PRESIDENT
Bettina B. Plevan
Tel: (212) 382-6700
Fax: (212) 768-8116
bplevan@nycbar.org
www.nycbar.org

September 21, 2005

Facsimile and Regular Mail

Senator Pat Roberts, Chairman
United States Senate Select Committee
On Intelligence
109 Hart Senate Office Building
Washington, DC 20510

Rep. Peter Hoekstra, Chairman
United States House of Representatives
Permanent Select Committee on Intelligence
2234 Rayburn House Office Building
Washington, DC 20515

Senator Arlen Specter, Chairman
United States Senate Judiciary Committee
SH-711 Hart Senate Office Building
Washington, DC 20510-3802

Rep. James Sensenbrenner, Chairman
United States House of Representatives
Judiciary Committee
2449 Rayburn House Office Building
Washington, DC 20515-4905

USA PATRIOT Act and HR 3199 and S. 1389

Dear Senators and Representatives:

I am writing on behalf of the Association of the Bar of the City of New York to address certain provisions of the USA PATRIOT Act being considered by the Conference Committee, reflected in bills passed by the House and Senate, H.R. 3199 and S. 1389. H.R. 3199 and S.1389 address several of the particularly troublesome provisions of the PATRIOT Act but do not cure their fundamental deficiencies.

Founded in 1870, the Association of the Bar is one of the oldest and most influential bar associations in the United States, with more than 22,000 members residing throughout the United States and many foreign countries. Through its standing committees, including its Committee on Civil Rights, the Association has long been involved in efforts to preserve the balance between national security and civil liberties and to assure that steps taken to protect national security do not unduly and needlessly undermine fundamental civil liberties.

INTRODUCTION

The Association is particularly concerned about four provisions of the PATRIOT Act:

Section 206, which now permits "roving" and "John Doe" wiretaps not limited to particular facilities or targeted individuals;

Section 213, which permits delayed-notice or "sneak and peek" search warrants, i.e., secret searches without contemporaneous notice to the target;

Section 215, which permits the FBI to obtain orders from the Foreign Intelligence Surveillance Act Court requiring production of documents, records, and other tangible things in connection with investigations to protect against international terrorism or clandestine intelligence activities; and

Section 505, which amends various statutes to enable the FBI to unilaterally issue "National Security Letters"(NSL) to compel disclosure from financial institutions, electronic communications providers, and consumer credit reporting agencies of a wide variety of sensitive information.

The Association believes that these provisions fail to provide for adequate judicial safeguards against abusive and unwarranted use of these exceptional investigative powers and permit the government to operate in secrecy without adequate cause or reasonable limitations thus preventing meaningful oversight by the courts, Congress and the American people. As a result, these provisions, in their current form, unduly threaten to invade the privacy of innocent persons, contravene the protections of the Fourth Amendment against unreasonable searches and seizures and suppress and chill freedom of speech protected by the First Amendment.

In H.R. 3199 and S. 1389 the House and Senate have sought in different ways to address some of these concerns and we commend them for their efforts. Unfortunately, however, these bills in a number of respects fail to adequately correct the problems raised by these provisions. We therefore urge the conferees to consider the following comments in negotiating a final bill. In doing so we are mindful of the special needs of law enforcement agencies in trying to prevent terrorist attacks, which sometimes require investigative procedures that permit somewhat greater latitude and secrecy than those employed in support of traditional criminal investigations. Nevertheless, we believe the PATRIOT Act provisions we discuss exceed such needs and unduly encroach on the very liberties and democratic system they are intended to preserve.

Section 206—Roving and John Doe Wiretaps

Section 206 of the PATRIOT Act expanded the Foreign Intelligence Surveillance Act (FISA) to permit the FBI to conduct "roving" wiretaps – that is, to intercept wire or electronic communications without first specifying to a judge which surveillance facilities will be monitored. The Intelligence Act for Fiscal 2002 further expanded this authority by allowing "John Doe" roving wiretaps – wiretaps in which the FBI specifies neither the facilities to be monitored nor the person whose communications will be intercepted. The FBI is not required to show "actual use" of the monitored facilities by a terrorist or foreign agent but only "possible use." Moreover, unlike roving wiretaps permitted for criminal law enforcement under Title III, the federal wiretap statute, FISA does not require the FBI to show criminal probable cause, to demonstrate any special need to undertake electronic surveillance, or to conduct the surveillance in such a way as to minimize the likelihood of intercepting communications by innocent persons.

