



U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 5, 2005

The Honorable Robert C. "Bobby" Scott
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Scott:

At the May 3, 2005, hearing of the Subcommittee on Crime, Terrorism, and Homeland Security of the House Judiciary Committee, you asked Chuck Rosenberg, Chief of Staff to the Deputy Attorney General, to respond to several questions set forth in former Congressman Barr's written testimony related to the Justice Department's use of section 213 of the USA PATRIOT Act. Mr. Rosenberg indicated at the hearing that the Department would attempt to get back to you with the information that you requested, and this letter is designed to fulfill that commitment.

As you know, the Department of Justice believes very strongly that section 213 is an invaluable tool in the war on terror and our efforts to combat serious criminal conduct. 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. Codified at 18 U.S.C. § 3103a, section 213 of the Act created an explicit statutory authority for investigators and prosecutors to ask a court for permission to delay notice temporarily that a search warrant was executed.

Delayed-notice search warrants have been used by law enforcement officers for decades. Such warrants were not created by the USA PATRIOT Act. Rather, the Act simply codified a common-law practice recognized by courts across the country.¹ Section 213 simply established a uniform nationwide standard for the issuance of those warrants, thus ensuring that delayed-notice search warrants are evaluated under the same criteria across the nation. Like 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 for or seized constitutes evidence of a criminal offense. A delayed-notice warrant differs from an ordinary search

¹ See *United States v. Freitas*, 800 F.2d 1451 (9th Cir. 1986); *United States v. Pangburn*, 983 F.2d 449 (2d Cir. 1993); *United States v. Villegas*, 899 F.2d 1324 (2d Cir. 1990); *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000).

warrant only in that the judge specifically authorizes the law enforcement officers executing the warrant to wait for a limited period of time before notifying the subject of the search that a search was executed.

In addition, investigators and prosecutors seeking a judge's approval to delay notification must show that, if notification were made contemporaneous to the search, there is reasonable cause to believe one of the following adverse results might occur:²

1. notification would endanger the life or physical safety of an individual;
2. notification would cause flight from prosecution;
3. notification would result in destruction of, or tampering with, evidence;
4. notification would result in intimidation of potential witnesses; or
5. notification would cause serious jeopardy to an investigation or unduly delay a trial.

To be clear, it is only in these five tailored 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 would be too often forced into making a "Hobson's choice": delaying the urgent need to conduct a search and/or seizure *or* conducting the search and prematurely notifying 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 is important to stress that in *all* circumstances the subject of a criminal search warrant is informed of the search. It is simply false to suggest, as some have, that delayed-notice search warrants allow the government to search an individual's "houses, papers, and effects" without notifying them of the search. In every case where the government executes a criminal search warrant, including those issued pursuant to section 213, the subject of the search is told of the search. With respect to delayed-notice search warrants, such notice is simply delayed for a reasonable period of time – a time period defined by a federal judge.

Delayed-notice search warrants are constitutional and do not violate the Fourth Amendment. The U.S. Supreme Court expressly held in *Dalia v. United States* that the Fourth Amendment does not require law enforcement to give immediate notice of the execution of a search warrant.³ Since *Dalia*, three federal courts of appeals have considered the constitutionality of delayed-notice search warrants, and all three have upheld their constitutionality.⁴ To our knowledge, no court has ever held otherwise. In short, long before the

² See 18 U.S.C. § 2705(a)(2).

³ See *Dalia v. United States*, 441 U.S. 238, 247 (1979) (Argument that covert entries are unconstitutional for their lack of notice is frivolous); see also *Katz v. United States*, 389 U.S. 347 (1967).

⁴ See *supra* note 1.

enactment of the USA PATRIOT Act, it was clear that delayed notification was appropriate in certain circumstances; that remains true today. The USA PATRIOT Act simply resolved the mix of inconsistent rules, practices and court decisions varying from circuit to circuit. Therefore, section 213 had the beneficial impact of mandating uniform and equitable application of the authority across the nation.

