U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 25, 2003

The Honorable J. Dennis Hastert
Speaker
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

The Department of Justice strongly objects to the amendment offered by Congressman Otter, and adopted Tuesday by the House of Representatives, to H.R. 2799, the "Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 2004." If it were to become law, the Otter Amendment – which would prohibit the use of appropriated funds to ask a court to delay notice of a search warrant under 18 U.S.C. § 3103a(b) – would have a devastating effect on the United States' ongoing efforts to detect and prevent terrorism, as well as to combat other serious crimes. The Otter Amendment could result in the intimidation of witnesses, destruction of evidence, flight from prosecution, physical injury, and even death. Moreover, the amendment would strip federal investigators and prosecutors of a tool that they have used for many years, indeed, since long before the USA PATRIOT Act. Equally disconcerting is that the House of Representatives's hasty decision to adopt the Otter Amendment appears to have been based in part on inaccurate information.

18 U.S.C. § 3103a(b), which was added by section 213 of the USA PATRIOT Act, is a vital aspect of the Justice Department's strategy of prevention – detecting and incapacitating terrorists *before* they are able to strike, rather than simply waiting for terrorists to mount an attack and then bringing a prosecution. Section 213 allows *federal judges*, in certain narrow circumstances, to authorize investigators to give delayed notice that a search warrant has been executed.[1] It was enacted by overwhelming votes of 357-66 in the House and 98-1 in the Senate.

[1] 18 U.S.C. § 3103a(b) provides as follows:

> **(b) Delay.**--With respect to the issuance of any warrant or court order under this section, or any other rule of law, to search for and seize any property or material that constitutes evidence of a criminal offense in violation of the laws of the United States, any notice required, or that may be required, to be given may be delayed if—
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> **(1)** the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result (as defined in section 2705);
> **(2)** the warrant prohibits the seizure of any tangible property, any wire or electronic communication (as defined in section 2510), or, except as expressly provided in chapter 121, any stored wire or electronic information, except where the court finds reasonable necessity for the

This provision is an essential tool because there are a number of limited but dangerous circumstances in which providing immediate notification to a suspected terrorist could devastate an ongoing investigation – and even threaten innocent lives. If a terrorist learns contemporaneously that his property has been searched, he may immediately flee the country to escape prosecution. The terrorist would likely destroy computer equipment containing information about which targets he plans to strike. The terrorist would certainly alert his associates that an investigation is underway, enabling them to go into hiding – or causing them to accelerate their terrorist plot. The terrorist may stop communicating with other members of his cell, preventing law enforcement from learning who else is participating in a plot to kill innocent Americans. The terrorist may close his bank accounts, preventing investigators from discovering who is financing his terrorist activities. And the terrorist may injure – or, even worse, kill – witnesses who have information that could implicate him, and whose cooperation with authorities may be revealed by the search.

In accordance with longstanding law and practice, federal courts also need the continued ability in these cases to protect the integrity of an ongoing investigation – and the safety of the American people – by temporarily delaying when the required notification is given. By law, section 213 can be used only in extremely narrow circumstances – when immediate notification may result in: "*endangering the life or physical safety of an individual*"; *"flight from prosecution*"; "*destruction of or tampering with evidence*"; "*intimidation of potential witnesses*"; or "*otherwise seriously jeopardizing an investigation or unduly delaying a trial*." 18 U.S.C. § 2705(a)(2) (emphasis added).

Crucially, in each and every case, section 213 specifically obliges law enforcement to give required notice that a search or seizure has taken place. In fact, *it would be a violation of the USA PATRIOT Act to fail to provide notice.* This provision simply allows investigators, after seeking and receiving a court-issued search warrant, to temporarily delay when the required notification is given. And it goes without saying that no court may issue a search warrant unless there is probable cause. *See* U.S. CONST. amend. IV ("no Warrants shall issue, but upon probable cause, supported by Oath or affirmation").

Since the USA PATRIOT Act was signed into law on October 26, 2001, the United States has sought, and courts have ordered, a delayed notice warrant under section 213 just 47 times as of April 1, 2003. Yet although this tool is sparingly and judiciously used, it has helped produce some vital successes in the war on terrorism. The following illustrations help explain why section 213 is a crucial authority in terrorism and other cases:

Here are some actual examples where Section 213 authority has been issued by courts:

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seizure; and
(3) the warrant provides for the giving of such notice within a reasonable period of its execution, which period may thereafter be extended by the court for good cause shown.