Nor does the statute require the FBI to make any showing that the surveillance target demonstrated an intention to "thwart interception by changing facilities", as is now required in the criminal law enforcement context.

We recognize that the need to act quickly to preempt terrorist tactics and that the increasing sophistication of terrorists in the use of increasingly sophisticated communications devices may justify the use of devices like a roving wiretap in intelligence investigations. But we submit that section 206 fails to strike a proper balance in the protection of innocent persons whose communications may be unjustifiably tapped because they use a device that might "possibly" be used by an unidentified terrorist suspect. Under this provision any person using a pay phone in a neighborhood of a suspected terrorist or a scholar or student using a computer in a university library or computer lab that could possibly be used by a suspected terrorist could be the subject of a wiretap. This can occur without any meaningful requirements to show actual justification or to provide any specificity that would permit judicial monitoring to curb abuses. It entails not only an extraordinary invasion of personal privacy of innocent persons, which is highly questionable under the Fourth Amendment, but it has a potentially chilling effect on free speech for which anonymity and privacy are essential.

H.R. 3199 and S. 1389 recognize some of these problems in varying ways. We believe S. 1389 does so far more effectively. The House bill fails to require any showing of particularity, but the Senate bill specifies that the order authorizing the roving tap shall include "sufficient information to describe a specific target with particularity," if facilities or the location to be tapped and the identity of the target is unknown. In addition if the tap begins to "rove" to a new device or location, under the Senate bill the government must notify the court within 10 days after the tap is moved and requires that the government specify: (1) the nature and location of the new surveillance; (2) the facts and circumstances that justify the applicant's belief that the facility or location is being used or is about to be used by the target of the surveillance, and (3) a statement of any proposed minimization procedures differing from those in the original order that may be necessitated by the change of location or facility. The House bill, on the other hand, would not require a showing of the basis for believing that actual use is occurring or will occur at the new surveillance facility or location; nor does the House bill require any additional statement as to minimization procedures.

The House bill would sunset section 206 in 2015, while the Senate bill would sunset the provision in 2009. The shorter period is preferable as the extraordinary powers it confers should be reviewed by Congress at the earliest feasible date.

Neither the House nor Senate bill requires specific identification of the persons who must assist the government in the effectuation of the surveillance and we believe this should be added to the final bill. More generally, we believe that roving wiretaps conducted under FISA should be conducted in accordance with the same safeguards that apply to roving surveillance conducted in criminal investigations under Title III.

Section 213—Delayed Notice Search Warrants—Sneak and Peek Searches

Section 213 of the PATRIOT Act amends 18 U.S.C. section 3103 to permit secret searches without immediate notice to the target. The amended provision permits the FBI to conduct "sneak and peek" searches whenever it can show, in addition to criminal probable cause,

reasonable cause that delayed notice is necessary to prevent endangerment of life, flight from prosecution, tampering of evidence, intimidation of potential witnesses, or "otherwise seriously jeopardizing an investigation or unduly delaying a trial." If a delayed notice search warrant is approved, notice must be given "within a reasonable period of its execution, which period may thereafter be extended by the court for good cause shown."

The Association is concerned with two features of Section 213. First, the catchall justification for a delayed notice search – a danger of "seriously jeopardizing an investigation or unduly delaying a trial" – is extremely broad and is likely to make delayed-notice searches routine. The practice of delaying notice makes timely challenges to search warrants by targets difficult if not impossible. This concern is compounded by the fact that the section imposes no specific time limit before notice must be given or an extension of delayed notice is sought. Prior to the PATRIOT Act, in striking a balance between privacy concerns and law enforcement concerns, courts issuing delayed notice warrants typically limited delayed notice to 7 days and required the government to come back and justify any further delay.

We submit that neither the House nor Senate bills adequately addresses these concerns. The House bill does not narrow or remove the catchall justification. While the Senate bill deletes the phrase "or unduly delay a trial", it would permit the FBI to conduct a sneak-and-peek search where contemporaneous notice would "seriously jeopardize an investigation." In our view, this standard provides too little guidance to the court and is too loose to justify such an exceptional practice. We would urge that the catchall be eliminated entirely.

