

# United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

February 23, 2004

The Honorable Orrin G. Hatch  
Chairman  
Senate Committee on the Judiciary  
104 Hart Senate Office Building  
Washington, DC 20510

Dear Mr. Chairman:

We write to request that you schedule a hearing in the Judiciary Committee as soon as possible on S. 1709, the Security and Freedom Ensured (SAFE) Act, a narrowly-tailored, bipartisan bill that would amend several provisions of the USA PATRIOT Act (P.L. 107-56). We would also like to take this opportunity to respond to concerns the Justice Department has raised regarding the SAFE Act.

We voted for the PATRIOT Act and believe now, as we did then, that the PATRIOT Act made many reasonable and necessary changes in the law. However, the PATRIOT Act contains several provisions that create unnecessary risks that the activities of innocent Americans may be monitored without adequate judicial oversight.

This concern is shared by a broad coalition of organizations and individuals from across the political spectrum. In fact, 257 communities in 38 states—representing approximately 43.5 million people—have passed resolutions opposing or expressing concern about the PATRIOT Act. Groups as politically diverse as the ACLU and the American Conservative Union have also endorsed changes in the law.

In his State of the Union address, the President called for reauthorization of the PATRIOT Act. Given the bipartisan concerns about the most controversial provisions of the law, however, this will not happen unless these provisions are revisited. Congress, in fact, made oversight of the PATRIOT Act implicit by sunseting over a dozen sections of the bill at the time of its passage.

S. 1709, the SAFE Act, was drafted with this oversight in mind. It was drafted to clarify and amend in a minor way the PATRIOT Act's most troubling provisions so that whole or even piecemeal repeal of the law would be unnecessary. It was drafted to safeguard the liberties of law-abiding citizens while preserving the law enforcement authorities essential to a successful war on terror.

The Administration unfortunately has threatened to veto the SAFE Act. The Justice Department argues that the SAFE Act would “eliminate” some PATRIOT tools and “make it even more difficult to mount an effective anti-terror campaign than it was before the PATRIOT Act was passed.”

We respectfully disagree with the Justice Department’s objections to our reasoned and measured effort to mend the PATRIOT Act. The SAFE Act neither repeals any provision of the PATRIOT Act, nor impedes law enforcement’s ability to investigate terrorism by amending pre-PATRIOT Act law. Rather, the SAFE Act retains the expanded powers created by the PATRIOT Act while restoring important checks and balances on powers including roving wiretaps, “sneak and peek” warrants, compelled production of personal records, and National Security Letters.

### *Roving Wiretaps*

The SAFE Act would place reasonable checks on the use of roving wiretaps for intelligence purposes. Normally, when the government seeks a warrant authorizing a wiretap, its application must specify both the target (the individual) and the facilities (the telephone or computer) that will be tapped. Roving wiretaps, which do not require the government to specify the facilities to be tapped, are designed to allow law enforcement to track targets who evade surveillance by frequently changing facilities. Before the PATRIOT Act, roving wiretaps were only permitted for criminal, not intelligence, investigations. The PATRIOT Act authorized the FBI to use roving wiretaps for intelligence purposes for the first time.

Using roving wiretaps for intelligence purposes is important. Unfortunately, the PATRIOT Act did not include sufficient checks to protect innocent Americans from unwarranted government surveillance. Under the PATRIOT Act, the FBI is not required to determine whether the target of the wiretap is present at the place being wiretapped, as it is for criminal wiretaps.

The Intelligence Authorization Act of 2002 made another dramatic change in the law. The FBI is now permitted to obtain a “John Doe” roving wiretap for intelligence purposes, an authority not authorized in any other context. A “John Doe” roving wiretap does not specify the target of the wiretap or the place to be wiretapped. In other words, the FBI can obtain a wiretap without saying whom they want to wiretap or where they want to wiretap.

