, they don't know, if you didn't let them know.

Mr. ROSENBERG. But you do let them know. You always let them know.

Mr. SCOTT. What is the sanction for not letting them know?

Mr. ROSENBERG. You mean for willfully violating a Federal rule of criminal procedure? I'm not an expert here, but I imagine there would be some civil remedy.

Mr. SCOTT. For evidence that is excluded in court under the exclusionary rule which suggests that some violation occurred, are you aware of any police officer or prosecutor that has ever been prosecuted for the illegal search, other than being embarrassed with the exclusionary rule?

Mr. ROSENBERG. Not all bad searches are illegal searches, sir; some bad searches are made in good faith, and evidence is suppressed even though there is no illegality.

Mr. SCOTT. If you have a bad search and don't notify them, what is the sanction?

Mr. ROSENBERG. You do notify them; you notify in all cases.

Mr. SCOTT. But there is no sanction if you don't.

Mr. ROSENBERG. Again, if you don't notify—if you willfully violate the Federal Rules of Criminal Procedure, Mr. Scott, then I would imagine at the end—it hasn't happened to me, I have never willfully violated the rules of criminal procedures as a prosecutor—that there would be a remedy for the subject of the search.

Mr. COBLE. The gentleman's time has expired. The gentleman—in order of appearance, the gentleman from Ohio Mr. Chabot is recognized for 5 minutes.

Mr. CHABOT. Thank you, Mr. Chairman. I want to thank you for holding this important hearing.

I want to first join my colleagues in welcoming former Congressman Bob Barr; we are very interested in his testimony. We may not agree with everything, as we didn't necessarily agree on this Committee all the time, but it was an honor to serve with Congressman Barr here. And we sat next to each other for about 8 years on this Committee and on the full Judiciary Committee and went through all kinds of things together, from impeaching Presidents to debating about whether or not we ought to put cameras in the Federal courtrooms, and a whole range of other issues.

So it's great to have you back today, Bob. Bob, we wish you best in the future as well. I would like to see you back up here someday if the cards are right.

Let me, if I can, turn to you at this point Ms. Mac Donald. And Mr. Scott was cross-examining you there with some questions and things, and because of time, oftentimes witnesses don't get a chance to respond to the extent that they might like to. If there are any additional responses that you might like to make to any of the points that my friend was making, I would be happy to give you that time now.

Ms. MAC DONALD. Well, I think, again, we need to understand that these are members of the Federal judiciary who have been sworn to uphold the Constitution that are ruling on whether delay is reasonable in a particular search. And again, this is after already having found probable cause to conduct the search in the first place.

There is a second step that the judge has to go through in approving a delayed notice search, which is, is there grounds, certain exigent circumstances that make delay reasonable, such as witness intimidation or obstruction of evidence.

It seems to me we have to assume that the checks and balances that the Founders provided in setting up the Constitution in the first place, the most important of which is judicial review, will work in this situation. I don't understand how you can possibly conduct a preemptive investigation, whether it's a criminal investigation or a terror investigation, without a delayed notice capacity. It is logically impossible to preemptively investigate either a crime or terrorism and notify the subjects of the search.

Mr. CHABOT. Thank you.

Let me ask you another question. The Knoxville News Sentinel in Tennessee reported that during the jury deliberation process in the case of *Hafiz* and *Torres-Luna* that ultimately found the two men not guilty of cocaine possession and distribution, as well as multiple Federal firearm violations, the jury posed a PATRIOT Act-related question to the judge. The question asked, if the defendants were being tried under the PATRIOT Act—in a handwritten note to the judge added that the PATRIOT Act had been ruled unconstitutional in four States and several municipalities. Judge Leon Jordan responded simply, "no". Could you comment on that story?

Ms. MAC DONALD. That's classic. You found a classic example. The ACLU and other groups have done a bang-up job of getting misunderstanding out there. Everybody thinks they're under PATRIOT Act investigations. They think the war in Afghanistan is being conducted under PATRIOT Act powers.

The PATRIOT Act was a narrow act designed for one thing and one thing only, intelligence. It acknowledged the fact that our only weapon against terrorist is intelligence. We cannot target-harden our way into safety.

And so when it comes to bringing surveillance powers into the 21st century, acknowledging the existence of cell phones and e-mail, the PATRIOT Act does that, tearing down the wall that prevented two FBI agents on the same al Qaeda squad from talking to each other, the PATRIOT Act tore down that wall. It is narrow; it is not something that is affecting the entire country. And again, if there had been abuses under this act, believe me, Congressman, we would have heard about it.

Mr. CHABOT. And that's what I wanted to get into with the little time I have remaining. I know, Mr. Rosenberg, I think, Mr. Sullivan, you also indicated, that there weren't any examples of PATRIOT Act abuse, and not a single example of abuse of civil rights and that sort of thing, and I've heard that before.

Bob, do you have any cases or are there any examples that you've heard that you would believe that would counter that? What would be your response to that?

Mr. BARR. It's, of course, very difficult to say, Mr. Chabot. For one thing, section 213 searches are conducted in secret, so it's very difficult to know what abuses there might have been, if any. So it's virtually impossible, at least until the end of these investigations when—and I certainly take the Department of Justice at its word, that at the end of the investigations, everybody will be notified. The problem is, Mr. Chabot, we know for a fact, according to the Attorney General's testimony, that in at least I believe six of the instances in which the Government allows that it has sought the section 213 authority to conduct a search without notice, that the delayed notice has gone on indefinitely. So it's virtually impossible to say, Mr. Chabot.

We do know there have been some examples of noticeless searches such as that, even though it was not conducted under section 213, the problems that manifest themselves are the same, the *Mayfield* case out in Oregon. And I don't want to get into a big discussion of that, but that was simply a case in which there was a noticeless search that turned out to be problematic.

So I think one can reasonably state that there have been problems, the extent of which, the magnitude of which it is impossible to say at this still relatively early stage in the exercise of section 213 powers.

Mr. CHABOT. Could I ask for unanimous consent for 1 additional minute, if I could, just to ask for a response?

Mr. COBLE. I'll do that, but we're going to have a second round as we go.

Mr. CHABOT. If I could have 1 minute, I would appreciate it.

Mr. COBLE. All right.

Mr. CHABOT. Would any of the witnesses like to respond to the response about allegations and the secret cases and things?

Ms. MAC DONALD. I would like to respond to the *Mayfield* case, because I know it has been raised before. The *Mayfield* case was not an abuse of the PATRIOT Act. The problem was there were fingerprints; the FBI misread the fingerprints. But it's—the use of the

PATRIOT Act were completely valid. And this was, after all, a terrorism investigation. Let's remember the context. This was after the Madrid train bombing, and the FBI had evidence that led them to Mr. Mayfield. Unfortunately they read their prints wrong. It had nothing to do with abuse of the PATRIOT Act.

Mr. CHABOT. Thank you very much. Yield back.

Mr. COBLE. The Chair now recognizes Mr. Sullivan's personal Congressman, Mr. Delahunt.

Mr. DELAHUNT. That's right, I am his Congressman.

Ms. Mac Donald, I think that Mr. Barr's observation that access to information is very problematic in terms of reaching a conclusion as to whether there has been problems or abuse—you know, you referenced earlier the—I think it was 1968 and J. Edgar Hoover and the FBI having transformed itself.

[10:58 a.m.]

Mr. DELAHUNT. I beg to differ. I think it has transformed itself recently. But one can point to numerous abuses during the 1970's and the 1980's and the 1990's. I know Mr. Sullivan is familiar with what occurred in the Boston office of the FBI, as am I.

You know, you talk about secrecy in Government or distrust, if you will, of secrecy in Government. I would suggest it is healthy. It is really, if you will, reflective of the Founders' concerns about Government. It really led to the Bill of Rights. I think that Mr. Barr would probably concur with that. So I can assure you—I sat on a Committee that was examining the conduct of the Boston office of the FBI; to secure information from the executive branch of Government was extremely difficult. We do not know what is occurring, and I say Congress does not really know. And I am not suggesting any individual is in any way withholding information. It is just, if you will, I presume that the natural tensions that exist between the branches. But the problem is, is secrecy in Government.

You know, the American people are reading that there is a huge increase in the number of classified documents on a yearly basis. You know, the gentleman that is responsible for archives and the keeping of that information has publicly expressed concern. So notice and transparency, you know, is important in terms of accountability. We are all held to be accountable. I hope that there are very few abuses. I mean, I think you say you cannot cite a single example. Well, we do not know.

And I guess, let me direct this question to Mr. Barr, because he served in Congress, and he is familiar with the relationship between the branches. And I have to tell you something, I think we have had a series of very informative hearings under the leadership of Chairman Coble relative to the PATRIOT Act, but I am becoming more and more inclined to not make permanent any particular provision that will sunset. In fact, I would go a step further, because I would entertain and, possibly when the time comes, seek to amend to make the entire PATRIOT Act subject to sunset. I do not know how many years. But I have no doubt that it would encourage cooperation by the executive branch and enhance accountability to the American public.

And I would—Bob, what is your—former Congressman Barr, what is your take on my observations?

Mr. BARR. Well, it is a view that I share and I think the true conservatives share as well. And I am somewhat mystified why a lot of my former colleagues and your current colleagues are so afraid of a sunset provision.

Particularly those of us who are conservative about many issues understand the need for oversight, as you have eloquently expressed it, and we also know that the realities are that if, generally speaking, if Congress does not have to do something, it will not. And this is a case in point. I do not think that we would be here today, I do not think that these hearings would be convened at this point in time were it not for the sunset provisions. It is a very, very important provision that liberals and conservatives alike ought to embrace.

Mr. COBLE. I thank the gentleman.

The distinguished gentleman from California. If you will suspend just a minute.

Let me say to my friend from Massachusetts, the other day, you may recall I indicated that I am not uncomfortable conceptually with sunsets; it gives us a chance to come back and reexamine it. But I would say this—and this would be over my pay grade I am sure—but I would like for us subsequently to, when we examine sunsets, I would like for it to be at the end of a Congress rather than in the first early weeks as the case has been now. We have been jumping through hoops, as you all know, for the past 2 months.

The gentleman from California.

Mr. LUNGREN. Thank you very much, Mr. Chairman.

Thank you, members of the panel, for appearing before us.

Mr. Barr, I happen to think oversight is extremely important. That is why I have made the observation more than once that Congress cannot do appropriate oversight just meeting Tuesday through Thursday. That is above our pay grade here, but I mean that honestly. Congress ought to reorganize itself so that we are here 5 days a week. This Chairman is working very hard to do it, but the compression of time with Committees and Subcommittees where, basically, part of Tuesday and Wednesday is the only time you have got to meet together I do not think gives us proper time for reflection. And that is just an observation I have had after being gone from this place for 16 years.

Mr. Rosenberg, Mr. Barr has said that "secret searches," of American homes and businesses must not be allowed to become routine; they must be closely circumscribed. I happen to agree with him on that. However you characterize it—but one way the Government can justify delayed notice search warrants is through—well, the ways they can are articulated specifically in the statute. But one of those is number five: Notification would cause serious jeopardy to an investigation or unduly delay a trial. That has been criticized as being a catch-all phrase that leads to delayed notice being issued in run-of-the-mill cases. How would you respond to that characterization?

Mr. ROSENBERG. Mr. Lungren, by the way, I believe, too, that we should be carefully circumscribed and scrutinized in the way that we use this power. Having said that, I do not see that as a catch-all provision. As a career prosecutor, I can tell you that most of the

time that we use a delayed notice search—and, again, we only use it in two out of every thousand searches or so—it is because notifying the subject of the search prematurely is going to essentially end, upset, or jeopardize the investigation. And just to be clear: We need to go to a judge, a magistrate judge or a Federal judge, and demonstrate that to her satisfaction.

So you may call it a catch-all provision—not you personally. Others may call it a catch-all provision, but it is not. It is really the part of the statute that we rely on most often, at least the plurality of the time, that we are seeking this authority, because that is the way we do our business. We have investigations, and as they play out, we like to see who else is involved, who the conspirators are, who they are talking to, who they are selling to. And if we bring it down too fast, we jeopardize that.

Mr. LUNGREN. I know we have had this in the law for some period of time. We want to make sure it applies to terrorist cases. And it has been my observation that we do have the presence of so-called sleeper cells in the United States who we have evidence not only have been here for days, months, but years, which would suggest an investigation of people involved in that might take more than a few days. And in his written testimony, Congressman Barr stated that section 213 sets no limits on the length of time notice of search warrants execution may be delayed.

But isn't it true, Mr. Rosenberg, Ms. MacDonald, that the judge would set the time? The judge sets the time? And that if, at the end of that time, you need more time, you have to go back?

Mr. ROSENBERG. That is exactly right, sir. The judge would set that time based upon our application. We would have to demonstrate what we needed and why we needed it.

Mr. LUNGREN. What about Mr. Barr's suggestion that 7 days would be a reasonable time, at least to start the process going?

Mr. ROSENBERG. He is right in some cases, 7 days may be all we need in some cases. But it is clearly not all we need in certain cases. And so I believe the way the law is written now gives us the flexibility and the judge the necessary oversight to set a reasonable amount of time.

Mr. LUNGREN. Now, let me mention, in the letter that we received from the Justice Department, they talked about one of the cases that was involved with 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. The length of the delay granted by the court was 7 days. Notification could not be made within 7 days, and the office was required to seek 31 extensions. The office was able to do that. Why is that a problem?

Mr. ROSENBERG. Well, it is a problem only in the following sense: Every time we go back—and we go back often for many things—but every time we go back, we are not doing something else. We have a finite pool of resources; we can spend it in any number of ways. In this case, the judge gave us 7-day increments.

Mr. LUNGREN. Thirty-one times.

Mr. ROSENBERG. Thirty-one times. But that is 31 applications, 31 times that the agent comes down to the courthouse to swear out the warrant; 31 times that an assistant U.S. Attorney is not doing something else.

