Testimony of

The Honorable Bob Barr

May 10, 2005

TESTIMONY ON THE USA PATRIOT ACT
BEFORE THE SENATE JUDICIARY COMMITTEE
BY
BOB BARR
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Chairman Specter, Ranking Member Leahy, distinguished members of the Committee, I am deeply grateful for the chance to testify before the full Committee on this crucial matter.

I believe strongly that the bipartisan support for civil liberties in the aftermath of the tragic 9/11 attacks, support that is so apparent today, will prove the greatest testament to our traditional constitutional values when the history of this era is written. I commend the Committee for playing a lead role in this endeavor.

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 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 Central Intelligence Agency.

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.

Finally, I am 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.

Our organization strongly urges Congress to resist calls to summarily remove the sunset provisions in the PATRIOT Act. This reflects our philosophy in support of all necessary and constitutional powers with which to fight acts of terrorism, but against the centralization of undue authority in any one arm or agency of government.

To that end, we also urge Congress to improve the Patriot Act by carefully inserting modest checks against abuse. In particular, I urge the Members of the Committee to support the bi-partisan Security and Freedom Enhancement Act (SAFE) of 2005, sponsored by Senators Larry Craig from Idaho and Richard Durbin from Illinois, who both spoke so eloquently earlier in support of the Constitution.

While it would retain every expansion of law enforcement and intelligence authority in the Patriot Act, the SAFE Act would incorporate modest--but essential--new safeguards against abuse.

For the purposes of this hearing, I will focus largely on the SAFE Act's proposed modification to the standard under which FBI intelligence agents may secretly compel the production of personal records using section 215 of the PATRIOT Act, as well the proposed change to the standard for criminal delayed-notification search warrants, known as "sneak and peek" warrants.

First, however, I would like to make clear that, even though I voted for the PATRIOT Act in October 2001, as did many of my colleagues in the House and almost the entire roster of this Committee, I did so with a hesitancy born of the understanding it was an extraordinary measure for an extraordinary threat; that it would be used exclusively, or at least primarily, in the context of important anti-terrorism cases; and that the Department of Justice would be cautious in its implementation and forthcoming in providing information on its use to the Congress and the American people.

I believe now, however, that perhaps my faith was misplaced. The Justice Department has repeatedly disclosed its use and desire to use the expanded authority in the USA PATRIOT Act in run-of-the-mill criminal cases. Furthermore, the Administration has repeatedly stated its intention to expand the authority in the USA PATRIOT Act, and has floated various pieces of legislation that would do so.

Those of us who support modest changes to the PATRIOT Act seek two things. First, we want Congress to bolster public accountability over the Patriot Act, which would provide greater assurances that the law is serving its intended purpose.

Second, we want to guarantee that extraordinary surveillance powers are being used to keep terrorists at bay, and are not transformed into a general police power that can be used and misused against Americans under the guise of "national security." This concern, is particularly acute among conservatives, who worry about its possible future misapplication of the Patriot Act against pro-life, land rights or Second Amendment activists.

The SAFE Act's proposed changes to section 215 of the USA PATRIOT Act illustrate these dual concerns perfectly. Section 215 of the USA PATRIOT Act amended what was special authority under FISA (the Foreign Intelligence Surveillance Act) to seize rental car, self-storage and airline records for national security investigations.

Prior to the USA PATRIOT Act, the underlying statutes--50 U.S.C. §§ 1861, 1862--applied only to a limited subset of businesses, and it required a showing of "specific and articulable facts" that the individual target was in fact an agent of a foreign power.

Section 215 of the PATRIOT Act removed both of these limitations, thereby greatly expanding the power of the government to reach all "tangible things (including books, records, papers, documents and other items)," and lowering the evidentiary standard below even that of standard grand jury subpoenas, which are pegged to at least some showing of relevance to criminal activities, and which include the additional safeguards of a clear "right to quash" and a right to challenge any secrecy order that may have been imposed on the subpoena.

Some have questioned why the section 215 power has become known as the "library provision," when it does not expressly mention library records and given that it covers so much beyond library records or other information maintained by libraries. Indeed, many opponents of PATRIOT Act reform point to the fact that library records were not mentioned. PATRIOT Act supporters routinely cite the fact that many people refer to section 215 in this way as evidence of the "hysteria" or "misinformation" among those who seek modest changes to the PATRIOT Act.

This argument is highly disingenuous. In point of fact, library records are not mentioned in the provision, because the provision applies to much more than just library records.