The Justice Department defends this authority by noting that even if the target of the wiretap is not identified, a description of the target is required. The law does not require the description to include any specific level of detail, however. It could be as broad as, for example, “white man” or “Hispanic woman.” Such a general description does not adequately protect innocent Americans from unwarranted government surveillance.

The SAFE Act would retain the PATRIOT Act’s authorization of roving wiretaps for

intelligence purposes but impose reasonable limits on this authority. Law enforcement would be required to ascertain the presence of the target before beginning surveillance and identify either the target of the wiretap or the place to be wiretapped. The FBI would not be able to obtain “John Doe” roving wiretaps, thereby ensuring that the government does not surveil innocent Americans who are not the target of the wiretap.

The Justice Department argues that “John Doe” roving wiretaps are necessary because there may be circumstances where the government knows a target’s physical description but not his identity. If the government is tracking a suspect closely enough to utilize a wiretap, it is unlikely his or her identity will be unknown to them. In this unusual circumstance, the SAFE Act would permit the issuance of a “John Doe” wiretap which would not identify the target but rather the facilities to be wiretapped. If the government wished to obtain a roving wiretap, they could do so by identifying the target. It is important to note that the government is not required to identify the target by his or her actual name. The government, for example, could identify the target by an alias. This level of detail should be required to make clear who is being targeted to prevent innocent people with no relationship to the target from being spied upon.

#### *“Sneak and Peek” Searches*

The SAFE Act would impose reasonable limits on the issuance of delayed notification (or “sneak and peek”) search warrants. A sneak and peek warrant permits law enforcement to conduct a search without notifying the target until sometime after the search has occurred. The Justice Department argues that sneak and peek warrants for physical evidence “had been available for decades before the PATRIOT Act was passed,” but such warrants were never statutorily authorized before the passage of the PATRIOT Act. Too, though some courts have permitted sneak and peek warrants in limited circumstances, the Supreme Court has never ruled on their constitutionality.

In codifying sneak and peek warrants, Section 213 of the PATRIOT Act did not adopt limitations on this authority that courts had recognized. For example, courts have required a presumptive seven-day limit on the delay of notice. Section 213 requires notice of the search within “a reasonable period,” which is not defined. According to the Justice Department, this has resulted in delays of up to 90 days, and of “unspecified duration lasting until the indictment was unsealed.”

Section 213 authorizes issuance of a sneak and peek warrant where it finds that providing immediate notice of the warrant would have an “adverse result,” as defined by 18 U.S.C. Section 2705. Section 2705, which allows delayed notice for searches of stored wire and electronic communications, defines adverse result very broadly, including any circumstances “otherwise seriously jeopardizing an investigation or unduly delaying a trial.” This catch-all provision could arguably apply in almost every case. A sneak and peek search of a home involves a much greater degree of intrusiveness than a seizure of wire or electronic communications, so this broad standard for delaying notice is inappropriate. Section 213 also does not limit delayed notification warrants to terrorism

investigations, and unlike many surveillance-related PATRIOT Act provisions, does not sunset.

Last year, an overwhelming majority in the House of Representatives voted to repeal Section 213. The SAFE Act would not go nearly this far. It would place modest limits on the government's ability to obtain sneak and peek warrants, while still permitting broad use of this authority.

The SAFE Act would still authorize a sneak and peek warrant in a broad set of specific circumstances: where notice of the warrant would endanger the life or physical safety of an individual, result in flight from prosecution, or result in the destruction of or tampering with the evidence sought under the warrant. Importantly, it would eliminate the catch-all authorization of sneak and peek authority in any circumstances "otherwise seriously jeopardizing an investigation or unduly delaying a trial." It would require notification of a covert search within seven days, but would authorize unlimited additional seven-day delays so long as any circumstance that would justify a delay of notice continues to exist. According to the Justice Department, "the most common period of delay" under Section 213 is seven days, so a seven-day limit with court-authorized extensions is not overly onerous but would prevent abuse.