Mr. LUNGREN. Let me ask Mr. Barr to follow up on that and then ask you to respond because my time will be up.

Congressman Barr, here you have a situation where they went 31 times, each time getting 7 days. Doesn't that seem a little silly? Or do you think that is appropriate because what we are doing is we are protecting constitutional rights, and therefore, we ought to extend that? And my second question is, is it the 7 days that you support, or is it some statutorily specified time that could be longer than 7 days?

Mr. BARR. I do not think there is anything magical about 7 days, Mr. Lungren. I do think it is important that there be a requirement on the Government such as in the SAFE Act that I and a number of others are supporting. For extensions, we believe that is entirely appropriate. I do think, though, that if the Government is forced to go back to the court on a regular basis, and if it is 7 days, then it is 7 days. And my experience as a U.S. attorney, that sort of thing was never a problem. Yes, does it take a few minutes of time? Absolutely. But those are procedures that are, generally speaking, fairly routine to both the assistant U.S. attorneys and the investigators.

Mr. LUNGREN. Would 21 days or 30 days be appropriate under your concept?

Mr. BARR. I think 21 days could be. And that is the provision that is provided in the SAFE Act which is pending in the other body in the Senate version.

Mr. LUNGREN. Ms. MacDonald?

Ms. MACDONALD. Well, Mr. Barr reminded us of the constitutional history of warrants and warrants for searches perfectly appropriately.

And of course, Mr. Delahunt, we need to preserve the constitutional framework for our Government. I believe the PATRIOT Act does that. But let us remember that the fourth amendment itself speaks in terms of reasonableness. It prohibits only unreasonable searches. It does not itself try to codify that with numerical terms. So judges, their very profession is involved in reading broad grants of authority like the Constitution gives them. So I think that the wording of the current section 213, which says you may delay notice for a reasonable period of time, is fully within the constitutional tradition and allows judges to make that fact, specific determination for each preemptive investigation.

Mr. COBLE. The gentleman's time has expired.

Mr. Rosenberg, I noticed that you referred to judges in the feminine gender. I do not want any of these male judges to accuse you of discrimination. Hopefully, that will not happen.

Mr. ROSENBERG. I have a daughter at home who is going to make sure I do it just that way.

Mr. COBLE. Very well.

Folks, in view of my allergy infirmity, I am going to rest my vocal cords, and let Mr. Scott start the second round.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Barr, if you give the notice late, if you violate the law, if you had 7 days to do it and you turned in the evidence, turned in the report a couple of days or a couple of weeks late, but you are not going to use the evidence, is there any sanction?

Mr. BARR. Currently, no, the law provides none.

Mr. SCOTT. Now, when we start trusting people, we have to put it in the context that this Administration in prior testimony on enemy combatants suggested that you could arrest an American citizen and hold them indefinitely without charges until the end of the conflict, which sounds like until the end of the war on terrorism, which certainly violates what most of us thought the Constitution would have required.

So let me ask you, Mr. Barr, another question. On the question of Mohammed Atta's computer, are there provisions in the law right now without the catch-all provision that would have allowed someone to get to his computer? Or would you have to rewrite the catch-all provision to be able to allow the search of his computer on a delayed notice?

Mr. BARR. I think, Mr. Scott, that if you look at the language of the exception, the adverse result, which is found in 18 U.S.C. 2705, clearly, and I think this is evident in the various examples of how delayed notice or notice-less searches have been used that have been provided by the Department of Justice and by the Attorney General. The categories that we are talking about here, endangering the life or physical safety, flight from prosecution, destruction of or tampering with evidence, or intimidation of potential witnesses are extremely broad. And I went through the list of examples that the Department has cited, and I would be hard pressed as a former prosecutor using one's imagination within the bounds of the law not to find an appropriate basis even in those four exceptions to the general rule to take into account the situation that would have been faced or would be faced in a Mohammed Atta situation.

And it is also important, I think, to emphasize, Mr. Scott, that the SAFE Act, which is simply one vehicle now currently pending before both houses of the Congress to correct this deficiency, clearly, clearly lays out a scenario and appropriate basis on which that very situation could and should be addressed.

Mr. SCOTT. Thank you.

Now, Mr. Barr, in your testimony, you ask several questions about what we know about the use of section 213. And I am going to ask Mr. Rosenberg, do you know how many times section 213 has been used in the 155 cases? How many of those were terrorist cases? How many we used against U.S. citizens? How many times the secret warrants have actually led to prosecutions? And how many of those were terrorism cases? And what happens to the contents of such searches if no charges are brought? I assume you cannot answer those off the top of your head.

Mr. ROSENBERG. I cannot answer all of those off the top of my head.

Mr. SCOTT. If you could provide us with that information.

Mr. ROSENBERG. I think I can answer part of that, though, Mr. Scott. I do not know how it breaks down between terrorism cases and perhaps what I would call the more ordinary criminal cases. But my impression, and again, having been an assistant U.S. attorney for so long, that most of the time that we use a delayed notification search it would be in the drug context or perhaps the fraud context. Now, some of those may also be terrorism-related. I would

be happy to get back to you, though, sir, with all the specifics or at least as many as we can muster.

Mr. SCOTT. Well, if you are having a drug investigation, any search is going to, "seriously jeopardize an investigation, or unduly delay a trial," any drug investigation would qualify for that.

Mr. ROSENBERG. Not necessarily. Not if you are at the end of the investigation and you are doing a search and making an arrest simultaneously.

Mr. SCOTT. If you are investigating drugs in a major city, that is going to be, it seems to me, an ongoing operation.

Mr. ROSENBERG. Often it is. But, again, if you are at the end, you could certainly in theory and in practice search and arrest, notify then, and bring the whole thing down.

Mr. SCOTT. Would you agree to a more comprehensive report on the use of section 213 and have more meaningful limits on the length of the delays for notification?

Mr. ROSENBERG. I know we are happy to look at anything that the Committee proposes. I do not have the authority to commit the Department of Justice to anything right now.

Mr. SCOTT. You cannot blame me for trying.

Mr. COBLE. I thank the gentleman from Virginia.

The gentleman from California, Mr. Lungren, is recognized for 5 minutes.

Mr. LUNGREN. Thank you very much, Mr. Chairman.

Mr. Rosenberg, I would like to go back to the question of the fifth basis for allowing a delayed notification, quote, unquote, criticized by some as the catch-all phrase. Mr. Barr in his testimony specifically claims that law enforcement could claim that immediate notice of search would seriously jeopardize an investigation in many and perhaps most cases, in other words, not requiring you to be put to the test on the previous three or four, where you have to show specifically how it is done. Can you respond to that in some detail? And what I mean by that is, this architecture of the law has been there for some period of time prior to the PATRIOT Act. It has been utilized on numerous occasions in the past. From your standpoint, do you recognize the potential abuse there? Is this just something that sort of is overblown? I mean, do you understand why some people are concerned? And how do you specifically respond to that? That is, if you have those previous three or four, I guess it is four that you can talk about, how come you need this one?

Mr. ROSENBERG. It is a very fair question, and I appreciate the opportunity to address it. Remember, sir, we always have a filter on this, a very important filter, a Federal judge. And so it might be the case—and, again, I am speaking hypothetically now—where we do not know of a specific person whose life is endangered or we do not know of concrete evidence that we are going to lose or that will be destroyed. And so there is that more general provision that allows us to demonstrate, we hope, to a judge and have him or her authorize the delay under the fifth provision. But we have to go to a judge, and we have to demonstrate probable cause for the search and reasonable cause for the delay. And so you always have this filter. And that is the most important thing I can say today: We have to go to a judge, and we have to show a fact-specific reason to invoke one of these exceptions. Now, sometimes, we will invoke

two or three in the same case. Lawyers often plead in the alternative. It is common. And we will say we think we may endanger the life of a witness; and if we lose that witness, it would seriously jeopardize the investigation. They can both be true at the same time. But we will lay out all the facts of a particular case and ask the judge to make that determination for us. We are not doing it ourselves.

Mr. LUNGREN. Mr. Barr, I would love to have you respond to that, because it just strikes me that we have had this architecture for some years used in obscenity cases, drug cases, organized crime cases. Now, we are having it apply in terrorist cases. And while I share your concern that we ought not to let the terrorists succeed by having them cause us to tear up our Constitution in addition to or as opposed to tearing up our physical structure, that we are faced with a very, very serious threat that is out there. And because of the vastness of the threat and the almost sort of new intelligence that we are receiving and trying to understand this threat, that that fifth category may be more appropriate in terrorist cases than some of these other cases. And so I just ask you for your response to that. Is your criticism that the four previous categories are sufficient to cause specificity of evidence to be presented before the judge such that he or she could make an intelligent decision so that the fifth one is not necessary? And is that what your sense of catch-all phrase is?

Mr. BARR. I do not have any problem, Mr. Lungren, with a fifth category. And that is why, for example, in the SAFE Act currently pending before the House and the Senate, it clearly provides that where there could be a serious endangerment of the national security by giving contemporaneous notice, the Government can seek or can apply for delayed notification. That is entirely appropriate. I think that clearly reflects the new world in which we are operating. I think it is a very broad authority for the Government, but yet it places a burden on the Government for more than some bureaucratic reason which unduly delaying a trial provides. I think unduly delaying a trial as the basis for not providing notice which has been, since long before our Constitution, one of the bases of privacy in our country and freedom in our country, is clearly not sufficient. And even if one assumes, as the Government is saying, they have had no abuses of this, especially as a conservative, I have a problem with the Government having that sort of broad authority because it can be abused very easily.

Mr. LUNGREN. So am I. With all due respect, does that mean you do not want us to get rid of the fifth category, or are you just saying that we have to be particularly observant of that fifth category?

Mr. BARR. I think it needs to be that—and I do believe, even with the Government's explanation of the circumstances under which the category is seriously jeopardizing an investigation or unduly delaying a trial, clearly indicates it has become sort of a catch-all. You put it in along with those others in case the others do not——

Mr. LUNGREN. But you are raising that as a concern. You are not saying we need to——

Mr. BARR. I think—I believe that, in order to be consistent with sound constitutional principles, the current category five needs to

be removed. I would propose replacing it with one that is more specifically tailored to national security concerns.

Mr. LUNGREN. Okay.

Mr. Rosenberg, is the *Candyman* case relevant to this discussion at all?

Mr. ROSENBERG. I believe it is. You are referring to an investigation in which we had notice that a car I believe bearing some 30,000 ecstasy tablets was going across the Canadian border. It was stopped in Buffalo. And, using delayed notification search authority—meaning probable cause and reasonable cause for delay—we searched the car, allowed the investigation to continue, took very dangerous drugs off the street and, ultimately, rounded up a whole bunch of other drug conspirators. And we did that under the fifth so-called catch-all—a phrase that I reject—exception that you find in section 2705.

In other words, had we had to take that whole case down there and then in Buffalo, okay, we would have still succeeded in removing those ecstasy tablets from the street, but we would not have been able to follow the trail of that investigation to other conspirators.

Mr. LUNGREN. Was that in part because you did not know the extent of where the investigation would take you at that point in time, and that is why the fifth category was appropriate? I am trying to figure out why the fifth category is necessary and under what circumstances.

Mr. ROSENBERG. Well, that is exactly right. At the beginning of an investigation, you often do not know where the trail will lead. You are surprised many times by the twists and turns that it takes. And I know that you have a background in law enforcement. You do not always know who is involved or to what extent or where they live. And so allowing an investigation to run, not seriously jeopardizing it, enables us to learn the extent of the conspiracy and, in this case, to get other drugs and other conspirators off the street.

Mr. COBLE. Thank you. The gentleman's time has expired.

The gentleman from Massachusetts.

Mr. DELAHUNT. I would frame it in larger terms. I think, Congressman Barr, I think you are absolutely correct in terms of I do not think there is anybody that wants to endanger national security, and I do not think we will, because I think that we have that as a priority.

Yet, at the same time, we have concerns given our history, given this natural inclination to distrust Government. That is why a lot of folks ended up here on this continent. But I would suggest that there is a crisis of confidence in the justice system. You know, Ms. MacDonald describes it as a campaign of misinformation, and in part, it could very well be. But it is this whole issue of secrecy and transparency and need for accountability and, again, not just to Congress, but to the American people. And I know that is difficult to balance. I am thinking beyond the PATRIOT Act. And I would address this to the U.S. Attorney.

We have a case in my congressional district in Quincy, Massachusetts, the *Ptech* case, where a firm was subject to a lawful search, and records were seized. The U.S. Attorney issued a state-

ment saying there is an ongoing investigation. There was a lot of publicity surrounding the search itself, not as a result of anything that the U.S. Attorney's Office was responsible for, but for other reasons. People are wondering, what happened? That search occurred, was it some 2.5 years ago now? I think we have got to communicate with the American public that after an event like that occurs and we hear nothing anymore, there has to be some sort of an accounting if we are going to restore confidence in the system itself.

Mike, would you have any comments about the *Ptech* case?

Mr. SULLIVAN. Well, I certainly appreciate your concerns, Mr. Delahunt. And this is a case that is 2.5 years old. And, unfortunately, the fact that this matter was under investigation did somehow get leaked to the media. And this is an instance, quite candidly, where I think the investigation and the company would have benefited by far less public scrutiny during the early stages. We took great pains to notify them of our authority to conduct a search warrant and took great pains to schedule the search warrant. We were not concerned that the documents at that point in time somehow could be secreted away, to do it late at night. Unfortunately, the fact that the search warrant was going to be executed was leaked. And that is how the media and the public ended up getting information regarding *Ptech*. I only made a public statement after it became public information to reassure the public that there was no reason for public fear at that point in time because of the nature of the investigation.

But I do agree that, once a matter has become public, it is in the interest of the public to communicate when that matter has been resolved. Unfortunately, some of these cases do take years to reach final resolution.

