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TESTIMONY ON THE USA PATRIOT ACT

BY

**BOB BARR**

(MEMBER OF CONGRESS, 1995-2003)

BEFORE THE SELECT COMMITTEE ON  
INTELLIGENCE, UNITED STATES SENATE

APRIL 19, 2005

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Chairman Roberts, Ranking Member Rockefeller, distinguished members of the Select Committee, I thank you for the invitation to present my views in this written statement on the debate over the PATRIOT Act “sunset” provisions, and I applaud your oversight on this crucial matter.

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 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 21<sup>st</sup> 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.

We strongly urge 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.

As I have said many times before, I believe the current struggle to properly integrate our shared constitutional heritage into our efforts to provide for the common defense, is the defining debate of our time. If we fail to strike the appropriate balance, we will do irreparable harm to our most elemental principles as a nation.

To that end, I urge this Committee to carefully examine the current language of the 2001 USA PATRIOT Act, and to make modest modifications to a handful of its provisions. In particular, I strongly urge individual members to co-sponsor Senator Larry Craig's Security and Freedom Enhancement Act of 2005, known as the SAFE Act. Although in many respects, this legislation does not address all of our concerns with the USA PATRIOT Act, it is an essential first step.

Even though I voted for the USA PATRIOT Act in October 2001, as did many of my colleagues, I did so with 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 have become skeptical on all of these fronts.

First, the Justice Department has been quite frank in its use and desire to use the USA PATRIOT Act in *non-terrorism* contexts. Second, the administration has repeatedly stated its intention to expand the USA PATRIOT Act, and has floated various pieces of legislation that would do so.

And, third, although this Committee would be in the best position to judge, the Justice Department has not produced any compelling evidence that the USA PATRIOT Act has been essential in preventing al Qaeda-style terrorist plots. Although I grant we have not suffered another major terrorist attack since 9-11, as Homeland Security Secretary Michael Chertoff put it, “[i]t’s like sprinkling powder to keep away elephants. If no elephants show up, how do you prove it’s because of the powder, rather than because there were never any elephants?”<sup>1</sup>

Before I specifically discuss those provisions of the USA PATRIOT Act most pertinent to this Committee’s jurisdiction, I would like to bring two new developments in the “sunsets” debate to the Committee’s attention. Namely, we learned earlier this month both that the USA PATRIOT Act appears to have been used in the Brandon Mayfield affair, and that the Administration is increasingly turning to it for its surveillance needs.

The Mayfield revelation is particularly disturbing. Mayfield -- the Oregon lawyer turned prime suspect in the Madrid bombing investigation because of faulty fingerprint analysis at the FBI -- was subjected to a highly intrusive federal investigation and then detained as a “material witness” for two weeks before finally being exonerated.

According to Attorney General Gonzales, the FBI used the USA PATRIOT Act when it executed a covert search of Mayfield’s home. Specifically, the attorney general said that Section 207 was used to extend the duration of Mayfield’s surveillance, and that “in some sense” Section 218, which made it easier to use intelligence authorities in criminal contexts, was used.

We all fully understand the FBI is not perfect and generally support the bureau even when it makes honest mistakes.

However, the Mayfield case shows how the USA PATRIOT Act, by lessening meaningful judicial oversight, reduces the ability of the FBI and Justice Department to avoid such mistakes. In particular, it shows how -- through the increased use of classified and less exacting foreign intelligence surveillance authority in place of traditional criminal warrants based on probable cause and executed in the open -- the USA

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<sup>1</sup> STEPHEN BRILL, AFTER: HOW AMERICA CONFRONTED THE SEPTEMBER 12 ERA 348 (2003).

PATRIOT Act can compound mistakes and amplify them into serious deprivations of an innocent person's personal liberty.