- In *United States v. Odeh*, a recent narco-terrorism case, a court issued a section 213 warrant in connection with the search of an envelope that had been mailed to a target of an investigation. The search confirmed that the target was operating a hawala money exchange that was used to funnel money to the Middle East, including to an individual associated with someone accused of being an operative for Islamic Jihad in Israel. The delayed-notice provision allowed investigators to conduct the search without fear of compromising an ongoing wiretap on the target and several of the confederates. The target was later charged and notified of the search warrant.

- In *United States v. Dhafir*, a case in which the defendant is charged with money laundering and a variety of other offenses based on his having sent approximately four million dollars to Iraq in violation of the sanctions, the court issued delayed notification for three searches. The first involved the search of an airmail package which contained a large check bound for an overseas account allegedly used by the target to transfer money into Iraq. A delayed notice warrant also allowed the agents to search and copy the contents of an envelope that the target mailed from Egypt to his office in the U.S. This package contained a ledger showing how the funds had been dispersed in Iraq. A third delayed notification warrant permitted the agents to walk around the target's residence to survey the locks and security system in order to later secretly enter the residence to install the equipment necessary to execute an electronic surveillance order. These warrants prevented the investigation from being jeopardized, and allowed prosecutors to develop critical evidence in the case before the target knew that he was the subject of an investigation.

- During an investigation into a nationwide organization that distributes marijuana, cocaine and methamphetamine, the court issued a delayed notice warrant to search the residence in which agents seized in excess of 225 kilograms of drugs. The organization involved relied heavily on the irregular use of cell phones, and usually discontinued the use of cell phones after a seizure of the drugs and drug proceeds, making continued telephone interception difficult. Interceptions after the delayed notice seizure indicated that the suspects thought other drug dealers had stolen their drugs, and none of the telephones intercepted were disposed of, and no one in the organization discontinued their use of telephones.

The following hypotheticals are based on actual cases, with the facts altered to protect certain information that may not disclosed at this time:

- In the investigation of an individual who was suspected of possible terrorism and terrorist financing links, the court issued two delayed notice warrants to (1) copy the hard drive of the suspect's computer to determine whether he was communicating with persons overseas and (2) to place an electronic tracking

device on his vehicle. The delayed notice warrants allowed other aspects of the investigation to continue, including a lengthy period of surveillance of the suspect's movement with the aid of the tracking device.

- During the investigation of a domestic terrorist group, agents followed one member of the group to a "safe house." After confirming that the location was indeed a safe house location, court authority was obtained to plant hidden microphones and cameras in the apartment, pursuant to Title III and the All Writs Act. As a result, the investigators learned that weapons and ammunition were being stored in the safe house. A delayed notice warrant was issued to allow agents to search the apartment and seize the ammunition and weapons. Several cell members were convicted of seditious conspiracy and other offenses.

The following are hypothetical cases that are not based in actual investigations, but reflect realistic situations that could easily occur:

- A 9/11 Example: The government develops probable cause to show that a suspect is involved in a conspiracy to hijack aircraft and crash them into buildings, and that the suspect has documents and a computer in his hotel room that may identify the targets of the plot and the identities of co-conspirators. The delayed-notice provision could be used, if a court so authorized, to enter and search the hotel room and make copies of the documents and a mirror image of the computer, without prematurely exposing the investigation to the suspect and his unknown co-conspirators. After a reasonable period to allow the investigation to mature, the subject of the search would be notified.

  The purpose of delaying notice in this type of situation is to prevent the death of, or physical harm to, thousands or tens of thousands of potential terrorist victims. Furthermore, we know that terrorists often accelerate their plots if one of their associates is identified or arrested. Providing an immediate tip-off to a terrorist such as a Mohammed Atta that his room or computer has been searched does nothing to the protect civil liberties of American citizens, and potentially could imperil the lives of thousands of innocent Americans.

- A Terrorism Example: In the course of a terrorism investigation, the government develops probable cause that an arms dealer overseas is planning to import large quantities of high explosives to sell to unidentified terrorists in a major U.S. city, and that the arms dealer may already be storing some explosives in a warehouse in the city, along with documents identifying the terrorists. The delayed-notice provision could be used, if a court so authorized, to enter and search the warehouse in an effort to identify the terrorist co-conspirators and determine if there was a public-safety danger posed by any explosives stored there, without prematurely exposing the investigation to the arms dealer and the terrorists. After

a reasonable period to allow the investigation to mature (including locating any co-conspirators), the owner of the warehouse would be notified.

- A Child-Pornography Example: The government develops probable cause to show that a suspect is operating a child pornography ring, in which an unknown associate is dealing with children and producing the pornography. The delayed-notice provision could be used, if a court so authorized, to enter and search the suspect's residence and make copies of the documents and a mirror image of his computer, without prematurely exposing the investigation to the one suspect and his unknown associate. After a reasonable period to allow the investigation to mature, the subject of the search would be notified.