Mr. DELAHUNT. Well, again, and I respect your actions in the case. But it is 2.5 years at this point in time. Do you need any kind of authority to make a public statement indicating that this investigation has concluded—and I do not want to use the term exonerate—but concluded and there is no further action? I mean, I think we owe this to the 50-some odd employees who lost their jobs as a result of the publicity surrounding this particular case and give them, if you will, their reputations back. That, again, I am not in any way suggesting that the company's demise and the tarnished reputations was a result of your actions, but it occurred. And we have got to let the public know at some point in time whether there is anything there, or if there is not, remove the cloud. Do you need any kind of further authorization? Do you have the authority now to do it internally? Because I think it is very important. I use this just as an example, but I am sure that this example could be replicated all over the country in terms of communicating to the people. It goes to the issue of transparency and accountability.

Mr. SULLIVAN. I believe the U.S. Attorney's Offices across the country have the unilateral authority to make those public statements at the point in time where they feel confident that they can make those public statements.

Mr. DELAHUNT. Well, again, this goes to 2.5 years. I do not want to focus in on a particular case, but 2.5 years, it goes to the issue

I think that you heard caused Mr. Scott concern about indefiniteness. There comes a point in time when the Government at a moment in time has to fish or cut bait.

Mr. Rosenberg, you are shaking your head. I want to know why you are shaking your head.

Mr. ROSENBERG. I am shaking my head, yes, because I think it is a fair point. You mentioned earlier that distrust is healthy, Congressman. I agree with you; skepticism is healthy. And one of the ways in which the Government oversees what we do is both through the judges that review and sign or reject our warrants and through hearings like this where you ask hard questions and, hopefully, we give fathomable answers.

Mr. DELAHUNT. But if I can indulge an additional minute, Mr. Chairman.

But in the end, the American people are going to be the arbiters in terms of the integrity of the system. And when there is left hanging there clouds, then that erodes. It isn't just about, if you will, the people that are, if you will, the victims of improper publicity or leaks, but it is the integrity of the system. People are saying, what is happening? You know, whether it be there or—recently I was watching, I don't know, 60 Minutes or something on Sunday, and there is somebody with a new book out about most of the detainees in Guantanamo happened to be there at the wrong time at the wrong place. It does not help America's image abroad, and it certainly erodes the confidence of the American public in terms of the integrity of the justice system. They do not make a distinction between military investigators and the FBI. People do not necessarily make those kind of distinctions. So it is very important, because I would suggest, if we are going to have a healthy democracy, you know, one that we all feel comfortable with, you know, transparency is important, balanced, obviously, with our need for secrecy in terms of enhancing our national security.

Mr. COBLE. The gentleman's time has expired.

Folks this has been a good hearing. I again apologize to each and every one of you for my hacking and coughing. I know it sounded annoying, but I had no control over it. I will waive my second round of questions.

Let me just say this in summing up: Is the PATRIOT Act a perfect piece of legislation? No. But I do not think it is as onerous and unreasonable as some folks believe. But much of this is subject to interpretation. Many of us on this Subcommittee disagree from time to time, but we usually disagree agreeably. And we are going to get to the end of this row one of these days. And, for your information—I want to mention this—again, I want to thank you all for being here. In order to ensure a full record and adequate consideration of this important issue, the record will be left open for additional submissions for 7 days. Also, any written questions from any Member must also be submitted to you all within that same 7-day timeframe.

This concludes the oversight hearing on the implementation of the USA PATRIOT Act, sections 201, 202, 213 and 223—strike that. Not 213, because it does not sunset—201, 202, 223 of the Act that addresses criminal wiretaps and section 213 of the Act that

addresses delayed notice. Thank you for your cooperation. The Subcommittee stands adjourned.

[Whereupon, at 11:34 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE ROBERT C. SCOTT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA, AND RANKING MEMBER, SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Statement By
Congressman Robert C. "Bobby" Scott
Ranking Member
Subcommittee on Crime, Terrorism and Homeland Security
Hearing
On
Section 213, USA PATRIOT Act
May 3, 2005

Thank you, Mr. Chairman, for holding this hearing on the important issue before us today. We are considering Section 213 of the USA PATRIOT Act, the infamous "delayed notice" or "sneak and peek" authority extended under the Act. This lets the police secretly go into a suspect's home or business to look around for evidence, though not to seize it physically. In addition to the officer's observations, pictures and other recordings, such as CD's or floppy disks, can be taken. Under ordinary circumstances, notice of the search would be given through the officers showing up at your door to conduct a search. With "sneak and peek", notice is not given until some

time after the search, such as when an arrest or physical seizure of property takes place.

Even before Section 213, courts allowed "sneak and peek" searches with probable cause and reasonable circumstances justifying delayed notice. The U.S. Supreme Court has not ruled on the sufficiency of "sneak and peek" warrants under the 4th Amendment. There have been a few Circuit Court decisions in the 2nd, 9th and 4th Circuits. While these courts have not set a specific standard for such searches and notices, they have ruled that the search and notice must be reasonable and should not exceed 7 days without additional reasonable foundation separate from the foundation for the original delay.

Although this provision is not one of the sunsetted provisions

under the PATRIOT Act, it is the provision of the Act that has received the most Congressional attention since its enactment. "Sneak and peek" was not in the bill approved unanimously by this committee in the weeks following 9/11 and last Congress, the House passed by a wide margin an amendment to the DOJ appropriations bill denying the use of funds to implement "sneak and peek" warrants. "Sneak and peek" warrants are an anathema to our traditions of privacy and notice under the forth Amendment.

One of the problems with Section 213 is that it does not set a time limit on the how long notice can be delayed. Another problem is that it has a "catch-all" provision which allows the court to approve a "sneak and peek" warrant without there being dire exigent circumstances. Under the court approved "sneak

and peek" warrants before Section 213 warrants were approved only where it was deemed necessary to prevent such things as endangering life or physical safety, flight from prosecution, or destruction of evidence. Under Section 213, in addition to these exigent circumstances, a "sneak and peek" warrant can be issued to prevent a case from being "otherwise seriously jeopardized" or a trial from being "unduly delayed". Within the 155 "sneak and peek" warrants the Department of Justice concedes have been issued under Section 213, recent information reveals that 92 of them have ben under this catch-all justification.

Of course, when the Department talks about Section 213, as with all the PATRIOT Act provisions, it talks about how important it is to protecting us from terrorism. Yet, it is clear

that extraordinary powers such as "sneak and peek" are used on for more than terrorism cases. Just how much more is one of the issues we need to explore, but this broad use, including use on "garden variety" street crimes, makes it all the more imperative that we keep close watch on the use of these powers.

So, Mr. Chairman, this is another situation where if we don't eliminate the extraordinary authority of the government to pry into our private activities and affairs, we certainly should better structure that authority to assure that it is not subject to abuse or degradation over time. I look forward to the testimony of our witnesses on how we might best accomplish that. Thank you Mr. Chairman.

LETTER FROM THE HONORABLE WILLIAM E. MOSCHELLA, ASSISTANT ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE TO THE HONORABLE ARLEN SPECTER

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 –

[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

[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

REPORT FROM THE OFFICE OF THE INSPECTOR GENERAL ENTITLED "REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT," MARCH 11, 2005

U.S. Department of Justice
Office of the Inspector General

Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act

(as required by Section 1001(3) of Public Law 107-56)

March 11, 2005

Section 1001 of the USA PATRIOT Act (Patriot Act), Public Law 107-56, directs the Office of the Inspector General (OIG) in the U.S. Department of Justice (DOJ or Department) to undertake a series of actions related to claims of civil rights or civil liberties violations allegedly committed by DOJ employees. It also requires the OIG to provide semiannual reports to Congress on the implementation of the OIG's responsibilities under Section 1001. This report – the sixth since enactment of the legislation in October 2001 – summarizes the OIG's Section 1001-related activities from June 22, 2004, through December 31, 2004.

I. INTRODUCTION

According to the Inspector General Act, the OIG is an independent entity within the DOJ that reports to both the Attorney General and Congress. The OIG's mission is to investigate allegations of waste, fraud, and abuse in DOJ programs and personnel and to promote economy and efficiency in DOJ operations.

The OIG has jurisdiction to review programs and personnel in all DOJ components, including the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), the Federal Bureau of Prisons (BOP), the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the U.S. Attorneys' Offices, and other DOJ components.

The OIG consists of the Immediate Office of the Inspector General and the following divisions and offices:

- **Audit Division** is responsible for independent audits of Department programs, computer systems, and financial statements.
- **Evaluation and Inspections Division** provides an alternative mechanism to traditional audits and investigations to review Department programs and activities.
- **Investigations Division** is responsible for investigating allegations of bribery, fraud, abuse, civil rights violations, and violations of other criminal laws and administrative procedures that govern Department employees, contractors, and grantees.
- **Office of Oversight and Review** blends the skills of attorneys, investigators, and program analysts to investigate or review high profile or sensitive matters involving Department programs or employees.

- **Office of General Counsel** provides legal advice to OIG management and staff. In addition, the office drafts memoranda on issues of law; prepares administrative subpoenas; represents the OIG in personnel, contractual, and legal matters; and responds to Freedom of Information Act requests.

- **Management and Planning Division** assists the OIG by providing services in the areas of planning, budget, finance, personnel, training, procurement, automated data processing, computer network communications, and general support.

The OIG has a staff of approximately 420 employees, about half of whom are based in Washington, D.C., while the rest work from 16 Investigations Division field and area offices and 7 Audit Division regional offices located throughout the country.

II. SECTION 1001 OF THE PATRIOT ACT

Section 1001 of the Patriot Act provides the following:

> The Inspector General of the Department of Justice shall designate one official who shall –
>
> (1) review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice;
>
> (2) make public through the Internet, radio, television, and newspaper advertisements information on the responsibilities and functions of, and how to contact, the official; and
>
> (3) submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate on a semi-annual basis a report on the implementation of this subsection and detailing any abuses described in paragraph (1), including a description of the use of funds appropriations used to carry out this subsection.

III. CIVIL RIGHTS AND CIVIL LIBERTIES COMPLAINTS

Review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice.

The OIG's Special Operations Branch in its Investigations Division manages the OIG's investigative responsibilities outlined in Section 1001.[1] The Special Agent in Charge who directs this unit is assisted by two Assistant Special Agents in Charge (ASAC), one of whom assists on Section 1001 and DEA matters and a second who assists on FBI matters. In addition, four Investigative Specialists support the unit and divide their time between Section 1001 and FBI/DEA responsibilities.

The Special Operations Branch receives civil rights and civil liberties complaints via mail, e-mail, telephone, and facsimile. The complaints are reviewed by the Investigative Specialist and an ASAC. After review, the complaint is entered into an OIG database and a decision is made concerning its disposition. The more serious civil rights and civil liberties allegations that relate to actions of DOJ employees or DOJ contractors normally are assigned to an OIG Investigations Division field office, where OIG special agents conduct investigations of criminal violations and administrative misconduct.[2] Some complaints are assigned to the OIG's Office of Oversight and Review for investigation.

Given the number of complaints received compared to its limited resources, the OIG does not investigate all allegations of misconduct against DOJ employees. The OIG refers many complaints involving DOJ employees to internal affairs offices in DOJ components such as the FBI Inspection Division, the DEA Office of Professional Responsibility, and the BOP Office of Internal Affairs for appropriate handling. In certain referrals, the OIG requires the components to report the results of their investigations to the OIG. In most cases, the OIG notifies the complainant of the referral.

Many complaints received by the OIG involve matters outside our jurisdiction. The ones that identify a specific issue for investigation are forwarded to the appropriate investigative entity. For example, complaints of mistreatment by airport security staff are sent to the Department of Homeland

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[1] This unit also is responsible for coordinating the OIG's review of allegations of misconduct by employees in the FBI and the DEA.

[2] The OIG can pursue an allegation either criminally or administratively. Many OIG investigations begin with allegations of criminal activity but, as is the case for any law enforcement agency, do not end in prosecution. When this occurs, the OIG is able to continue the investigation and treat the matter as a case for potential administrative discipline. The OIG's ability to handle matters criminally or administratively helps to ensure that a matter can be pursued administratively, even if a prosecutor declines to prosecute a matter criminally.

Security (DHS) OIG. We also have forwarded complaints to the OIGs at the Department of Veterans Affairs, Department of State, United States Postal Service, Department of Defense, Central Intelligence Agency, and the Equal Employment Opportunity Commission. In addition, we have referred complainants to a variety of police department internal affairs offices that have jurisdiction over the subject of the complaints.

When an allegation received from any source involves a potential violation of federal civil rights statutes by a DOJ employee, the complaint is discussed with the DOJ Civil Rights Division for possible prosecution. In some cases, the Civil Rights Division accepts the case and requests additional investigation by either the OIG or the FBI. In other cases, the Civil Rights Division declines prosecution.

A. Complaints Processed This Reporting Period

From June 22, 2004, through December 31, 2004, the period covered by this report, the OIG processed **1,943** complaints that were sent primarily to the OIG's Section 1001 e-mail or postal address.[3]

Of these complaints, **1,748** did not warrant further investigation or did not fall within the OIG's jurisdiction. Approximately three-quarters of the 1,748 complaints made allegations that did not warrant an investigation. For example, some of the complaints alleged that government agents were broadcasting signals that interfere with a person's thoughts or dreams or that prison officials had laced the prison food with hallucinogenic drugs. The remaining one-quarter of the 1,748 complaints in this category involved allegations against agencies or entities outside of the DOJ, including other federal agencies, local governments, or private businesses. We referred those complaints to the appropriate entity or advised complainants of the entity with jurisdiction over their allegations.