In Mayfield's case, not only was a U.S. citizen detained, but his home was subjected to a "black bag" intelligence search even though the Justice Department was arguably conducting this search primarily for criminal purposes; in other words, in order to apprehend a suspect in a terrorist bombing that had already taken place. Such a foreign intelligence search is even more intrusive than the criminal "sneak and peek" search warrants available under section 213 of the USA PATRIOT Act, because notice is not simply delayed, it is never provided. The *Washington Post* reported that in a March 24th letter to Mayfield, the Justice Department acknowledged that during a covert search of his home, agents copied computer and paper files, took 355 digital photographs, seized six cigarette butts for DNA analysis, and used cotton swabs to obtain other DNA evidence.

In short, the Mayfield case should serve as a cautionary tale of how the USA PATRIOT Act can seriously exacerbate any "broken telephone" effect in an ongoing investigation.

I would also say, especially to Senators Hatch and Feinstein, that this is the type of problem that supporters of increased checks and balances refer to when discussing so-called "PATRIOT Act abuses." No one is of the mind that the FBI would deliberately seek to infringe on the rights of loyal, law-abiding Americans. But there need be no malice aforethought for something to constitute an "abuse." The fact is, procedural deficiencies in the law's implementation likely led to Mayfield's predicament, and Mayfield was an innocent man.

Put another way, sometimes the road to abuse is paved with good intentions. Take, for instance, the Racketeer Influenced and Corrupt Organizations, or RICO, Act, which was passed to provide tools to fight organized crime, but was then used against pro-life groups. Overbroad laws are necessarily subject to overbroad application, if not now, then under future administrations, including those with less regard for civil liberties. That in itself can be deemed "abusive."

The second consideration—that the USA PATRIOT Act is becoming an ever more popular tool for the Justice Department—should be of particular concern to limited government conservatives like myself. As

with taxes, unduly expanded government authority is next to impossible to retract.

As an illustration, I would point the Committee to the attorney general's 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.

Granted, three dozen court orders may be considered by some to be a drop in the ocean of foreign intelligence document-production orders. Clearly, however, the trend is toward increased, not decreased, use of the USA PATRIOT Act; and, given the reach of the statute, the increased enthusiasm for its use ought to sound alarms.

Similarly, on the eve of the recent, April 6th Senate Judiciary Committee hearing, the Justice Department released statistics disclosing the use to date of 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.

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, Senator Arlen Specter at the April 6th Judiciary Committee hearing also revealed 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.

While I understand the jurisdiction of this Committee is concerned primarily with foreign intelligence authorities, not with criminal "sneak

and peek” warrants, I respectfully submit that you should be concerned when criminal investigative powers are made so broad that they come to resemble powers associated with foreign intelligence investigations. 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.

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 – the members of this Committee understand better than anyone. 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 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.

Furthermore, I would point the committee’s attention to an April 1, 2005 Associated Press story on a recent report to Congress by the Assistant Attorney General for Legislative Affairs, William E. Moschella, disclosing the record number of Foreign Intelligence Surveillance Act, or FISA, wiretaps in 2004. The department requested and won approval of 1,754 FISA wiretaps in 2004, up from 1,724 in 2003.

Although the marginal increase between 2003 and 2004 is small, the numbers still represent a 70 percent jump over the number obtained in 2000. In 2003, moreover, the use of intelligence wiretaps outstripped that of normal criminal wiretaps for the first time in history. One can only presume that the same trend continued in 2004.

The USA PATRIOT Act is directly relevant to the increased use of these intelligence wiretaps, as a number of provisions in the law made these wiretaps more intrusive and much easier to obtain outside of terrorism or espionage investigations. Section 218, for instance, which is set to sunset this year, now requires the investigation of foreign intelligence or terrorism to be a “significant purpose,” rather than the primary purpose, of the intelligence wiretap.

Bearing these two new developments—the Mayfield revelations and the increased use of the PATRIOT Act—in mind, I urge the Intelligence Committee to look at three provisions that are of particular importance to your oversight mandate.