Although it is a vital tool to the Justice Department's efforts to prevent terrorism, section 213 is hardly an innovation. Quite the contrary, for federal courts have had the ability to issue delayed-notice warrants for many years, long before the USA PATRIOT Act. This is why section 213 is not subject to the USA PATRIOT Act's sunset provision, which Congress reserved for provisions that were regarded as new authorities. Because of differences among federal circuit-court rulings, the law was a mix of inconsistent standards that varied widely across the country. Section 213 solved this problem by establishing a uniform statutory standard applicable throughout the United States. In other words, the USA PATRIOT Act simply codified a longstanding procedure – delaying notification of a search warrant – which courts had already held is perfectly constitutional.

The notion that the Constitution prohibits delayed-notice search warrants is simply false. The Supreme Court has squarely held that the Fourth Amendment does not require law enforcement to give immediate notice that a search warrant has been executed. In *Dalia v. United States*, 441 U.S. 238 (1979), the Court emphasized "that covert entries are constitutional in some circumstances, at least if they are made pursuant to a warrant." *Id*. at 247. In fact, the *Dalia* Court stated that an argument to the contrary was "frivolous." *Id*. These same types of "delayed-notice" authorities have been on the books for at least 35 years – effective, court-approved tools that have helped prosecutors build the cases necessary to lock up Colombian drug lords and the leaders of organized crime. Thirty-five years ago, in Title III of the 1968 Omnibus Crime Control and Safe Streets Act Congress authorized federal courts to issue temporarily covert wiretap orders. Twenty-five years ago, in enacting the 1978 Foreign Intelligence Surveillance Act, Congress also authorized courts to issue temporary covert electronic-surveillance and search orders. It is precisely because these types of laws *are* constitutional that investigators have for many years been authorized by the courts to install a wiretap in a terrorist's apartment, a spy's car, and a mobster's social club without notifying the suspects.

Other federal courts have been equally clear in holding that the Fourth Amendment permits law enforcement to give delayed notice that a search warrant has been executed. For example, in *United States v. Villegas*, 899 F.2d 1324 (2d Cir. 1990), the Second Circuit – in a unanimous opinion by Judge Amalya Kearse – reasoned that:

> Certain types of searches or surveillances depend for their success on the absence of premature disclosure. The use of a wiretap, or a 'bug,' or a pen register, or a video camera would likely produce little evidence of wrongdoing if the wrongdoers knew in advance that their conversations or actions would be monitored. *When nondisclosure of the authorized search is essential to its success, neither Rule 41 nor the Fourth Amendment prohibits covert entry.*

Id. at 1336 (emphasis added). In fact, the court emphasized in this drug-trafficking case that delayed-notice searches actually are *less* invasive of privacy than other types of commonly-used investigative techniques:

> In devising appropriate safeguards for a covert-entry search for only intangibles, we note that in many ways this is the least intrusive of these three types of searches. It is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. It is less intrusive than a wiretap or video camera surveillance because the physical search is of relatively short duration, focuses the search specifically on the items listed in the warrant, and produces information as of a given moment, whereas the electronic surveillance is ongoing and indiscriminate, gathering in any activities within its mechanical focus.

Id. at 1337; *see also United States v. Ludwig*, 902 F. Supp. 121, 126 (W.D. Tex. 1995) (agreeing that delayed-notice searches "are less intrusive than conventional searches").

The Fourth Circuit, in a child-pornography case, has agreed that nothing in the Fourth Amendment imposes an immediate notification requirement: "the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The Fourth Amendment does not mention notice, and the Supreme Court has stated that the Constitution does not categorically proscribe covert entries, which necessarily involve a delay in notice." *United States v. Simons*, 206 F.3d 392, 403 (4th Cir. 2000). A Second Circuit case likewise confirmed that "[t]he Fourth Amendment does not deal with notice of any kind . . . ." *United States v. Pangburn*, 983 F.2d 449, 455 (2d Cir. 1993).

Before she was elevated to the Second Circuit, District Judge Sonya Sotomayor similarly held that a delayed-notice search was lawful: "The notice requirement of Rule 41(d) has been held by the Second Circuit, however, not to bar covert-entry searches for intangibles – so-called 'sneak and peek' warrants." *United States v. Heatley*, No. S11 96 CR. 515(SS), 1998 WL 691201, at *2 (S.D.N.Y. Sept. 30, 1998).