Consequently, **195** complaints involved DOJ employees or components and made allegations that required further review. Of those complaints, 170 raised management issues rather than alleged "civil rights" or "civil liberties" abuses and were referred to DOJ components for handling. For example, inmates complained about the general conditions at federal prisons, such as the poor quality of the food or the lack of hygiene products. Twelve of the 195 complaints did not provide sufficient detail to make a determination whether an abuse was alleged. We requested further information but did not receive responses from any of these 12 complainants. Finally, we requested that the BOP investigate one of the complaints and report to us on the investigation's

[3] This number includes all complaints in which the complainant makes any mention of a Section 1001-related civil rights or civil liberties violation, even if the allegation is not within the OIG's jurisdiction.

findings. That complaint involved an inmate who complained that he was sexually harassed by a correctional officer. BOP's investigation of the matter is ongoing.

Therefore, after analyzing these 195 complaints, the OIG identified **12** matters that we believed warranted opening a Section 1001 investigation or conducting a closer review to determine if Section 1001-related abuse occurred. Of the 12 new matters, the OIG retained 1 for investigation because the complainant made allegations of a potentially criminal nature. The OIG closed one because the allegations already had been addressed in a previous OIG investigation. The OIG referred the remaining ten matters, which appeared to raise largely administrative issues, to Department components for further investigation or review. For six of the ten matters, we requested that the components report their findings to us.

It is important to note that none of the complaints we processed during this reporting period alleged misconduct by DOJ employees relating to use of a provision in the Patriot Act.

The following is a synopsis of the new complaints processed during this reporting period:

Complaints processed:	**1,943**
Unrelated complaints:	**1,748**
No investigation warranted:	**(1,283)**
Outside of OIG's jurisdiction:	**(465)**
Complaints within OIG's jurisdiction warranting review:	**195**
Non-Section 1001 matters	
Management issues:	**170**
Referred to DOJ components:	**1**
OIG unsuccessfully sought further details:	**12**
Section 1001 matters warranting review:	**12**
OIG investigation:	**1**
Closed as duplicative:	**1**
Referred to DOJ components:	**10**

B. Section 1001 Cases This Reporting Period

1. Complaints Investigated by the OIG

a. New matters

During this reporting period, the OIG opened one new Section 1001-related investigation, continued four ongoing Section 1001-related cases, and closed four Section 1001 investigations. The following is a description of the new matter opened by the OIG:

- The OIG received a complaint from a Muslim inmate alleging that correctional officers at a BOP facility humiliated and abused Muslim inmates because of the officers' hatred of Muslims. Specifically, the inmate alleged that correctional officers used excessive force on him, gave other inmates permission to assault him, and then covered up the incidents. The inmate also claimed that the BOP staff improperly denied him showers, social visits, and the right to attend religious services.

b. Cases opened during previous reporting periods that the OIG continues to investigate

- The OIG continued an investigation of the FBI's conduct in connection with the erroneous identification of a latent fingerprint found on evidence from the March 2004 Madrid train bombing as belonging to Brandon Mayfield, an attorney in Portland, Oregon. As a result of the identification, the FBI had initiated an investigation of Mayfield that resulted in his arrest as a "material witness" and his detention for approximately two weeks. Mayfield was released when Spanish National Police matched the fingerprints on the evidence to an Algerian national. The OIG is examining the cause of the erroneous fingerprint identification and the FBI's handling of the matter. The Department's Office of Professional Responsibility is reviewing the conduct of the prosecutors in the case.

- The OIG is investigating allegations made by an Egyptian national that during his detention at a BOP facility he was subjected to an invasive body cavity search in the presence of numerous people, including a female officer; placed alone in a cell under severe restrictions for more than two months; and had his ability to practice his religion undermined intentionally by the prison staff. The OIG has interviewed the Egyptian national and numerous BOP employees as part of the investigation.

- The OIG is investigating allegations by a Muslim inmate that prior to his arrival at a BOP facility, correctional officers informed other inmates that he was a radical Muslim who would try to take over the leadership of other Muslim inmates. He further alleged that since his arrival at the BOP facility, he has been subjected to excessive, undocumented searches; placed in the Special Housing Unit in retaliation for "writing up" correctional officers; and verbally abused, physically threatened, and spat upon by a correctional officer.

- The OIG continues its investigation of allegations that a BOP correctional officer verbally and physically abused a Muslim inmate while the inmate was being transported to the prison's hospital and that the inmate was placed improperly in solitary confinement following the incident.

c. OIG investigations completed during this reporting period

- The OIG investigated allegations by Muslim inmates that staff at a BOP prison, including the warden, discriminated against the inmates and engaged in retaliatory actions. The OIG substantiated many of the allegations against the warden and other BOP staff. The OIG found a disturbing pattern of discriminatory and retaliatory actions against Muslim inmates by BOP officers at this facility, particularly against those who complained about poor conditions at the prison and those who cooperated with the OIG investigation.

  For example, we found that Muslim inmates meeting the criteria for bed reassignment were denied an opportunity to relocate within the unit to facilitate their prayer requirements. In contrast, non-Muslim inmates requesting bed reassignments generally were accommodated. We also found that members of the prison's executive staff, including the warden, unfairly punished Muslim inmates who complained about the conditions of confinement or who cooperated with the OIG's investigation. For instance, a Muslim inmate who had filed complaints relating to his treatment at the prison was placed in the Special Housing Unit for four months for what we determined were specious reasons. In a separate incident, our review found that 5 days after the OIG interviewed a Muslim inmate, the warden inappropriately and unjustly ordered the inmate transferred to the Special Housing Unit for more than 120 days. After prosecution of this matter was declined by the U.S. Attorney's Office, we provided our report to the BOP for administrative action.

- The OIG completed its investigation into allegations of misconduct relating to dialysis treatment of Muslim inmates at a BOP medical

center. The OIG had received letters from two inmates alleging that inmate patients were required to take injections of porcine (pork) heparin as part of their dialysis treatment, despite the patients' religious objections to pork. The OIG found several deficiencies in the medical center's management of information and communications affecting the use of heparin for the inmates' treatment. The OIG provided several recommendations to the BOP relating to these deficiencies. The BOP agreed to adopt these recommendations.

- The OIG investigated allegations by a Muslim inmate that BOP correctional officers subjected him to verbal abuse, discriminatory practices, and anti-Islamic sentiment. The inmate claimed that these abuses intensified after September 11, 2001, and that he was transferred to another BOP facility in retaliation for filing complaints against BOP correctional officers. Although the investigation revealed no evidence that BOP staff discriminated against the complainant because of his religious or political beliefs, one of the subjects admitted that he showed the complainant a photograph of a nude female and scratched his groin area before attempting to shake the hands of inmates. The OIG provided its report of investigation to the BOP for appropriate action.

- The OIG investigated allegations that four individuals of Arab descent were detained improperly by FBI agents at the U.S. port of entry in the Virgin Islands. Allegedly, the four were questioned, handcuffed, and transported to an FBI facility for further questioning without being provided an explanation for their detainment. They claimed they were fingerprinted, photographed, and subjected to humiliation. The OIG investigation did not substantiate any misconduct by the FBI agents or that the individuals were subjected to humiliation by the agents. The OIG provided its report of investigation to the FBI.

- The OIG investigated allegations from a Muslim individual who alleged that he was abused by FBI agents and immigration detention officers from the time he was arrested in March 2002 until he was deported in April 2002. The OIG investigation did not substantiate these allegations.

2. Complaints Referred to Other Components

During this reporting period, the OIG referred ten of the new complaints to internal affairs offices within DOJ components for investigation or closer review. Three of the complaints were referred to the FBI. In one of those complaints, the Council on American-Islamic Relations alleged that an FBI agent violated the civil rights of a Muslim individual when the agent questioned

the individual regarding his immigration status and knowledge of terrorist activities. The FBI's Inspection Division currently is investigating this matter.

In the second complaint, an off-duty BOP Correctional Officer of Arab descent alleged that he and another individual were victims of racial profiling when they were detained at an airport and questioned for several hours about their suspicious behavior during a flight. After we referred the complaint to the FBI Inspection Division, that office reviewed the matter and determined that the FBI agents did not violate FBI policy. The third complaint referred to the FBI involved a national security matter that was investigated by the FBI's Inspection Division and is pending resolution.

The OIG referred seven of the ten complaints to the BOP's Office of Internal Affairs (OIA). The complaints included allegations that BOP staff verbally abused Muslim inmates, placed Muslim inmates in segregation, confiscated Muslim inmates' religious articles, and denied Muslim inmates' telephone privileges and library access. Four of the complaints sent to the BOP were designated by the OIG as "Monitored Referrals," which means the BOP is required at the end of its investigation to send a report of the investigation to the OIG for its review. Of these four complaints, the BOP closed two matters as unsubstantiated, while the other two matters remain open. The BOP has an open investigation on each of the three other matters.

During this reporting period, the FBI addressed a matter that the OIG had referred to the FBI for review during the previous reporting period. The matter involved an electronic communication (EC) from one FBI field office to other FBI field offices around the country identifying the names and addresses of the proprietors and customers of a Muslim-based website. The EC listed the proprietors' and customers' names by FBI field office for the respective office to take whatever action it deemed appropriate. The OIG received a copy of the EC from an FBI employee concerned about the lack of predication or apparent basis on the face of the EC for the leads to be sent for investigation to the FBI field offices. We asked the FBI Inspection Division to review the incident and report back to us. In this reporting period, the FBI Inspection Division notified us that the FBI recognized that the EC raised First Amendment concerns. The FBI retracted the EC and directed the field offices to conduct no further investigative action based on the EC and to destroy all copies of the EC. The Inspection Division also informed us that the FBI had concluded that the EC should have been reviewed by the legal advisor for the originating field office prior to being disseminated and that in the future such an EC will be subject to legal review.

C. Other OIG Activities Related to Allegations of Civil Rights and Civil Liberties Abuses

The OIG has conducted other reviews that go beyond the explicit requirements of Section 1001 in order to implement more fully its civil rights and civil liberties oversight responsibilities. Given the multi-disciplinary nature of its work force, the OIG can extend its oversight beyond traditional investigations to include evaluations, audits, and special reviews of DOJ programs and personnel. Using this approach, the OIG has initiated or continued several special reviews that address, in part, issues relating to the OIG's duties under Section 1001.

1. Review of FBI Conduct Relating to Detainees in Military Facilities in Guantanamo Bay and Iraq

During the reporting period, the FBI began a special inquiry into FBI agents' observations of interrogation techniques used on detainees held at the U.S. military's Guantanamo Bay and Abu Ghraib prison facilities. The OIG requested materials from the FBI relating to the special inquiry and, after reviewing them, opened a review of this matter.

The OIG is examining whether any FBI staff observed or participated in non-law enforcement interrogation techniques of detainees at U.S. military detention facilities. In addition, the OIG is reviewing whether FBI employees reported their observations of these interrogation techniques and how those reports were handled.

2. Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York

An OIG special review issued in December 2003 (and described in detail in our January 2004 Section 1001 report) examined allegations that some correctional officers physically and verbally abused some detainees held in connection with the Department's terrorism investigation at the Metropolitan Detention Center (MDC) in Brooklyn, New York.[4] We concluded that certain MDC staff members abused some of the detainees, and we found systemic problems in the way detainees were treated at the MDC. In December 2003, we provided the results of our investigation to the BOP for its review and appropriate disciplinary action.

[4] See "Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York" (MDC Report), issued December 18, 2003. The MDC Report supplemented an OIG report issued in June 2003 entitled, "The September 11 Detainees: A review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks." Both reports can be found on the OIG's internet website (www.usdoj.gov/oig) under "Special Reports."

In response to our report and recommendations, the BOP OIA initiated an investigation based on the OIG's findings to determine whether discipline is warranted. More than a year later, the OIA review still is ongoing, and the BOP still is considering appropriate disciplinary action. The OIG continues to monitor this review and the BOP's ultimate actions with regard to disciplinary action.

In addition, during this reporting period, the BOP informed the OIG that it discovered additional videotapes from the MDC relevant to the OIG's supplemental review regarding abuse related to the September 11 detainees which had not been provided previously to the OIG – or the BOP OIA – as required. Some of the videotapes included additional instances of video- and audio-taped meetings between detainees and their attorneys at the MDC. Others concerned detainee movements. The OIG and the BOP OIA are reviewing the newly discovered videotapes. The OIG and the BOP OIA also have opened a joint investigation to determine why the MDC had not previously provided these videotapes.

With respect to the systemic problems we found at the MDC, our December 2003 Supplemental Report made seven recommendations to the BOP ranging from developing guidance for training correctional officers in appropriate restraint techniques to educating BOP staff concerning the impropriety of audio recording meetings between inmates and their attorneys. The BOP's response to the recommendations and the OIG analysis of that response can be found on the OIG's website under "Special Reports." In February 2005, the BOP provided materials to close the remaining two recommendations.

3. OIG's Analysis of the Department's Responses to Recommendations in the Detainee Report

In its June 2003 Detainee Report, the OIG made 21 recommendations related to issues under the jurisdiction of the FBI, the BOP, leadership offices at the DOJ, as well as immigration issues now under the jurisdiction of the DHS. As of this reporting period, 20 of the recommendations have been resolved. The one open recommendation calls for the Department and the DHS to enter into a memorandum of understanding (MOU) to formalize policies, responsibilities, and procedures for managing a national emergency that involves alien detainees. This MOU has not yet been established. Negotiations between the Department and the DHS over the language of the MOU are ongoing.

4. Review of the FBI's Implementation of Attorney General Guidelines

In May 2002, the Attorney General issued revised domestic Guidelines that govern general crimes and criminal intelligence investigations. The OIG is conducting a review of the FBI's implementation of four sets of Attorney General Guidelines: Attorney General's Guidelines Regarding the Use of Confidential Informants; Attorney General's Guidelines on FBI Undercover Operations; Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations; and Revised Department of Justice Procedures for Lawful, Warrantless Monitoring of Verbal Communications.

The objectives of the OIG review are to determine what steps the FBI has taken to implement the Guidelines, examine how effective those steps have been, and assess the FBI's compliance with key provisions of the Guidelines. Because the FBI's adherence to these Guidelines could implicate civil rights or civil liberties issues under Section 1001, we are including a description of the review in this report.