These are Sections 206, 215 and 505, which, respectively, created “roving wiretap” authority under FISA, expanded the government’s ability to seize personal records and other materials under foreign intelligence authorities, and finally removed the required “nexus” to foreign powers for the specific targets of FBI “national security letter” subpoenas.

First, when Congress created foreign intelligence roving wiretap authority in the USA PATRIOT Act, it failed to include the checks against abuse present in the analogous criminal statute. This is troubling because, as roving wiretaps attach to the target of the surveillance and not to the individual communications device, they provide a far more extensive and intrusive record of a person’s communications.

Accordingly, criminal roving wiretaps require agents to “ascertain” that the target, rather than a third-party, is in fact using the telephone before they begin recording. They also require that, if the FBI does not actually know the identity (or an alias) of the target, but knows that he or she will be using a particular phone, the wiretap can attach to a single phone and all its users.

In creating roving wiretap authority under FISA, the USA PATRIOT Act did away with this ascertainment requirement. Then, shortly thereafter, the intelligence authorization bill for FY2002 took away the requirement that the applicant specify either the identity of the target *or* the particular communications device.



The result, today, is a “John Doe” general warrant, issued secretly under FISA, that permits electronic surveillance irrespective of the communications device being tapped *or* the person being eavesdropped on.

The Justice Department has defended the open-ended nature of these “John Doe” wiretaps, by pointing to the requirement that the FBI provide the FISA court with a physical description of the target if it cannot identify the communications device or target. Critics question how much of a safeguard this description requirement is in practice, given the paucity of identifying information it requires. In recognition of the oversight authority and security clearance of this Committee, I would urge its members to inquire on this point at length.

In addition, I would urge the Committee to tighten the roving wiretap authority to prevent anonymous or dragnet wiretapping, and to use the internal safeguards in the criminal roving wiretap statute as a model. At the very least, a judge authorizing a roving wiretap should have some assurance that (a) an innocent bystander’s sensitive communications are protected, and (b) the court order is not an effective *general warrant* to be filled in later.

To that end, Senator Craig’s SAFE Act would restore the ascertainment requirement and mandate that an FBI applicant for a national security roving wiretap specify *either* the actual target (or an alias) or the communications device to be tapped. This would, I believe, reserve for the government power that is more than sufficiently flexible to meet the demands of modern anti-terrorism and other anti-criminal investigations, over and above that of pre-PATRIOT Act authorities.

Next, I would urge the committee to carefully review the use and utility of Section 215, the USA PATRIOT Act’s amendment to what was special authority under FISA to seize rental car, self-storage and airline records for national security investigations.

Prior to the USA PATRIOT Act, the underlying statute applied to only a limited subset of businesses, and it required a showing of “specific and articulable facts” that the target was an agent of a foreign power. The 2001 Act removed both these limitations, thereby greatly expanding the power of the government to reach to all “tangible things” (including books, records, papers, documents and other items), and lowering the

evidentiary standard below that of standard, grand jury subpoenas which are pegged to at least some showing of relevance to criminal action by a *particular person* in an ongoing international terrorism or foreign intelligence investigation.

Some have questioned why the section 215 power has become known as the “library provision,” when libraries were not mentioned and given that it covers so much beyond library records or other information maintained by libraries. The answer is simple. Prior to the USA PATRIOT Act, library and bookseller records were not covered by this power, which 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 the list goes on.

Section 215 also comes with a sweeping gag order, without any explicit provision for a recipient to 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, this is not like 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 presumably a serious offense.

Accordingly, 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 must restore the particularity requirement for the target of a Section 215 order, and should institute additional reporting requirements (subject, of course, to appropriate classification measures). 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, among other new procedural safeguards, would restore the specific and articulable facts standard and 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 “burdens” the government has always been able to meet 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 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.

Finally, I would urge the Committee to review Section 505 of the USA PATRIOT Act, which removed the requirement that the FBI self-certify that it has “specific and articulable facts” that the individual target of an administrative subpoena or “national security letter” (NSL), is an agent of a foreign power.