Prior to the USA PATRIOT Act, library and bookseller records were not covered by this power, which back then only permitted an order for the records of certain business. Now, library records are covered - as are all other records and tangible items, including membership lists of political organizations, gun purchase records, medical records, genetic information and any other document, item or record that the government contends is a "tangible thing."

Section 215 also comes with a sweeping and automatic gag order, without any explicit provision for a recipient to challenge that prior restraint on First Amendment grounds or even consult with counsel. And, if certification is made that the records are sought for any intelligence or terrorism inquiry, the judge has no power under the law to challenge that certification. Finally, and crucially, the power is also unlike a grand jury subpoena because a recipient has no explicit right to move to have it quashed in court, and failure to comply with a 215 order is presumptively a serious offense.

Critics of this section rightly charge that its open-ended scope and lack of meaningful judicial review open the door to abuses, and I agree. At the very least, Congress should restore the "specific and articulable facts" requirement for the target of a section 215 order that connects such records to a terrorist, spy or other foreign agent. Here again, such a modest limitation, consistent with traditional Fourth Amendment principles, would pose no significant hardship to federal agents. Federal judges would, as they have for ages past, continue to approve virtually all such applications properly supported and applied for by government agents.

The SAFE Act would -- in addition to restoring the specific and articulable facts standard -- provide a recipient with at least some outlet to challenge an unreasonable order. It would also require notice before any information seized pursuant to section 215 of the USA PATRIOT Act is introduced as evidence in any subsequent proceeding. These are reasonable steps the government has always been able to meet with respect to powers provided under the Foreign Intelligence Surveillance Act and which have never been seen as any real impediment to the government's ability to secure necessary evidence.

I welcome the Attorney General's recent statements, agreeing to some changes to Section 215 that would make explicit a recipient's right to challenge the order and the secrecy provision, and would make explicit a recipient's right to consult an attorney. The Attorney General is certainly right to agree to changes in this poorly drafted provision, but, unfortunately, it remains unclear if the Administration will agree to a standard for a Section 215 order (individual suspicion) that will truly protect privacy. I strongly urge you to adopt the SAFE Act's standard in this regard.

Before moving on to section 213, I would also point the Committee to the attorney general's recent statement that, to date, section 215 of the USA PATRIOT Act has been used 35 times. Note, however, that former Attorney General John Ashcroft declassified a memorandum to FBI Director Robert Mueller in September 2003 saying that Section 215 had never been used, meaning that those 35 court orders have all been issued in just the last year-and-a-half. The number of orders is on the rise.

The second focus of my testimony is section 213 of the PATRIOT Act, the so-called "sneak and peek" provision that grants statutory authorization for the indefinite delay of criminal search warrant notification. This discussion is particularly apt for the Senate Judiciary Committee, as its Members will have the unique opportunity to install additional checks on this overbroad provision. Before discussing our desired reforms to section 213, which is unfortunately not subject to the sunset provision, it may be helpful to take note of some statistics.

On the eve of the April 6th Senate Judiciary Committee hearing, which featured testimony by Attorney General Alberto Gonzales and FBI Director Mueller against changes to the PATRIOT Act, the Justice Department released statistics on the use to date of section 213 of the PATRIOT Act.

Apparently, the department sought and received the authority to delay notice 108 times between April 2003 and January 2005, a period of approximately 22 months. By contrast, it sought and received this authority 47 times between November 2001, when the PATRIOT Act was enacted, and April 2003, a period of about 17 months. The five-month difference in timeframe aside, these numbers clearly reveal a substantial increase in use.

Moreover, Chairman Specter also revealed at the April 6th Judiciary Committee hearing that 92 -- or approximately 60 percent -- of those 155 requests were granted under the broad justification that notice would have the result of "seriously jeopardizing an investigation," rather than under the more specific criteria that notice would endanger a person's life, imperil evidence, induce flight from prosecution or lead to witness tampering.

Also, as Attorney General Gonzales informed Representative Flake at an April 7th hearing of the House Judiciary Committee, six criminal delayed-notice warrants under section 213 of the PATRIOT Act were approved with an indefinite delay (just as we had feared), and one had a delay that lasted fully half a year. In addition, the statutory language that opens the door to such indefinite delay is directly contrary to the only two appellate court rulings published before the Patriot Act that evaluate secret criminal search warrants with delayed-notification authorized by the lower court. 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."

I would also submit that this Committee is in a special position to evaluate sneak and peek warrants. The Judiciary Committee has jurisdiction over the peculiar area of law in which criminal and intelligence investigative powers can blur into one another, and where they consequently have to be carefully cabined to protect constitutional rights. I respectfully submit that the sneak and peek statute is one law that is not appropriately cabined, and is currently so broad that it resembles powers associated with foreign intelligence investigations (i.e., outside reasonable limitations for criminal powers contained in the Fourth Amendment).