IV. ADVERTISING RESPONSIBILITIES

Make public through the Internet, radio, television, and newspaper advertisements information on the responsibilities and functions of, and how to contact, the official.

The OIG continues to meet its Section 1001 advertising requirements in a variety of ways.

A. Internet

The OIG's Internet website contains information about how individuals can report violations of their civil rights or civil liberties. On our website, the OIG also continues to promote an e-mail address (inspector.general@usdoj.gov) where individuals can send complaints of civil rights and civil liberties violations. The OIG received most of the 1,943 complaints processed this reporting period via e-mail.

Report a Complaint - DOJ

File Edit View Go Bookmarks Tools Window Help

U.S. Department of Justice
OFFICE OF THE INSPECTOR GENERAL

Introduction
What's New
Employment Opportunities
Special Reports
Semiannual Reports to Congress
Congressional Testimony
Audit Reports
Evaluation and Inspections Reports
Top Management Challenges
FOIA Reading Room
Quality Assurance Guidelines
Organization Charts
Office Directory
U. S. Department of Justice
IGnet

OIG Homepage >> Violation of your Civil Rights or Civil Liberties

How to Report a Complaint about Violation of your Civil Rights or Civil Liberties by a Department of Justice Employee:

The Office of the Inspector General (OIG) investigates allegations of fraud, waste, abuse, and misconduct by Department of Justice employees, contractors, and grantees. The OIG is an independent entity within the Department of Justice that reports to both the Attorney General and Congress on issues that affect the Department's personnel or operations.

The OIG has jurisdiction over all complaints of misconduct against Department of Justice employees, including the Federal Bureau of Investigation; Drug Enforcement Administration; Federal Bureau of Prisons; U.S. Marshals Service; Bureau of Alcohol, Tobacco, Firearms, and Explosives; United States Attorneys Offices; and employees who work in other Divisions or Offices in the Department of Justice. (The one exception is that allegations of misconduct involving Department attorneys that arise from their authority to investigate, litigate, or provide legal advice are the responsibility of the Department's Office of Professional Responsibility.)

To report alleged misconduct on employees or contractors of the former Immigration and Naturalization Service: www.usdoj.gov/oig/hotline3.htm

Section 1001 of the USA Patriot Act, signed into law by the President on October 26, 2001, directs the Inspector General to review information and receive complaints alleging abuses of civil rights and civil liberties by Department of Justice employees. The OIG has created a special section in its Investigations Division to process these complaints. This section will identify the more serious civil rights and civil liberties allegations and assign them to OIG employees for investigation. The OIG will refer other complaints to Department components for their review and handling.

Individuals who believe that a Department of Justice employee has violated their civil rights or civil liberties may contact the OIG by **mail**:

Civil Rights & Civil Liberties Complaints
Office of the Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Room 4322
Washington, D.C. 20530

e-mail: inspector.general@usdoj.gov

hotline: (contact information in English and Spanish): (800) 869-4499

or **hotline fax**: (202) 616-9898.

OIG Civil Rights Poster (JPG)

Document: Done (0.297 secs)

The OIG previously developed a poster, translated in Arabic, that explains how to file a civil rights or civil liberties complaint with the OIG. An electronic version of this poster is available on our website.

The DOJ's main Internet homepage contains a link that provides a variety of options for reporting civil rights and civil liberties violations to the OIG. The Civil Rights Division's website also describes the OIG's role in investigating allegations of misconduct by DOJ employees and provides information on how to file a complaint with the OIG.

In addition, several minority and ethnic organizations have added information to their websites about how to contact the OIG with civil rights and civil liberties complaints. For example, the Arab American Institute (www.aaiusa.org), an organization that represents Arab Americans' interests and provides community services, added the OIG's Section 1001 poster to its website of information and resources for the Arab American community. The Institute also has informed its members and affiliates of the OIG's Section 1001 responsibilities through its weekly e-mail newsletter. Similarly, the American-Arab Anti-Discrimination Committee (ADC), one of the largest Arab-American organizations in the nation, has posted the OIG's contact information and Section 1001 responsibilities on its website, which at one time

averaged more than 1 million hits per month. The ADC also has published the OIG's Section 1001 responsibilities in its magazine, the *ADC Times*, which is circulated to more than 20,000 people. Furthermore, the OIG's Arabic poster and Section 1001 responsibilities have been disseminated electronically by the Council on American Islamic Relations LISTERV and the National Association of Muslim Lawyers LISTSERV.

B. Television

In the prior reporting period, the OIG arranged to have the following television advertisement aired in areas with a higher concentration of Arab speakers with the text spoken in Arabic and scrolled in English:

> *The Office of the Inspector General investigates allegations of civil rights and civil liberties abuses by U.S. Department of Justice employees. If you believe a Department of Justice employee has violated your civil rights or civil liberties, contact the Inspector General at 800-869-4499. That number again is 800-869-4499.*

The OIG also purchased blocks of time on ANA Television Network, Inc., an Arab cable television station with outlets around the country. According to the promotional materials at the time, ANA Television Network was the largest Arab-American television network in the country. The segment aired 48 times during prime time in June and July 2003.

C. Radio

Also in the prior reporting period, the OIG submitted public service announcements (PSA) to 45 radio stations in cities across the country, including New York, Los Angeles, Sacramento, Chicago, Detroit, Houston, Dallas, and Washington, D.C. The text of the PSA read:

> *The Office of the Inspector General investigates allegations of civil rights and civil liberties abuses by U.S. Department of Justice employees. If you believe a Department of Justice employee has violated your civil rights or civil liberties, contact the Inspector General at 800-869-4499.*

In an earlier period, we also purchased airtime for 44 radio advertisements on Arab/Muslim American radio stations in New York, Chicago, Los Angeles, Detroit, and Dallas. These advertisements, both in English and Arabic, were 60 seconds long and included the PSA listed above.

D. Posters

Previously, the OIG disseminated approximately 2,500 Section 1001 posters to more than 150 organizations in 50 cities. The posters, in English and Arabic, explain how to contact the OIG to report civil rights and civil liberties abuses.

As we discussed in a previous reporting period, we also provided the posters to the BOP, which placed at least two in each of its facilities. We have received hundreds of complaints each reporting period from inmates alleging civil rights and civil liberties abuses, many of which we believe were sent to us in response to the posters.

E. Newspapers

During the last reporting period, the OIG purchased additional newspaper advertisements highlighting its role in investigating allegations of civil rights and civil liberties abuses. The display advertisement was placed in an Arab community newspaper and appeared both in English and Arabic.

بلِغوا عن اي إنتهاك للحقوق او للحريات المدنية

يقوم مكتب المفتش العام التابع لوزارة العدل الأميركية بالتحقيق في أية إتهامات حول إنتهاكات للحقوق والحريات المدنية على أيدي موظفين من مكتب مكتب السجون الفدرالي، التحقيقات الفدرالي (FBI)، مكتب الطّوارىء الأميركي، مكاتب المدعيين العامين، وجميع الوكالات الأخرى التابعة لوزارة العدل.
إذا كنت تعتقد بأن أحد موظفي وزارة العدل قد أقدم على إنتهاك حقوقك أو حرياتك المدنية، بإمكانك أن تتقدم بشكوى لدى مكتب المفتش العام.
بواسطة البريد على العنوان التالي:

Civil Rights & Civil Liberties Complaints

Office of the Inspector General
U.S Department of Justice
950 Pennsylvania Avenue, NW
Room 4706
Washington, D.C 20530

بريد الإلكتروني
inspector.general@usdoj.gov

أو الفاكس 9898-616 (202)

لمزيد من المعلومات إتصلوا بمكتب المفتش العام على الخط الساخن المجاني 4499 - 869 (800)

Report Civil Rights & Civil Liberties Abuses

The Office of the Inspector General (OIG), U.S. Department of Justice investigates allegations of civil rights and civil liberties abuses by employees in the FBI, DEA, Federal Bureau of Prisons, U.S. Marshals Service, U.S. Attorneys Offices, and all other Department of Justice agencies.

If you believe a Department of Justice employee has violated your civil rights or civil liberties, you may file a complaint with the OIG by:

mail: Civil Rights & Civil Liberties Complaints
Office of the Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Room 4706
Washington, D.C. 20530

e-mail: inspector.general@usdoj.gov

or fax: (202) 616-9898

For more information
Visit the OIG's website at www.usdoj.gov/oig

F. Flyers

The OIG had flyers translated into several commonly spoken languages in the Muslim world, including Arabic, Urdu, Punjabi, and Vietnamese. We are awaiting translations into Indonesian and Malaysian.

ਰਿਪੋਟ
ਸ਼ਕਸੀ ਅਜ਼ਾਦੀ ਦੇ ਵਿਰੁਧ ਵਿਤਕੇ।

REPORT
CIVIL RIGHTS & CIVIL LIBERTIES ABUSES

ਅਮਰੀਕਾ ਦਾ ਇਨਸਾਫ ਵਿਭਾਗ ਅਤੇ ਇੰਸਪੈਕਟਰ ਜਨਰਲ ਦਾ ਦਫਤਰ (OIG) ਲੋਕਾਂ ਦੇ ਮਾਨਵ ਅਧਿਕਾਰ ਅਤੇ ਮਾਨਵ ਅਧਿਕਾਰ ਉਤੇ ਕੀਤੀਆ ਗਈਆ ਬੇਇਨਸਾਫੀਆ ਦੀ ਤਹਕੀਕਾਤ ਕਰਦਾ ਹੈ। ਇਨਾ ਬੇਇਨਸਾਫ਼ੀਆ ਦਾ ਤਹਕੀਕਾਤ ਇਨਸਾਫ ਵਿਭਾਗ, ਐ.ਬੀ.ਆਈ. , ਡੀ.ਈ.ਅ. ਉਤੇ ਆਈ. ਐਨ. ਐਸ. ਫੈਡਰਲ ਜੇਲ ਵਿਭਾਗ, ਅਮਰੀਕਾ ਦੀ ਮਾਰਸ਼ਲ ਸੇਵਾ, ਅਮਰੀਕਨ ਵਕਾਲਤ ਦੇ ਦਫਤਰ ਅਤੇ ਹੋਰ ਸਾਰੇ ਇਨਸਾਫ ਵਿਭਗਾਂ ਦੇ ਮੁਲਾਜ਼ਮਾ ਅਤੇ ਅਧਿਕਾਰੀਆਂ ਦੀ ਕੀਤੀ ਜਾਂਦੀ ਹੈ।

ਅਗਰ ਤੁਹਾਨੂ ਯਕੀਨ ਹੈ ਕੀ ਤੁਹਾਡੇ ਨਾਲ ਕਿਸੀ ਇਨਸਾਫ ਵਿਭਾਗ ਦੇ ਮੁਲਾਜ਼ਮ ਨੇ ਬੇਇਨਸਾਫੀ ਕੀਤੀ ਹੈ, ਤੁਸੀ ਅਪਨੀ ਸ਼ਿਕਾਯਤ ਉ. ਆਈ. ਜੀ. ਦੇ ਦਫਤਰ ਨੂ ਇਸ ਪਤੇ ਤੇ ਭੇਜੋ।

ਚਿਠੀ ਭੇਜਣ ਦਾ ਪਤਾ

mail: Civil Rights & Civil Liberties Complaints
Office of the Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

e-mail: inspector.general@usdoj.gov

or fax: (202) 616-9898

For more information, call (800) 869-4499 or visit the OIG's website at www.usdoj.gov/oig

The Office of the Inspector General (OIG), U.S. Department of Justice, investigates allegations of civil rights and civil liberties abuses by Department of Justice employees in the FBI, DEA, ATF, Federal Bureau of Prisons, U.S. Marshals Service, U.S. Attorneys Offices, and all other Department of Justice agencies.

If you believe a Department of Justice employee has violated your civil rights or civil liberties, you may file a complaint with the OIG by:

mail: Civil Rights & Civil Liberties Complaints
Office of the Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

e-mail: inspector.general@usdoj.gov

or fax: (202) 616-9898

For more information, call (800) 869-4499 or visit the OIG's website at www.usdoj.gov/oig

V. EXPENSE OF IMPLEMENTING SECTION 1001

Submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate on a semi-annual basis a report...including a description of the use of funds appropriations used to carry out this subsection.

During this reporting period, the OIG spent approximately $428,856 in personnel costs, $13,592 in travel costs (for investigators to conduct interviews), and $600 in advertising and publication costs, for a total of $443,048 to implement its responsibilities under Section 1001. The personnel and travel costs reflect the time and funds spent by OIG Special Agents, inspectors, and attorneys who have worked directly on investigating Section 1001-related complaints and on conducting special reviews.

REPORT FROM THE U.S. DEPARTMENT OF JUSTICE ENTITLED "DELAYED NOTICE SEARCH WARRANTS: A VITAL AND TIME-HONORED TOOL FOR FIGHTING CRIME," SEPTEMBER 2004

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.

LETTER FROM THE HONORABLE WILLIAM E. MOSCHELLA, ASSISTANT ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE TO THE HONORABLE HOWARD COBLE

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 3, 2005

The Honorable Howard Coble
Chairman
Subcommittee Crime, Terrorism and Homeland Security
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for the invitation to appear at the Committee on the Judiciary, Subcommittee on Crime, Terrorism and Homeland Security on May 3, 2005 to discuss the reauthorization of the USA PATRIOT Act. Specifically, today's hearing is focused on section 201, 202, 223 and most recently, the Committee added section 213 (which is not subject to sunset) to the agenda. In light of the expanded topic, we are writing to provide the Committee some additional information which supplements the Department's letter to Chairman Sensenbrenner dated April 4, 2005.

Specifically detailed below are examples of where the "seriously jeopardizing an investigation" prong was the sole "adverse result" used to request delayed notice. In addition to Operation Candy Box, which was detailed in our April 4, 2005, letter to the Committee, we have described seven additional cases below. It is important to note that the approximately twenty-eight instances cited in our April 4 letter do not equate to twenty-eight investigations or cases. For example, some of the cases that used delayed-notice search warrants utilizing the "seriously jeopardize" prong involved multiple search warrants.

