



Department of Justice

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
HOUSE OF REPRESENTATIVES

CONCERNING

THE PROVISIONS OF THE USA PATRIOT ACT RELATING TO
DELAYED NOTICE SEARCH WARRANTS (§ 213)

PRESENTED ON

MAY 3, 2005

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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

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).

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 have used section 213 somewhat less frequently than 155 times.

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 it 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.