Neither bill imposes a satisfactory time limit on delay. The House bill permits delayed notice up to 180 days and extensions in 90-day increments. The Senate bill requires that delayed notice be provided by a date certain within a reasonable period of the warrant's execution, as established by the court, and that extensions for good cause be justified by a showing of need for further delay. Each additional period of delay is to be limited to 90 days or less unless the facts justify a longer delay. These standards are too vague and allow too much discretion. We would urge that the section be amended to specify a specific duration for delayed notice – 7 days has been used by courts in the past. The section also should be amended to provide that any further delays in notice should be permitted only upon a showing of need and then in increments of not more than 21 days. While some courts have upheld the constitutionality of delayed notice in the past, we submit that extended delays of the kind permitted by Section 213 or the House and Senate's proposed amendments raise more serious constitutional concerns.

<u>Sections 215 and 505—Orders to Produce Tangible Things and National Security Letters</u>

Section 215 amended FISA's "business records" provision. As amended, the statute permits the FBI to obtain orders from the FISA court compelling any person or organization to disclose "any tangible thing." Prior to the PATRIOT Act, the FBI could not obtain an order under this provision unless it could show reason to believe that the person whose records were sought was a foreign agent. FISA also previously limited those from whom information could be sought to specified types of businesses; the PATRIOT Act eliminates any such limitation thus significantly expanding the reach of Section 215 to such varied institutions as libraries or hospitals. The PATRIOT Act permits the FBI to obtain records pertaining to any person upon a certification that the records are "sought for" an authorized counterintelligence or terrorism

investigation. Recipients of Section 215 orders are prohibited from disclosing to any persons, other than those necessary to produce the items, that the FBI has sought or obtained information from them.

Section 505 expanded the FBI's authority to issue "national security letters" (NSLs). Issued unilaterally by the FBI, NSLs can be used to compel the disclosure of a wide variety of sensitive information from third-party possessors, including banks, credit reporting companies, and Internet service providers. Those served with NSLs are prohibited from disclosing to any person that the FBI has sought or obtained information from them. The FBI can issue an NSL upon a self-certification that the records are relevant to an authorized counterintelligence or terrorism investigation.

Sections 215 and 505 raise a number of similar concerns. Neither provides that organizations served with surveillance orders may seek judicial review of the FBI's demand before complying with it. In the case of Section 215, the FBI cannot serve a surveillance order without obtaining prior authorization from the FISA court, but this authorization is granted solely on the basis of the FBI's statement that the records are sought for an authorized investigation to "protect against international terrorism or clandestine intelligence activities." No showing of probable cause or individualized suspicion is required. Further, the broad reach of both provisions, without requiring any showing of relevancy, increases the likelihood that they can be used to sweep up unusually sensitive records of innocent persons. Former Attorney General John Ashcroft testified before the House Judiciary Committee in June 2003 that Section 215 could be used to obtain library records, educational records, computer files, and even genetic information.

In the case of Section 505, the FBI's surveillance activity is conducted without prior judicial authorization of any sort. Moreover, the gag order provisions of Sections 215 and 505 deter recipients from seeking the advice of legal counsel and prevent judicial challenges by recipients or persons whose information is the subject of a 215 order or an NSL. The absence of meaningful judicial review – or of any judicial review, in the case of Section 505 – means that constitutional rights are left unprotected and that the surveillance authorities can be easily abused. Indeed, a federal district court in New York recently invalidated Section 505 on this basis. *See Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004), appeal pending *sub nom Doe v. Gonzales*, No. 05-0570-CV (2d Cir.). The Association believes that requiring meaningful judicial review would protect constitutional rights without undermining the FBI's ability to conduct legitimate investigations.

The gag order provisions of Sections 215 and 505 also raise First Amendment concerns. Both statutes prohibit third parties whom the FBI approaches for information from disclosing to any other person that the FBI has sought or obtained information from them. While the Association believes that such secrecy may be necessary in unusual cases, the gag provisions raise serious concerns because they impose secrecy with respect to every investigation without requiring the FBI to make any particularized showing that such secrecy is necessary. Moreover, the current provisions do not provide for any termination of the non-disclosure provision; the secrecy they require is permanent. As a result, recipients and others affected by the 215 orders or NSLs are unable to bring abuses of these provisions to the attention of Congress or the public.