As we are sure you will agree, the following examples of the use of delayed-notice search warrants illustrate not only the appropriateness of the Department's use of this important tool, but also its criticality to law enforcement investigations.

Example #1: Western District of Pennsylvania

The Justice Department obtained a delayed-notice search warrant for a Federal Express package that contained counterfeit credit cards. At the time of the search, it was very important not to disclose the existence of a federal investigation, as this would have revealed and endangered a related Title III wiretap that was ongoing for major drug trafficking activities. Originally, the Department was granted a ten-day delay by the court, but the Department sought and was granted eight extensions before notice could be made.

An Organized Crime Drug Enforcement Task Force ("OCDETF"), which included agents from the Drug Enforcement Administration (DEA), the Internal Revenue Service, and the Pittsburgh Police Department, as well as from other state and local law enforcement agencies, was engaged in a multi-year investigation that culminated in the indictment of the largest drug trafficking organization ever prosecuted in the Western District of Pennsylvania. The organization was headed by Oliver Beasley and Donald "The Chief" Lyles. A total of fifty-one defendants were indicted on drug, money laundering and firearms charges. Beasley and Lyles were charged with operating a Continuing Criminal Enterprise as the leaders of the organization. Both pleaded guilty and received very lengthy sentences of imprisonment.

The Beasley/Lyles organization was responsible for bringing thousands of kilograms of cocaine and heroin into Western Pennsylvania. Cooperation was obtained from selected defendants and their cooperation was used to obtain indictments against individuals in New York who supplied the heroin and cocaine. Thousands of dollars in real estate, automobiles, jewelry and cash have been forfeited.

The case had a discernable and positive impact upon the North Side of Pittsburgh, where the organization was based. The DEA reported that the availability of heroin and cocaine in this region decreased as the result of the successful elimination of this major drug trafficking organization. In addition, heroin overdose deaths in Allegheny County declined from 138 in 2001 to 46 in 2003.

While the drug investigation was ongoing, it became clear that several leaders of the drug conspiracy had ties to an ongoing credit card fraud operation. An investigation into the credit card fraud was undertaken, and a search was made of a Fed Ex package that contained fraudulent credit cards. Had the search into the credit card fraud investigation revealed the ongoing drug investigation prematurely, the drug investigation could have been seriously jeopardized. The credit card investigation ultimately resulted in several cases including US v. Larry Goolsby, Sandra Young (Cr. No. 02-74); US v. Lasaun Beeman, Derinda Daniels, Anna Holland, Darryl Livsey and Kevin Livsey (Cr. No. 03-43); US v. Gayle Charles (Cr. No. 03-77); US v. Scott Zimmerman, Lloyd Foster (Cr. No. 03-44). All of the defendants charged with credit card fraud were convicted except one, Lloyd Foster, who was acquitted at trial. These cases have now concluded.

Example #2: Western District of Texas

The Justice Department executed three delayed notice searches as part of an OCDETF investigation of a major drug trafficking ring that operated in the Western and Northern Districts of Texas. The investigation lasted a little over a year and employed a wide variety of electronic surveillance techniques such as tracking devices and wiretaps of cell phones used by the leadership. The original delay approved by the court in this case was

for 60 days. The Department sought two extensions, one for 60 day and one for 90 days both of which were approved.

During the wiretaps, three delayed-notice search warrants were executed at the organization's stash houses. The search warrants were based primarily on evidence developed as a result of the wiretaps. Pursuant to section 213 of the USA PATRIOT Act, the court allowed the investigating agency to delay the notifications of these search warrants. Without the ability to delay notification, the Department would have faced two choices: (1) seize the drugs and be required to notify the criminals of the existence of the wiretaps and thereby end our ability to build a significant case on the leadership or (2) not seize the drugs and allow the organization to continue to sell them in the community as we continued with the investigation. Because of the availability of delayed-notice search warrants, the Department was not forced to make this choice. Agents seized the drugs, continued our investigation, and listened to incriminating conversations as the dealers tried to figure out what had happened to their drugs.

On March 16, 2005, a grand jury returned an indictment charging twenty-one individuals with conspiracy to manufacture, distribute, and possess with intent to distribute more than 50 grams of cocaine base. Nineteen of the defendants, including all of the leadership, are in custody. All of the search warrants have been unsealed, and it is anticipated that the trial will be set sometime within the next few months.

Example #3: District of Connecticut

The Justice Department used section 213 of the USA PATRIOT Act in three instances to avoid jeopardizing the integrity of a pending federal investigation into a Connecticut drug trafficking organization's distribution of cocaine base and cocaine. The provision was used to place a global positioning device on three vehicles.

These applications were submitted in the case of United States v. Julius Moorning, et al. That case was indicted at the end of April 2004, and 48 of 49 individuals charged have been arrested. As of this date, 38 of the defendants have entered guilty pleas, and several more are being scheduled. The trial of the remaining defendants is scheduled to begin on June 15. All defendants with standing to challenge any of the orders obtained have entered guilty pleas.

The Justice Department believed that if the targets of the investigation were notified of our use of the GPS devices and our monitoring of them, the purpose of the use of this investigative tool would be defeated, and the investigation would be totally compromised. As it was, the principals in the targeted drug-trafficking organization were highly surveillance-conscious, and reacted noticeably to perceived surveillance efforts by law enforcement. Had they received palpable confirmation of the existence of an ongoing federal criminal investigation, the Justice Department believed they would have ceased

their activities, or altered their methods to an extent that would have required us to begin the investigation anew.

In each instance, the period of delay requested and granted was 90 days, and no renewals of the delay orders were sought. And, as required by law, the interested parties were made aware of the intrusions resulting from the execution of the warrants within the 90 day period authorized by the court.

Example #4: Western District of Washington

During an investigation of a drug trafficking organization, which was distributing cocaine and an unusually pure methamphetamine known as "ice," a 30-day delayed-notice search warrant was sought in April 2004. As a result of information obtained through a wiretap as well as a drug-sniffing dog, investigators believed that the leader of the drug distribution organization was storing drugs and currency in a storage locker in Everett, Washington. The warrant was executed, and while no drugs or cash was found, an assault rifle and ammunition were discovered. Delayed notice of the search warrant's execution was necessary in order to protect the integrity of other investigative techniques being used in the case, such as a wiretap. The investigation ultimately led to the indictment of twenty-seven individuals in the methamphetamine conspiracy. Twenty-three individuals, including the leader, have pled guilty, three are fugitives, and one is awaiting trial.

Example #5: Southern District of Illinois

The Justice Department used section 213 of the USA PATRIOT Act in an investigation into a marijuana distribution conspiracy in the Southern District of Illinois. In particular, in November 2003, a vehicle was seized pursuant to authority granted under the provision.

During this investigation, a Title III wiretap was obtained for the telephone of one of the leaders of the organization. As a result of intercepted telephone calls and surveillance conducted by DEA, it was learned that a load of marijuana was being brought into Illinois from Texas. Agents were able to identify the vehicle used to transport the marijuana. DEA then located the vehicle at a motel in the Southern District of Illinois and developed sufficient probable cause to apply for a warrant to search the vehicle. It was believed, however, that immediate notification of the search warrant would disclose the existence of the investigation, resulting in, among other things, phones being "dumped" and targets ceasing their activities, thereby jeopardizing potential success of the wiretaps and compromising the overall investigation (as well as related investigations in other districts). At the same time, it was important, for the safety of the community, to keep the marijuana from being distributed.

The court approved the Department's application for a warrant to seize the vehicle and to delay notification of the execution of the search warrant for a period of seven days, unless extended by the Court. With this authority, the agents seized the vehicle in question (making it appear that the vehicle had been stolen) and then searched it following the seizure. Approximately 96 kilograms of marijuana were recovered in the search. Thirty-one seven-day extensions to delay notice were subsequently sought and granted due to the ongoing investigation.

As a result of this investigation, ten defendants were ultimately charged in the Southern District of Illinois. Seven of these defendants have pled guilty, and the remaining three defendants are scheduled for jury trial beginning on June 7, 2005.

Example #6: Eastern District of Wisconsin

In a Wisconsin drug trafficking case, a delayed-notice search warrant was issued under section 213 because immediate notification would have seriously jeopardized the investigation. In this case, the Department was in the final stages of a two-year investigation, pre-takedown of several individuals involved in the trafficking of cocaine. The Department initially received a delayed-notice search warrant for seven days, and thereafter received three separate seven-day extensions. For each request, the Department showed a particularized need that providing notice that federal investigators had entered the home being searched would compromise the informant and the investigation.

On February 14, 2004, the United States Attorney's Office for the Eastern District of Wisconsin requested a search warrant to look for evidence of assets, especially bank accounts, at a suspect's residence as well as to attach an electronic tracking device on a vehicle investigators expected to find in the garage. The purpose of the device would be to track the suspect and observe his meetings in the final weeks before the takedown. The warrant also requested delayed notice, based on the particularized showing that providing notice that federal investigators had entered the home would compromise an informant and the investigation. The court issued the search warrant and granted the delayed notification for a period of seven days. On February 15, 2004, authorized officers of the United States executed the search warrant on the subject premises. However, agents were unable to locate the vehicle to install the electronic tracking device.

Before the expiration of the initial delayed-notice period, the Department sought an extension of the delay based on the showing that notice would compromise the informant and the investigation. The court granted a seven-day extension, but investigators were still unable to locate the suspect's vehicle during this time. During this period, however, five suspects were charged with conspiring to possess more than five kilograms of cocaine, and arrest warrants were issued for each of the individuals.

After the issuance of the arrest warrants, the Department sought its third delay of notice to allow agents to endeavor to install the electronic tracking device and to attempt to locate the five suspects. Once again, the request was based on the showing that notice would compromise the informant and the investigation. The court granted another seven-day extension, and agents were able to find a location where one suspect appeared to be staying. After locating the suspect, and before the expiration of the delayed-notice period, the government requested a separate warrant for this location and for other locations used by the conspirators. The Department also requested its fourth and final delay in the notice period to allow agents to execute the search warrants sought, and to arrest the suspects. The court granted all requests and the suspects were subsequently arrested. As required by law, notice of the searches was given upon arrest.

Example #7: Eastern District of Washington

In a drug trafficking and money laundering case in the State of Washington, a delayed-notice search warrant was issued under section 213 because immediate notification would have seriously jeopardized the investigation. In this case, a district judge had authorized the interception of wire and electronic communications occurring over four cellular telephones that were being used in furtherance of drug trafficking and/or money laundering activities. On December 18, 2004, more than one month after the Drug Enforcement Administration (DEA) began surveillance, DEA agents administratively seized a black Ford Focus owned by one of the suspects based on the determination that the vehicle likely contained controlled substances.

On December 21, 2004, the DEA requested a warrant to search the seized vehicle for drugs, and the court issued the warrant based on the DEA's articulation of probable cause. On the same day, the search warrant was executed on the suspect's vehicle, which was still in the DEA's possession pursuant to the administrative seizure. During the search, agents located approximately two kilograms of suspected cocaine and three pounds of suspected methamphetamine. At the time, the service copy of the search warrant was "served" on the vehicle.

Due to the nature of the investigation, which included the orders authorizing the interception of wire and electronic communications to and from a number of cellular telephones, the DEA believed that both the continued administrative seizure of the vehicle and notice of the execution of the search warrant would greatly compromise the investigation. Therefore, the DEA requested an order allowing them to remove the served copy of the warrant from the vehicle, and delay notice to the owner for sixty days in order to avoid jeopardizing the ongoing criminal investigation. The court granted the order, concluding that immediate notification would compromise a major drug trafficking and money laundering investigation.

Approximately twenty-five individuals have been indicted as a result of this investigation (eight of whom are still fugitives), and trial is scheduled for this October.

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In closing, the Department of Justice believes it is critical that law enforcement continue to have this vital tool for those limited circumstances, such as those discussed above, where a court finds good cause to permit the temporary delay of notification of a search.

We hope the information provided above is helpful. Should you require any further information, please do not hesitate to contact this office.

Sincerely,

William E. Moschella
Assistant Attorney General

cc: The Honorable Robert C. (Bobby) Scott
Ranking Minority Member

ARTICLE SUBMITTED BY HEATHER MAC DONALD, JOHN M. OLIN FELLOW, THE MANHATTAN INSTITUTE FOR POLICY RESEARCH, ENTITLED "STRAIGHT TALK ON HOMELAND SECURITY," *City Journal* (Summer 2003)

City Journal
Straight Talk on Homeland Security
Heather Mac Donald
Summer 2003

The backlash against the Bush administration's War on Terror began on 9/11 and has not let up since. Left- and right-wing advocacy groups have likened the Bush administration to fascists, murderers, apartheid ideologues, and usurpers of basic liberties. Over 120 cities and towns have declared themselves "civil liberties safe zones"; and the press has amplified at top volume a recent report by the Justice Department's inspector general denouncing the government's handling of suspects after 9/11. Even the nation's librarians are shredding documents to safeguard their patrons' privacy and foil government investigations.

The advocates' rhetoric is both false and dangerous. Lost in the blizzard of propaganda is any consciousness that 9/11 was an act of war against the U.S. by foreign enemies concealed within the nation's borders. If the media and political elites keep telling the public that the campaign against those terrorist enemies is just a racist power grab, the most essential weapon against terror cells—intelligence from ordinary civilians—will be jeopardized. A drumbeat of ACLU propaganda could discourage a tip that might be vital in exposing an al-Qaida plot.

It is crucial, therefore, to demolish the extravagant lies about the anti-terror initiatives. Close scrutiny of the charges and the reality that they misrepresent shows that civil liberties are fully intact. The majority of legal changes after September 11 simply brought the law into the twenty-first century. In those cases where the government has expanded its powers—as is inevitable during a war—important judicial and statutory safeguards protect the rights of law-abiding citizens. And in the one hard case where a citizen's rights appear to have been curtailed—the detention of a suspected American al-Qaida operative without access to an attorney—that detention is fully justified under the laws of war.