The Justice Department states that the SAFE Act imposes restrictions on the issuance of sneak and peek warrants that could tip off terrorists, and "thus enable their associates to go into hiding, flee, change their plans, or even accelerate their plots." To the contrary, the SAFE Act would authorize issuance of a sneak and peek warrant in all of these circumstances. If notice of the warrant could lead terrorists or their associates to hide or flee, a court could delay notice to prevent flight from prosecution. If notice of the warrant could lead terrorists or their associates to change or accelerate their plots, a court could delay notice to prevent the resulting danger to life or physical safety. The Constitution protects the sanctity of our homes, and we should only allow this sanctity to be breached in such serious circumstances.

### *Compelled Production of Personal Records*

The SAFE Act would place reasonable checks on the government's authority to compel production of library and other personal records. Section 215 of the PATRIOT Act permits law enforcement to obtain such records without individualized suspicion and with minimal judicial oversight. Before the PATRIOT Act, FISA authorized the FBI to seek a court order for the production of records from four types of businesses: common carriers, public accommodations facilities, physical storage facilities, and vehicle rental facilities. In order to obtain such records, the FBI was required to state specific and articulable facts showing reason to believe that the person to whom the records relate was a terrorist or a spy. If a court found that there were such facts, it would issue the order.

Under FISA as modified by Section 215, the FBI is authorized to compel production of "any tangible things (including books, records, papers, documents, and other items)" not

just records, from any entity, not just the four types of businesses previously covered. The FBI is only required to certify that the records are “sought for” an international terrorism or intelligence investigation, a standard even lower than relevance. The FBI need not show that the documents relate to a suspected terrorist or spy. If the FBI makes the required certification, the court no longer has the authority to examine the accuracy of the certification or ask for more facts to support it; the court “shall” issue the order. Defenders of Section 215 frequently assert that the issuance of an order for records requires court approval, but this type of court approval amounts to little more than a rubber stamp. The PATRIOT Act gives the government too much power to seize the personal records of innocent Americans who are not suspected of involvement in terrorism or espionage.

The SAFE Act retains the PATRIOT Act’s expansion of the business records provision to cover “any tangible things” and any entity. It would reinstate the pre-PATRIOT Act standard for compelling production of business records, which requires individualized suspicion. The FBI would be required to certify that there are specific and articulable facts giving reason to believe that the person to whom the records relate is a terrorist or a spy. A court would be required to issue the order if it found that there are such facts. The SAFE Act would thus prevent broad fishing expeditions, which waste scarce government resources, are unlikely to produce useful information, and can infringe upon privacy rights.

The Justice Department argues that this standard is inappropriate because it is higher than the relevance standard under which federal grand juries can subpoena records. This ignores some crucial distinctions. The recipient of a grand jury subpoena can challenge the subpoena in court and tell others, including those whose records are sought, about the subpoena. In contrast, the recipient of a Section 215 subpoena cannot challenge the subpoena in court and is subject to a gag order. The scope of a federal grand jury is limited to specific crimes, while an intelligence investigation is not so limited.

Finally, it is very important to note that, in the more than two years since the passage of the PATRIOT Act, Section 215 has never been used. If the authority has never been used during this time of great national peril, it is difficult to understand how imposing some reasonable checks on it could cripple the war on terrorism. Indeed, the government offers no examples, real or imagined, in which the SAFE Act’s revisions of Section 215 would hinder counterterrorism efforts.

### *National Security Letters*

The SAFE Act would impose reasonable limits on the issuance of National Security Letters (NSLs). Section 505 of the PATRIOT Act allows the FBI to use NSLs to obtain personal records without individualized suspicion. An NSL is a document signed by an FBI agent requiring disclosure of financial, credit and other personal information and requiring the recipient not to disclose the request to the individual whose records are being sought. It does not require judicial or grand jury approval.

Before the PATRIOT Act, the FBI could issue an NSL to obtain records from a wire or electronic communication service provider by certifying that it had reason to believe that the person to whom the records relate is a terrorist or a spy. The approval of FBI headquarters was required.