Lengthy, secret surveillance, including secret "black bag" jobs (all undertaken, since 1978, with the proper approval of the Foreign Intelligence Surveillance Court, of course) have long been the hallmark of a specialized, but crucial, type of investigation - the foreign intelligence investigation of suspected spies and international terrorists. When these intrusive powers, such as the power to enter a home without notifying the owner, become more common in criminal or other types of investigations, the American people become rightly alarmed. The resulting furor risks more draconian limits on all such secret surveillance powers - even in the investigations where they may actually be needed.

Although I acknowledge the Justice Department's argument that section 213 and 215 searches and surveillance represent only a fraction of the searches and surveillance conducted by the FBI and other security agencies, I remain concerned. These are extraordinary authorities and they are being used more frequently, and more and more outside their proper context of foreign intelligence and terrorism investigations. Any hint of such a trend should be very worrisome.

Before I conclude, I would also like to discuss an ongoing controversy over a recent federal court decision (currently stayed pending appeal) striking down a provision of the PATRIOT Act as unconstitutional. Though not directly relevant to sections 213 or 215, I suspect it may come up in today's hearing, and I respectfully address it here.

In September 2004, Judge Victor Marrero of the United States District Court for the Southern District of New York issued a 50-page ruling in the case of Doe v. Ashcroft, 334 F.Supp.2d 471 (S.D.N.Y. 2004). In it, he struck down 18 U.S.C. § 2709, the statute permitting the issuance of so-called "national security letters," or NSLs, for customer records from Internet, telephone and other electronic service providers.

NSLs, as the Committee knows well, are administrative subpoenas issued at the sole discretion of the FBI under a self-certification procedure. They may be used to compel the production of certain types of records held by third-party businesses and institutions. Though the statute held invalid by Judge Marrero only dealt with the types of records mentioned above, other NSL statutes permit their use to obtain financial and credit records.

To be very clear, the Marrero decision struck section 2709 in its entirety, including the amendments to section 2709 made by section 505(a) of the PATRIOT Act. Put another way, the judge's decision struck down all of section 505(a) of the PATRIOT Act, but also struck down the rest of the NSL statute amended by section 505(a) with it.

The judge ruled on two primary grounds--that the section 2709 NSL is unreviewable, and that the attached gag order forever barred a recipient from telling anyone anything about the NSL. As the judge noted repeatedly in his opinion, the USA PATRIOT Act did remove the requirement of individual suspicion from the statute. For instance, he rests a large part of his First Amendment findings on the FBI's post-PATRIOT Act ability to suppress anonymous speech using an NSL.

Judge Marrero proffers two hypotheticals on that score, neither of which would have been possible prior to the USA PATRIOT Act unless the FBI had specific facts that the individual target was an agent of a foreign power. The FBI could use an NSL, the judge notes, to disclose the identity of an anonymous "blogger" critical of the government, or to discover the identity of everyone who has an e-mail account through a political campaign.

A number of interested parties continue to claim, however, that Doe v. Ashcroft did not strike down a provision of the USA PATRIOT Act because section 2709, prior to the Act, did not contain a right to challenge and contained a gag order. This is inaccurate. First, whenever a statute is struck down in its entirety any then-operative amendments are also rendered unconstitutional. It is hard to see how a decision that strikes down every word of one section of a law

can be said not to "involve" that law. Second, analytically speaking, the USA PATRIOT Act is the 800-pound gorilla in the Marrero opinion, and clearly factored into his reasoning.

In sum, then, I would urge the Committee to continue its careful oversight of sections 213, 215 and the rest of the PATRIOT Act, and of thoughtful consideration of amendments like those proposed in the SAFE Act. If we do this right today, if we are able to fix the PATRIOT Act to make it hew to the Constitution while it fortifies our common defense, we will have broken the tragic mold of past national security crises.

Too often in our history, we have acted too quickly in the face of major national security challenges, and have severely deprived our citizens of their God-given rights under the Constitution. Worse, such deprivations have, without exception, been unnecessary to secure our country. In the post-9/11 world, we have strayed perilously close to the edge, and I fear we will fall all the way if the PATRIOT Act is not fixed. If we do, however, meet the test of history and fix the law before it can lead to another historical shame, we will have broken with the past. And we will have done so by securing our liberties and our safety in equal measure. What could be more American than that?

Thank you again for this opportunity to comment on the vitally important deliberations of this Committee. I remain available to provide whatever further information the Committee might request.