The anti–War on Terror worldview found full expression only hours after the World Trade Center fell, in a remarkable e-mail that spread like wildfire over the Internet that very day. Sent out by Harvard Law School research fellow John Perry Barlow, founder of the cyber-libertarian Electronic Freedom Foundation, the message read: "Control freaks will dine on this day for the rest of our lives. Within a few hours, we will see beginning the most vigorous efforts to end what remains of freedom in America. . . . I beg you to begin NOW to do whatever you can . . . to prevent the spasm of control mania from destroying the dreams that far more have died for over the last two hundred twenty-five years than died this morning. Don't let the terrorists or (their natural allies) the fascists win. Remember that the goal of terrorism is to create increasingly paralytic totalitarianism in the government it attacks. Don't give them the satisfaction. . . . And, please, let us try to forgive those who have committed these appalling crimes. If we hate them, we will become them."

Barlow, a former lyricist for the Grateful Dead, epitomizes the rise of the sixties counterculture into today's opinion elite, for whom no foreign enemy could ever pose as great a threat to freedom as the U.S. For Barlow, the problem isn't the obvious evil of Islamic terrorism but the imputed evil of the American government—an inversion that would characterize the next two years of anti-administration jeremiads. In this spirit, critics would measure each legal change not against the threat it responded to, but in a vacuum. Their verdict: "increasingly paralytic totalitarianism."

Right-wing libertarians soon joined forces with the Left. A few months after the Twin Towers fell, the Rutherford Institute, a Christian think tank concerned with religious liberty, added the final piece to the anti-administration argument: the 9/11 attacks were not war but, at most, a crime. Rutherford president John Whitehead denounced the Bush administration's characterization of the terror strikes as "acts of war by foreign aggressors," without however offering a single argument to support his view. Since that characterization has produced, in Whitehead's view, growing "police statism" that is destroying Americans' freedom, the characterization must be false.

In fact, of course, the 9/11 bombings were classic decapitation strikes, designed to take out America's political and financial leadership. Had a state carried them out, no one could possibly deny that they were acts of war, as John Yoo and James Ho point out in a forthcoming *Virginia Journal of International Law* article. The aim of the 19 foreign terrorists and their backers was not criminal but ideological: to revenge U.S. policies in the Middle East with mass destruction.

Recognizing that the World Trade Center and Pentagon attacks were acts of war entails certain consequences. First, the campaign against al-Qaida and other Islamic terror organizations is really war, not a metaphor, like the "war on drugs." Second, it is a war unlike any the U.S. has ever fought. The enemy, mostly but not exclusively foreign, is hidden on American soil in the civilian population, with the intention of slaughtering as many innocent noncombatants as possible. The use of military force abroad, while necessary, is by no means sufficient: domestic counterterrorism efforts by the FBI and other domestic law enforcement agencies are at least as essential to defeating the enemy.

When these agencies are operating against Islamic terrorists, they are operating in an unprecedented war mode—but most of the rules that govern them were designed for crime fighting. The tension between the Justice Department's and FBI's traditional roles as law enforcement agencies and their new roles as terror warriors lies at the heart of the battle over the Bush administration's post-9/11 homeland-security policies: critics refuse to recognize the reality of the war and thus won't accept the need for expanded powers to prosecute it.

Most of the changes in the law that the Justice Department sought after 9/11 concern the department's ability to gather intelligence on terror strikes before they happen—its key responsibility in the terror war. Yet the libertarian lobby will not allow the department to budge from the crime paradigm, refusing to admit that surveillance and evidence-gathering rules designed to protect the rights of suspected car thieves and bank robbers may need modification when the goal is preventing a suitcase bomb from taking out JFK. But of course the libertarians rarely acknowledge that suitcase bombs and the like are central to this debate.

Ironically, none of the changes instituted by Attorney General Ashcroft comes anywhere near what the government *could* ask for in wartime, such as the suspension of *habeas corpus*, as Lincoln ordered during the Civil War. The changes preserve intact the entire criminal procedural framework governing normal FBI and police actions, and merely tinker around the edges. But the left and right civil libertarians are having none of it.

The charges they have brought against the War on Terror have been so numerous, impugning every single administration action since 9/11, that it would take hundreds of pages to refute them all. But the following analysis of only the main charges will amply illustrate the range of duplicitous strategies that the anti-government forces deploy.

Strategy #1: Hide the Judge. Jan O'Rourke, a librarian in Bucks County, Pennsylvania, is preparing for the inevitable post-9/11 assault: She is destroying all records of her patrons' book and Internet use and is advising other Bucks County libraries to do the same. The object of her fear? The U.S. government. O'Rourke is convinced that federal spooks will soon knock on her door to spy on her law-abiding clients' reading habits. So, like thousands of librarians across the country, she is making sure that when that knock comes, she will have nothing to show. "If we don't have the information, then they can't get it," she explains.

O'Rourke is suffering from Patriot Act hysteria, a malady approaching epidemic levels. The USA-PATRIOT Act, which President Bush signed in October 2001, is a complex measure to boost the federal government's ability to detect and prevent terrorism. Its most important provision relaxed a judge-made rule that, especially after Clinton administration strengthening, had prevented intelligence and law enforcement officials from sharing information and collaborating on terror investigations (see "Why the FBI Didn't Stop 9/11," Autumn 2002). But the act made many other needed changes too: updating surveillance law to take into account new communications technology, for instance, enhancing the

Treasury Department's ability to disrupt terrorist financing networks, and modestly increasing the attorney general's power to detain and deport suspected terrorist aliens.

From the moment the administration proposed the legislation, defenders of the status quo started ringing the tyranny alarm. When the law passed, the Electronic Privacy Information Center depicted a tombstone on its website, captioned: "The Fourth Amendment: 1789–2001." The *Washington Post* denounced the bill as "panicky." And the ever touchy American Library Association decided that a particular provision of the Patriot Act—section 215—was a "present danger to the constitutional rights and privacy of library users," though the section says not a word about libraries.

The furor over section 215 is a case study in Patriot Act fear-mongering. Section 215 allows the FBI to seek business records in the hands of third parties—the enrollment application of a Saudi national in an American flight school, say—while investigating terrorism. The section broadens the categories of institutions whose records and other "tangible items" the government may seek in espionage and terror cases, on the post-9/11 recognition that lawmakers cannot anticipate what sorts of organizations terrorists may exploit. In the past, it may have been enough to get hotel bills or storage-locker contracts (two of the four categories of records covered in the narrower law that section 215 replaced) to trace the steps of a Soviet spy; today, however, gumshoes may find they need receipts from scuba-diving schools or farm-supply stores to piece together a plot to blow up the Golden Gate Bridge. Section 215 removed the requirement that the records must concern an "agent of a foreign power" (generally, a spy or terrorist), since, again, the scope of an anti-terror investigation is hard to predict in advance.

From this tiny acorn, Bush administration foes have conjured forth a mighty assault on the First Amendment. The ACLU warns that with section 215, "the FBI could spy on a person because they don't like the books she reads, or because they don't like the websites she visits. They could spy on her because she wrote a letter to the editor that criticized government policy." Stanford Law School dean Kathleen Sullivan calls section 215 "threatening." And librarians, certain that the section is all about them, are scaring library users with signs warning that the government may spy on their reading habits.

These charges are nonsense. Critics of section 215 deliberately ignore the fact that any request for items under the section requires judicial approval. An FBI agent cannot simply walk into a flight school or library and demand records. The bureau must first convince the court that oversees anti-terror investigations (the Foreign Intelligence Surveillance Act, or FISA, court) that the documents are relevant to protecting "against international terrorism or clandestine intelligence activities." The chance that the FISA court will approve a 215 order because the FBI "doesn't like the books [a person] reads . . . or because she wrote a letter to the editor that criticized government policy" is zero. If the bureau can show that someone using the Bucks County library computers to surf the web and send e-mails has traveled to Pakistan and was seen with other terror suspects in Virginia, on the other hand, then the court may well grant an order to get the library's Internet logs.

Moreover, before the FBI can even approach the FISA court with any kind of request, agents must have gone through multiple levels of bureaucratic review just to open an anti-terror investigation. And to investigate a U.S. citizen (rather than an alien) under FISA, the FBI must show that he is knowingly engaged in terrorism or espionage.

Ignoring the Patriot Act's strict judicial review requirements is the most common strategy of the act's critics. Time and again, the Cassandras will hold up a section from the bill as an example of rampaging executive power—without ever mentioning that the power in question is overseen by federal judges who will allow its use only if the FBI can prove its relevance to a bona fide terror (or sometimes criminal) investigation. By contrast, in the few cases where a law enforcement power does not require judicial review, the jackboots-are-coming brigade screams for judges as the only trustworthy check on executive tyranny.

Strategy #2: Invent New Rights. A running theme of the campaign against section 215 and many other Patriot Act provisions is that they violate the Fourth Amendment right to privacy. But there is no Fourth

Amendment privacy right in records or other items disclosed to third parties. A credit-card user, for example, reveals his purchases to the seller and to the credit-card company. He therefore has no privacy expectations in the record of those purchases that the Fourth Amendment would protect. As a result, the government, whether in a criminal case or a terror investigation, may seek his credit-card receipts without a traditional Fourth Amendment showing to a court that there is "probable cause" to believe that a crime has been or is about to be committed. Instead, terror investigators must convince the FISA court that the receipts are "relevant."

Despite librarians' fervent belief to the contrary, this analysis applies equally to library patrons' book borrowing or Internet use. The government may obtain those records without violating anyone's Fourth Amendment rights, because the patron has already revealed his borrowing and web browsing to library staff, other readers (in the days of handwritten book checkout cards), and Internet service providers. Tombstones declaring the death of the Fourth Amendment contain no truth whatsoever.

What's different in the section 215 provision is that libraries or other organizations can't challenge the FISA court's order and can't inform the target of the investigation, as they can in ordinary criminal proceedings. But that difference is crucial for the Justice Department's war-making function. The department wants to know if an al-Qaida suspect has consulted maps of the Croton reservoir and researched the toxic capacities of cyanide in the New York Public Library not in order to win a conviction for poisoning New York's water supply but to preempt the plot before it happens. The battleground is not the courtroom but the world beyond, where speed and secrecy can mean life or death.

Strategy #3: Demand Antiquated Laws. The librarians' crusade against section 215 has drawn wide media attention and triggered an ongoing congressional battle, led by Vermont socialist Bernie Sanders, to pass a law purporting to protect the "Freedom to Read." But the publicity that administration-hostile librarians were able to stir up pales in comparison to the clout of the Internet privacy lobby. The day the Patriot Act became law, the Center for Democracy and Technology sent around a warning that "privacy standards" had been "gutt[ed]." The Electronic Freedom Foundation declared that the "civil liberties of ordinary Americans have taken a tremendous blow." Jeffrey Rosen of *The New Republic* claimed that the law gave the government "essentially unlimited authority" to surveil Americans. The ACLU asserted that the FBI had suddenly gained "wide powers of phone and internet surveillance." And the Washington Post editorialized that the act made it "easier" to wiretap by "lowering the standard of judicial review."

The target of this ire? A section that merely updates existing law to modern technology. The government has long had the power to collect the numbers dialed from, or the incoming numbers to, a person's telephone by showing a court that the information is "relevant to an ongoing criminal investigation." Just as in section 215 of the Patriot Act, this legal standard is lower than traditional Fourth Amendment "probable cause," because the phone user has already forfeited any constitutional privacy rights he may have in his phone number or the number he calls by revealing them to the phone company.

A 1986 federal law tried to extend the procedures for collecting phone-number information to electronic communications, but it was so poorly drafted that its application to e-mail remained unclear. Section 216 of the Patriot Act resolves the ambiguity by making clear that the rules for obtaining phone numbers apply to incoming and outgoing e-mail addresses as well. The government can obtain e-mail headers—but not content—by showing a court that the information is "relevant to an ongoing criminal investigation." Contrary to cyber-libertarian howls, this is not a vast new power to spy but merely the logical extension of an existing power to a new form of communication. Nothing else has changed: the standard for obtaining information about the source or destination of a communication is the same as always.

Section 216 made one other change to communications surveillance law. When a court issues an order allowing the collection of phone numbers or e-mail headers, that order now applies nationally. Before, if a phone call was transmitted by a chain of phone companies headquartered in different states, investigators needed approval from a court in each of those states to track it. This time-consuming procedure could not be more dangerous in the age of terror. As Attorney General John Ashcroft testified in September 2001, the "ability of law enforcement officers to trace communications into different

jurisdictions without obtaining an additional court order can be the difference between life and death for American citizens." Yet the ACLU has complained that issuing national warrants for phone and e-mail routing information marginalizes the judiciary and gives law enforcement unchecked power to search citizens.

The furor over this section of the Patriot Act employs the same deceptions as the furor over section 215 (the business records provision). In both cases, Patriot Act bashers ignore the fact that a court must approve the government's access to information. Despite the *Washington Post*'s assertion to the contrary, section 216 does not lower any standards of judicial review. Both the anti-216 and anti-215 campaigns fabricate privacy rights where none exists. And neither of these anti-government campaigns lets one iota of the reality of terrorism intrude into its analyses of fictional rights violations—the reality that communications technology is essential to an enemy that has no geographical locus, and whose combatants have mastered the Internet and every form of modern communications, along with methods to defeat surveillance, such as using and discarding multiple cell phones and communicating from Internet caf&#eacute;s. The anti–Patriot Act forces would keep anti-terror law enforcement in the world of Ma Bell and rotary phones, even as America's would-be destroyers use America's most sophisticated technology against it.