Section 505 of the PATRIOT Act allows the FBI to issue an NSL simply by certifying that the records are “sought for” a terrorism or intelligence investigation, regardless of whether the target is a suspect. Headquarters approval is no longer required. Unlike many other surveillance-related PATRIOT Act provisions, the expanded NSL authority does not sunset.

The SAFE Act would retain the PATRIOT Act’s lower standard for the issuance of NSLs and its delegation of issuing authority to field offices. It would simply clarify that a library is not a “wire or communication service provider,” which from the plain meaning of the words, it is not. The FBI could still obtain information regarding e-mails or other communications that took place at libraries by issuing an NSL to the library’s wire or communication service provider.

The Justice Department states that the SAFE Act would “extend a greater degree of privacy to activities that occur in a public place than to those taking place in the home.” We disagree. The SAFE Act would simply ensure that the FBI issues the NSL to the service provider, which is the appropriate recipient, rather than a community library, which is ill-equipped to respond to such a request.

### *Expanding the Sunset Clause*

The SAFE Act would expand the sunset clause of the PATRIOT Act to ensure Congress has an opportunity to review provisions of the bill that greatly expand the government’s authority to conduct surveillance on Americans. Many of the PATRIOT Act’s surveillance provisions sunset on December 31, 2005. The SAFE Act would sunset four additional surveillance provisions: Sections 213, 216, 219, and 505.

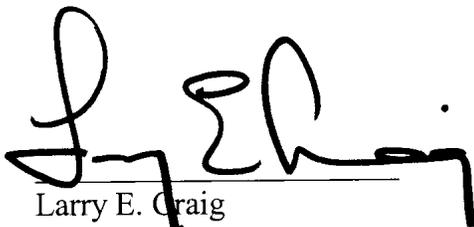
We have already discussed Sections 213 (sneak and peek warrants) and 505 (national security letters). Section 216 allows the use of surveillance devices known as pen registers and trap and trace devices to gather transactional information about electronic communications (e.g., e-mail) if the government certifies the information likely to be gathered is “relevant” to an ongoing criminal investigation. The information the government gathers is “not to include the contents” of communications, but content is not defined. Section 219 permits a federal judge in any district in the country in which “activities related to terrorism may have occurred” to issue a nationwide search warrant in a terrorism investigation. The target of such a search warrant has no ability to challenge the warrant in their home district. The SAFE Act would simply give Congress an opportunity to assess the effectiveness of these four provisions before deciding whether or not to reauthorize them.

The Justice Department argues that Congress should not expand the sunset to these authorities because they will all be needed by the FBI for “the foreseeable future.” Even if this is true, it is no reason not to give Congress the chance to review the usefulness of these powers. If they are needed for the fight on terrorism, we will surely renew them.

Throughout American history, during times of war, civil liberties have been restricted in the name of security. We therefore have the responsibility to proceed cautiously. During the Civil War, President Lincoln suspended habeas corpus, and during World War II, President Roosevelt ordered the detention of Japanese Americans in internment camps. We must be vigilant in our defense of our freedoms. But we also must ensure that law enforcement has sufficient authority to combat the grave threat of terrorism. We must strike a careful balance between the law enforcement power needed to combat terrorism and the legal protections required to safeguard American liberties. That is what the SAFE Act would do.

While we are disappointed that the Administration has expressed disagreement with the SAFE Act, we view this as an opportunity for increased public discussion of one of the most important issues of our day. Accordingly, we request that you schedule a hearing on the SAFE Act as soon as possible. Thank you for your time and consideration.

Sincerely,



Larry E. Craig  
United States Senator



Richard J. Durbin  
United States Senator

CC: The Honorable Patrick Leahy, Ranking Member, Committee on the Judiciary  
The Honorable Bill Frist, Majority Leader  
The Honorable Tom Daschle, Minority Leader