The Department has provided the House Judiciary Committee with detailed information regarding how often section 213 has been used. This information demonstrates that the use of a delayed-notice search warrant is the exception, not the rule. Law enforcement agents and investigators provide immediate notice of a search warrant's execution in the vast majority of cases. According to Administrative Office of the U.S. Courts (AOUSC), during the 36-month period ending September 30, 2004, U.S. District Courts handled 95,925 search warrants. By contrast, in the 39-month period between the passage of the USA PATRIOT Act and January 31, 2005, the Department used the section 213 authority only 153⁵ times according to a Department survey. Even when compared to the AOUSC data for a shorter period of time, the 153 uses of section 213 still only account for less than 0.2% of the total search warrants handled by the courts. Thus, the Department estimates that fewer than one in 500 of the search warrants that have been obtained since the passage of the PATRIOT Act have been delayed-notice search warrants. In other words, in over 499 of 500 cases, immediate notice was provided

Turning now to the specific questions posed by former Congressman Barr, he first asked "how many times section 213 has been used in terrorism cases, as opposed to more ordinary crimes." Eighteen of the 153 uses of the section 213 authority took place in terrorism investigations, while ninety-seven warrants were used in narcotics investigations and thirty-eight were used in other criminal investigations, such as those involving fraud, human trafficking, and violent crime. It should be noted, as mentioned above, that delayed notice search warrants were used in narcotics and other criminal investigations prior to the enactment of the USA PATRIOT Act so their continued use in these investigations is neither remarkable nor surprising.

Moving to former Congressman Barr's second question, he asked how many times section 213 "has been used against citizens, versus foreign suspects." The Department does not possess the information to answer this question. Our surveys of U.S. Attorneys' Offices did not ask any questions regarding the national origin or immigration status of the targets of investigations where section 213 was used, and such considerations are irrelevant to the Department's use of this important law-enforcement tool. Where necessary, the Department uses delayed-notice search warrants with court approval to prevent danger to human life, flight from prosecution, the destruction of evidence, witness intimidation, and serious jeopardy to an investigation, without regard to whether the target of the investigation is a citizen or an alien.

⁵ The data reflected in this letter were gathered from paper surveys completed by each U.S. Attorney's Office. We had previously reported 155 uses of section 213, and 28 uses of "seriously jeopardizing an investigation" as the only ground cited for delaying notice. In collecting additional information for this Committee, we discovered that, in previous surveys, some U.S. Attorneys' Offices had mistakenly reported extensions of delayed-notice search warrants as new warrants, or had reported the same warrant in multiple surveys while two U.S. Attorneys' Offices had indicated a single use of section 213 when they had used multiple delayed-notice search warrants in a single investigation. These combined errors caused the numbers that we previously reported to Congress to slightly overstate our use of section 213, and slightly understate our use of the "seriously jeopardizing an investigation" prong.

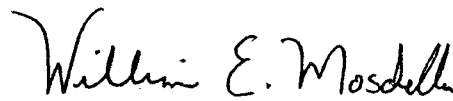
Former Congressman Barr next asked how many times delayed-notice search warrants “have led to prosecutions or convictions and how many of those were in terrorism cases.” The Department does not possess the information to answer this question precisely. We can assure you, however, that the Department has obtained at least hundreds of convictions as a result of investigations in which delayed-notice search warrants were used and that prosecutions have been brought in the overwhelming majority of investigations in which delayed-notice search warrants were used. This, again, is not remarkable as investigators must already have probable cause of criminal conduct before seeking a delayed-notice search warrant.

Finally, former Congressman Barr asked what happens to items discovered or seized as a result of delayed-notice search warrants if no charges are brought. Items seized pursuant to delayed-notice search warrants are treated the same as items seized pursuant to other lawful search warrants. Generally speaking, the government maintains control over the items seized, as warranted by the investigation. However, a person who is aggrieved by the deprivation of property may move for the property’s return pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure. The court would then decide on the disposition of the seized items. It should be noted, however, that such actions as taking photos during a search do not constitute a seizure of property subject to a Rule 41(g) motion.

To conclude, delayed-notice warrants are used infrequently and scrupulously – only in appropriate situations where immediate notice likely would harm individuals or compromise investigations, and even then only with a judge’s express approval. The investigators and prosecutors on the front lines of fighting crime and terrorism should not be forced to choose between preventing immediate harm – such as a terrorist attack or an influx of illegal drugs – and completing a sensitive investigation that might shut down an entire terror cell or drug trafficking operation. Thanks to the long-standing availability of delayed-notice warrants in these circumstances, they do not have to make that choice. Section 213 enables us to better protect the public from terrorists and criminals while preserving Americans constitutional rights. The Department of Justice believes it is critical that law enforcement continue to have this vital tool for those limited circumstances, such as those discussed above, where a court finds good cause to permit the temporary delay of notification of a search.

We hope the information provided above is helpful. Should you require any further information, please do not hesitate to contact this office.

Sincerely,



William E. Moschella
Assistant Attorney General

cc: The Honorable F. James Sensenbrenner, Jr.
Chairman

The Honorable John Conyers, Jr.
Ranking Minority Member

The Honorable Howard Coble