Two district courts in the Second Circuit have found the gag provision unconstitutional for this reason. *See Doe v. Ashcroft*, *supra,* 334 F.Supp. at 524-25; *Doe v. Gonzales* No. 3:05-CV-1256 (D. Conn. Sept. 9, 2005), appeal pending No. 05-4896 (2d Cir.).

The Senate bill would address some of the problems with Section 215. For example, S. 1389 would amend the statute to allow for judicial review of the relevance of the information sought. It also specifies that the reviewing judge shall issue an order only if the judge finds that the facts included in the application do, in fact, establish reasonable grounds to believe that the information sought is relevant to an authorized investigation. The Association believes that these amendments are preferable to the amendments proposed by HR 3199, which are unlikely to meaningfully increase the judicial review afforded to FBI surveillance conducted under this provision. The Association supports the proposed amendments specifying that organizations served with Section 215 orders may themselves challenge the validity of the orders before a federal judge – in the same way that recipients of grand jury subpoenas are permitted to do. The Association believes that such procedural safeguards would protect individual rights without compromising the FBI's ability to conduct legitimate investigations.

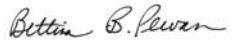
The House and Senate bills would also address some of the problems with Section 505. Most importantly, they would both make clear that recipients of NSLs may challenge the FBI's demand in court before complying with it.

The House and Senate bills also make clear that the non-disclosure provisions of Sections 215 and 505 do not bar disclosure to legal counsel. Both bills, however, fail to address most of the other problems with these non-disclosure provisions. In particular, neither bill would require the FBI to demonstrate the necessity of secrecy on a case-by-case basis. As is the case with prior restraints in other contexts, the Association believes that the government should bear the burden of demonstrating the need for non-disclosure. In addition, the Association urges the conferees to amend the law to ensure that any non-disclosure obligation is limited to the length of time for which the FBI can demonstrate its need. Finally, the Association believes that judicial review of any non-disclosure obligation must be meaningful, and not merely pro forma. While both bills provide that recipients of 505 orders may seek judicial review of the non-disclosure obligation, the bills require the courts to defer to the FBI's certification that secrecy is necessary. With respect to Section 215, the Senate bill specifies the availability of judicial review of the non-disclosure obligation, but the House bill does not, and the judicial review contemplated by the Senate bill appears to be toothless, because the FBI is not required even to aver that secrecy is necessary. The Association believes that the First Amendment requires "strict scrutiny" in this context and that the FBI's legitimate needs can and should be accommodated without retreating from this well-settled constitutional standard.

In sum, while Section 1389 better addresses some of the problems with the sections of the PATRIOT Act discussed above, than does H.R. 3199, neither bill satisfactorily addresses many of the most serious problems. The Association, therefore, urges the conferees, and Congress when a final bill reaches the floor for a vote, to make the revisions to the PATRIOT Act

recommended in our comments set forth above. The Association submits that such revisions will not undermine national security, and are necessary to preserve the civil liberties which are the foundation of our constitutional democracy.

Sincerely,



Bettina B. Plevan

cc:
Senator Bill Frist
Senator Harry Reid
Senator John D. Rockefeller, IV
Rep. Jane Harman
Senator Patrick Leahy
Rep. John Conyers, Jr.
Rep. J. Dennis Hastert
Rep. Nancy Pelosi
Senator Mike DeWine
Senator Orrin G. Hatch
Senator Jon Kyl
Senator Edward M. Kennedy
Senator Carl Levin
Senator Charles Schumer
Senator Hillary Clinton
Rep. Gary Ackerman
Rep. Eliot Engel
Rep. Vito Fossella
Rep. Carolyn Maloney
Rep. Gregory Meeks
Rep. Jerrold Nadler
Rep. Major R Owens
Rep. Charles Rangel
Rep. Jose Serrano
Rep. Edolphus Towns
Rep. Nydia Velazquez
Rep. Anthony Weiner