Strategy #4: Conceal Legal Precedent. Section 213 of the Patriot Act allows the FBI (with court approval) to delay notifying a property owner that his property will be or has been searched, if notice would have an "adverse result": if he might flee the country, for example, or destroy documents or intimidate witnesses before agents can acquire sufficient evidence to arrest him. In such cases, the court that issues the search warrant may grant a delay of notice for a "reasonable period" of time.

The advocates dubbed Section 213 the "sneak-and-peek" section and have portrayed it as one of the most outrageous new powers seized by Attorney General John Ashcroft. The ACLU's fund-raising pitches warn: "Now, the government can secretly enter your home while you're away . . . rifle through your personal belongings . . . download your computer files . . . and seize any items at will. . . . And, because of the Patriot Act, you may never know what the government has done." Richard Leone, president of the Century Foundation and editor of *The War on Our Freedoms: Civil Liberties in an Age of Terrorism*, cites the fact that the Patriot Act "allows the government to conduct secret searches without notification" to support his hyperbolic claim that the act is "arguably the most far-reaching and invasive legislation passed since the espionage act of 1917 and the sedition act of 1918."

These critics pretend not to know that, long before anyone imagined such a thing as Islamic terrorism, federal judges have been granting "sneak-and-peak" warrants in criminal cases under identical standards to those of section 213. The possibility of seeking delayed notice is a long-standing law enforcement prerogative, sanctioned by numerous courts. Section 213 merely codified the case law to make the process uniform across different jurisdictions. Portraying section 213 as a new power is simple falsehood, and portraying it as an excessive and unnecessary power is extraordinarily ignorant. Delayed notice under life-threatening conditions is not just reasonable but absolutely imperative.

Strategy #5: Keep the FBI off the Web. In May 2002, Attorney General Ashcroft announced that FBI agents would for the first time be allowed to surf the web, just like hundreds of millions of people across the globe. Previously, the Internet was strictly off-limits to federal law enforcement, unless agents had already developed evidence that a crime was under way. In other words, although a 12-year-old could sit in on a *jihadi* chat room where members were praising Usama bin Ladin, or visit sites teaching bombmaking, or track down the links for the production of anthrax—all information essential to mapping out the world of Islamic terrorists or finding out how much terrorists might know—intelligence officials couldn't inspect those same public sites until they had already discovered a terror plot. But for an FBI agent in Arizona to wait for specific information about a conspiracy before researching his local biochem lab to see if it might have any connection to the Washington anthrax attacks, or might be a target for sabotage, is not the best strategy for fighting terrorism.

But Ashcroft's critics say the bureau *should* wait. According to the Electronic Privacy Information Center,

for instance, the new guidelines "threaten Fourth Amendment rights" because they permit the FBI to "engage in prospective searches without possessing any evidence of suspicious behavior." But there are no Fourth Amendment rights in the web. Far from expecting privacy on a website, its designers hope for the greatest possible exposure to all comers. The Internet is more public even than a newspaper, since it is free and unbound by geography; it is the most exhibitionistic communication medium yet designed. To require the FBI to be the one entity on earth that may not do general web searches, as the civil libertarians have demanded, makes no sense.

In fact, the new guidelines are unduly narrow. They prohibit searches by an individual's name—Usama bin Ladin, say—unless agents have cause to suspect him of involvement in a terror plot. But since millions of web users may conduct searches of Usama bin Ladin's name or of any other individual without violating anyone's privacy rights, it is hard to discern a basis for barring the government from also obtaining that information in preliminary criminal or terror investigations. Law enforcement agencies need to survey as much information as possible about Islamic terrorism before, not after, attacks happen, so that they can recognize an early warning sign or pattern in what an uninformed observer may see as an innocuous set of events.

Opening the web to the FBI, common sense for any criminal investigation, is particularly essential in fighting Islamic terrorism, because the web is the most powerful means of spreading jihad. Rohan Gunaratna, an al-Qaida expert at Scotland's Saint Andrews University, argues that unless the authorities shut down jihadist sites, "we will not be able to end terrorism." But even if the U.S. can't shut down web pages celebrating mass destruction in the name of holy war, it should at least be able to visit them to learn what's out there.

The May guidelines also permit agents to attend public meetings for the first time since 1976 in order to "detect or prevent terrorist activities." Let's say a Moroccan imam at a Brooklyn mosque regularly preaches vengeance against America for its support of Israel. The imam was banished from Morocco for his agitation against the secular government. Visitors from Saudi Arabia known to associate with radical fundamentalists regularly visit.

Under previous guidelines, the FBI could not attend public worship at the mosque to learn more about the imam's activities unless it had actual evidence that he was planning to release sarin in the subways, say. But most of the preparations leading up to a terror attack—such as casing transportation systems, attending crop-dusting school, or buying fertilizer—are legal. Only intelligence gathering and analysis can link them to terrorist intent. To require evidence before permitting the intelligence gathering that would produce it is a suicidal Catch-22.

Yet the civil libertarian lobby would keep the FBI in the dark about public events until the last minute. The Electronic Privacy Information Center brands the public-meeting rule a "serious threat to the right of individuals to speak and assemble freely without the specter of government monitoring." But the First Amendment guarantees free speech and assembly, not freedom from government attendance at public meetings. Even so, the new guidelines narrow the government's power anyway, by allowing agents to participate in public meetings only for a terror investigation, not for criminal investigations.

Strategy #6: Exploit Hindsight. Early this June, anti–War on Terror advocates and journalists pulled out all the stops to publicize a report by the Justice Department's inspector general criticizing the department's detention of illegal immigrants suspected of terrorist ties. Headlines blared: DETAINEES ABUSED. CIVIL RIGHTS OF POST-SEPT. 11 DETAINEES VIOLATED, REPORT FINDS (*Washington Post*); U.S. FINDS ABUSES OF 9/11 DETAINEES; JUSTICE DEPT. INQUIRY REVEALS MANY VIOLATIONS OF IMMIGRANTS' RIGHTS (*Los Angeles Times*); THE ABUSIVE DETENTIONS OF SEPT. 11 (*New York Times* editorial). Advocacy groups declared full vindication of their crusade against the Bush administration.

These headlines exaggerated the report only modestly. To be sure, Inspector General Glenn Fine did not declare any rights violations in the Justice Department's policies or practices, but he did decry "significant problems in the way the 9/11 detainees were treated." He charged that the investigation and clearance of

terror suspects took too long, that the Justice Department did not sufficiently differentiate moderately suspicious detainees from highly suspect ones, and that the conditions in one New York City detention center, where guards were charged with taunting detainees and slamming them against walls, were unduly harsh.

Fine's report, however measured its language, is ultimately as much a misrepresentation of the government's post-9/11 actions as the shrillest press release from Amnesty International. While it pays lip service to the "difficult circumstances confronting the department in responding to the terror attacks," it fails utterly to understand the terrifying actuality of 9/11. Fine's cool and sensible recommendations—"timely clearance process, timely service of immigration charges, careful consideration of where to house detainees . . . ; better training of staff . . . ; and better oversight"—read, frankly, like a joke, in light of the circumstances at the time.

Recall what the Justice Department and FBI were facing on 9/11: an attack by an invisible, previously unsuspected enemy on a scale unprecedented in this country, with weapons never imagined. Utter uncertainty prevailed about what the next hour or day or week might bring: if these 19 men had remained undetected while plotting their assault with such precision, who else was ready to strike next, and with what weapons? In New York, the FBI office, seven blocks from Ground Zero, had to evacuate on 9/11 to a temporary command center set up in a parking garage; the New York INS evacuated its processing center downtown as well. Electricity and other utilities were down, as was delivery and express mail service. One week after the attacks, 96,000 leads had flooded in to FBI offices around the country; tens of thousands more would soon follow, requiring round-the-clock operations at FBI headquarters, with thousands of agents following up the leads. Recriminations over the government's failure to prevent the catastrophe also flooded in: Why hadn't the intelligence community "connected the dots"? Why didn't the CIA and FBI communicate better? How had the State Department and INS let in foreign terrorists bent on destroying America?

Given the magnitude of the carnage and the depth of the uncertainty, the government would have failed in its duty had it not viewed suspects as serious risks. These were, possibly, enemy combatants, not car thieves or muggers. Justice Department officials declared that any suspect picked up in the course of a terror investigation, if an illegal immigrant, would be held in detention until the FBI cleared him of any possible terror connections. Moreover, if agents, following a lead, were looking for a particular individual and discovered half a dozen illegal immigrants at his apartment, all seven would be detained as suspects, since the FBI had no way of knowing who might be an accomplice of the wanted man. In another safeguard against letting a terrorist go, FBI headquarters ruled that it needed to sign off on all clearances, since only bureau brass possessed the full national picture of developing intelligence. Finally, the FBI mandated CIA background checks on all detainees.

These policies are eminently reasonable. That they ended up delaying clearance for an average of 80 days for the 762 illegal aliens detained after 9/11 does not discredit their initial rationale. (That delay is not unlawful, since the government can hold illegal aliens for an undefined period under emergency circumstances.) Justice Department officials expected to release innocent detainees in days, or at most several weeks, and they were concerned as the process stretched out; memos about the need to speed things up flew around the department daily. Officials worried about staying within the law and not violating anyone's rights (which they did not), but they also worried—and for good reason—about releasing even one deadly person. Even in retrospect, this calculus is unimpeachable: the costs of being legally held as an illegal alien and terror suspect for three months without ultimate conviction, while huge for the person held, pale in comparison to the costs of allowing terrorists to go free. (That some prison guards may have abused about 20 detainees is deplorable but does not invalidate the detention policy.)

The inspector general has plenty of good-government suggestions for how to make sure that, after the next terror attack, suspects are efficiently processed, but he is silent on the paramount questions that will face the government should a bomb go off in the nation's capital or a biological weapon in the subway at rush hour: how to find out who did it and who is waiting in the wings, and how to protect the country in the face of grossly inadequate knowledge. Should the country experience another attack on the scale of 9/11, the aftermath undoubtedly will not follow administrative law procedures perfectly. As long as the

government does not deliberately or flagrantly abuse suspects' rights, it need have no apology for the slow functioning of bureaucracy through the crisis.

Strategy #7: Treat War as a Continuation of Litigation by Other Means. For Bush opponents, Jose Padilla, an American citizen picked up on American soil and detained as an al-Qaida operative for the last year without access to an attorney, represents the clearest possible case of the administration's evisceration of civil rights. And it is truly a hard case, turning on the question of what rights an American enemy combatant should have in a war in which America is the battleground, and the enemy, wearing no uniform, may carry a U.S. passport.

This much about Jose Padilla is undisputed: a Chicago gang-banger convicted of murder before age 18, he then embellished his rap sheet with a Florida conviction for weapons possession. In May 2002, government agents arrested him at O'Hare airport coming in from Pakistan.

What happened in between the gun conviction and the airport arrest is in dispute. According to an affidavit signed by a Pentagon official, Padilla traveled to Egypt, Saudi Arabia, and other favorite al-Qaida haunts. While in Afghanistan in 2001, he sold al-Qaida bigwig Abu Zubaida on a plan for blowing up a radioactive bomb somewhere in the United States. After researching the project from a safe house in Lahore, Pakistan, Padilla flew to O'Hare to conduct reconnaissance for the "dirty bomb" plot, but the government nabbed him, eventually classifying him as an "enemy combatant" and sending him to a South Carolina military brig for interrogation. An attorney has demanded to represent Padilla in a *habeas corpus* proceeding, challenging the government's right to hold him, but the administration has insisted that Padilla must represent himself. Now that the federal judge adjudicating Padilla's *habeas* motion has ruled against the government on the attorney issue, the administration has appealed.

In fact, as the judge presiding over Padilla's *habeas* petition acknowledged, the Sixth Amendment and Fifth Amendment guarantees of due process afford a right to counsel only in criminal trials, not in a *habeas corpus* action. And the government is not prosecuting Padilla as a criminal. It is detaining him as an enemy combatant—a historical prerogative of the executive during war. Only if the government decides to try Padilla as an al-Qaida conspirator would he then have the right to counsel.

Nevertheless, the judge ordered that counsel be provided to help Padilla make his case for release, a decision that conflicts dangerously with the commander in chief's constitutional duty of securing the national defense. In the War on Terror, interrogating al-Qaida operatives is a vital weapon, whose efficacy depends on the lengthy, painstaking cultivation of trust and dependency between the detainee and his questioners. Let an attorney, whose every professional instinct is adversarial and obstructionist, advise the prisoner, and that relationship would almost surely snap. What if Padilla were about to crack and give up his superiors just before a lawyer began consulting with him? The opportunity to pierce al-Qaida's structure could be lost forever.

Padilla still has the opportunity to make his case for liberty before a court, and the government still has to prove the validity of his detention. Should he prove incompetent to argue his petition, the judge could then appoint a special master to help find the facts, as legal journalist Stuart Taylor has recommended. That master would not represent Padilla but rather the court's interest in accurately resolving the case.

The Bush bashers are correct that the Padilla case, with its serious liberty issues weighing against serious national peril, has pushed the law where it has never gone before. But that is because the threat the country is facing is without precedent, not because the administration is seizing unjustified power.

When the War on Terror's opponents intone, "We need not trade liberty for security," they are right—but not in the way they think. Contrary to their slogan's assumption, there is no zero-sum relationship between liberty and security. The government may expand its powers to detect terrorism without diminishing civil liberties one iota, as long as those powers remain subject to traditional restraints: statutory prerequisites for investigative action, judicial review, and political accountability. So far, these conditions have been met.

But the larger fallacy at the heart of the elites' liberty-versus-security formula is its blindness to all threats to freedom that do not emanate from the White House. Nothing the Bush administration has done comes close to causing the loss of freedom that Americans experienced after 9/11, when air travel shut down for days, and fear kept hundreds of thousands shut up in their homes. Should al-Qaida strike again, fear will once again paralyze the country far beyond the effects of any possible government restriction on civil rights. And that is what the government is trying to forestall, in the knowledge that preserving security is essential to preserving freedom.