In fact, even the Ninth Circuit (which generally is regarded as less receptive to law-enforcement authorities than other courts) has recognized that it is appropriate to give delayed

notice under certain circumstances. *See United States v. Freitas*, 800 F.2d 1451 (9th Cir. 1986). In the course of rejecting a search warrant that *never* required notice to be provided, *see id.* at 1453 ("The warrant contained no notice requirement."), the court explained that searches conducted without contemporaneous notification are appropriate if they are "closely circumscribed," *id*. at 1456. Several years later, in a unanimous opinion authored by Judge Dorothy Nelson, the court held that the Fourth Amendment does not require prior or contemporaneous notification. *See United States v. Johns*, 948 F.2d 599, 605 n.4 (9th Cir. 1991) ("[T]he Fourth Amendment requires that officers provide notice of searches within a reasonable, but short, time after the surreptitious entry.").

Unfortunately, the Otter Amendment was adopted after a debate that featured multiple factual and legal inaccuracies. Alarmingly, these inaccuracies appear to have influenced at least one Member to support the amendment. Speaking immediately after the remarks of a co-sponsor of the amendment, this Member stated: "It is a cliché in this House that almost no speeches change people's minds, but I think this speech is one occasion when it has certainly changed mine, and I want to thank the gentleman for that." We would like to correct the record so that Congress's deliberations over this important issue are fully informed.

For example, one Member claimed that section 213 of the USA PATRIOT Act "authorizes no-knock searches" and allows law enforcement to delay notification "indefinitely." He went on to lament that the provision "prevents people, or even their attorneys, from reviewing the warrant for correctness in legalities." Nothing could be further from the truth. As discussed above, section 213 requires law enforcement to give notice that a search warrant has been executed *in all circumstances*, and "within a reasonable period of time." 18 U.S.C. § 3103a(b)(3). And the subject of a search retains the ability to challenge the warrant through a motion to suppress the evidence – the same manner in which delayed-notice warrants have always been challenged.

The same Member complained that section 213 "allows the CIA and the NSA to operate domestically." There is no basis in fact or in the law for this claim. Nothing in the USA PATRIOT Act in general, or section 213 in particular, grants the CIA or the NSA the authority to undertake domestic operations.

Another Member claimed that section 213 allows investigators to "break in without the proper procedures and without probable cause." Again, this allegation is without merit. The Fourth Amendment specifies that a judge may not issue a warrant in the absence of probable cause. *See* U.S. CONST. amend. IV ("no Warrants shall issue, but upon probable cause, supported by Oath or affirmation"). This rule is fully applicable to warrants issued under section 213.

Moreover, the procedures listed in section 213 – including the standards under which delayed-notice warrants are available, and when required notice must be provided – are based on judicially-created standards that pre-dated the USA PATRIOT Act. *Compare* 18 U.S.C. §

3103a(b)(1) (allowing delayed notice when there is "reasonable cause" to believe immediate notification may have an adverse result), *with United States v. Villegas*, 899 F.2d 1324, 1337 (2d Cir. 1990) (allowing delayed notice when there is "good reason" for delay); *compare also* 18 U.S.C. § 3103a(b)(3) (requiring notice within "a reasonable period"), *with Villegas*, 899 F.2d at 1337 (requiring notice within "a reasonable time").

Finally, another Member asserted that the "[c]ommon law has always required that the government cannot enter your property without you and must, therefore, give you notice before it executes a search." In reality, as discussed above, for years the Supreme Court and other federal courts have held that the Fourth Amendment permits law enforcement to give delayed notice that a search warrant has been executed.

In conclusion, the Department of Justice shares the House of Representatives' commitment to preserving American liberties while we seek to protect American lives. When testifying before the House Judiciary Committee on September 24, 2001, the Attorney General stressed: "The fight against terrorism is now the highest priority of the Department of Justice. As we do in each and every law enforcement mission we undertake, we are conducting this effort with a total commitment to protect the rights and privacy of all Americans and the constitutional protections we hold dear." We continue to believe that the USA PATRIOT Act – including section 213 – accomplishes both objectives. Neither this provision nor any other portion of the USA PATRIOT Act has been held by any court to be unconstitutional. Section 213 gives courts the ability to protect sensitive information about ongoing domestic and international terrorism investigations for a limited period of time. And it does no more than establish a uniform statutory standard to guide the exercise of a power that courts have exercised, and whose constitutionality has been upheld, for years. We urge the House to reconsider its action and continue to work in partnership with the Administration in ensuring that America's most vital anti-terror tools remain available to those working every day to detect and prevent catastrophic attacks.

The Office of Management and Budget has advised that there is no objection to this report from the standpoint of the Administration's program. If we may be of further assistance in this matter, please do not hesitate to contact this office.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

cc: The Honorable Tom DeLay
Majority Leader

The Honorable Nancy Pelosi
Minority Leader