Prior to the USA PATRIOT Act, the FBI could use NSLs, which serve as non-judicial subpoenas issued at the sole discretion of the FBI, to demand business, Internet, credit and telephony records, among other things. Before doing so, agents had to at least certify internally that the NSL pertained to a particular individual, who was acting on behalf of a foreign power.

The USA PATRIOT Act effectively allows the FBI to issue NSLs for certain financial, transactional, electronic communications and credit records without *any* individualized suspicion. It changed the standard again to relevance to any investigation. The SAFE Act treats NSLs much like it does Section 215 orders -- it maintains the expansive scope of the law, but includes the appropriate, minimal standard of individual suspicion; provides an explicit right to challenge the order; and retains the secrecy requirement, all of which take into account the sensitivity of national security investigations without taking away any necessary government powers.

In short, the SAFE Act simply modifies the powers expanded by the USA PATRIOT Act, by making the government’s exercise thereof subject to the basic Fourth Amendment notion that before the

government “pierces” an individual’s right to privacy of information that can be used as evidence against them, it must have a reasonable suspicion that the person has either violated the law or is serving as an agent of a foreign power. The government has not shown any reason why it cannot meet such a nominal burden, and the Fourth Amendment requires it do so.

I believe, especially given that NSLs currently have no judge in the picture at all, that the SAFE Act’s approach is entirely appropriate.

The committee should also note that Section 505(a) of the USA PATRIOT Act has been at the center of an ongoing bit of confusion about a 2004 court decision dealing with NSLs and whether that court decision involved the 2001 Act or some other law. If I may, I would like to take this opportunity to make sure the record is accurate.

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 NSLs for customer records from Internet, telephone and other electronic service providers.

The judge struck the provision in its entirety, including the amendments made by section 505(a) of the PATRIOT Act. Accordingly, 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 with it.<sup>2</sup>

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

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<sup>2</sup> Judge Marrero’s decision did not affect the rest of Section 505, which amended a number of different statutes that permit the FBI to issue NSLs for the production of other kinds of records.

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 lawmakers and other 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 simply not true. 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, the USA PATRIOT Act is the 800-pound gorilla in the Marrero opinion, and clearly factored into his reasoning.

In sum, then, I urge the Committee to take into account the recent developments in the USA PATRIOT Act debate, most notably the Mayfield revelations and the indications that the Justice Department is turning to the PATRIOT Act more and more.

I also respectfully ask that the Committee look closely at the three most contentious PATRIOT Act amendments to foreign intelligence law -- Sections 206, 215 and 505 -- and urge individual members to co-sponsor S.737, the Security and Freedom Enhancement Act of 2005, which already enjoys bipartisan support.

As evidenced by the circumstances surrounding the founding of this very Committee, foreign intelligence law, especially as it applies domestically, poses serious risks to basic constitutional freedoms. While some hail the provisions in the USA PATRIOT Act as breaking down an artificial “wall” or a “technicality” between the gathering and use of evidence in criminal cases – matters necessarily subject to the Bill of Rights – and the gathering of foreign intelligence – appropriately *not* subject in its gathering to the limitations in the Bill of Rights – the fact is the artificial “wall” that applied different standards to the gathering and use of each category of information, is neither artificial nor a technicality: it is the Constitution of the United States of America. In treating them as one and the same in the name of fighting “terrorism” or any other threat posed to the good order and safety of our society, we show

disdain for the fundamental underpinning of our constitutional form of government and the freedoms it enshrines.

Doing otherwise will result in an historical pattern where such laws are made ever more secret, ever more unchecked and ever more susceptible to abuse; and each subsequent national “crisis” forces the shades drawn tighter. It is a slippery slope, down which this Committee, this year in consideration of whether to sunset certain provisions in the USA PATRIOT Act and in deciding whether to place very modest and limited – but fundamentally important – restraints on some of the law’s provisions, can help avoid.

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.