

Testimony of Valerie Caproni
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Before the Senate Select Committee on Intelligence
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Chairman Roberts, Vice Chairman Rockefeller, and Members of the Committee, it is my pleasure to appear before you this morning to discuss legislation that would reauthorize many important provisions of the USA PATRIOT Act and provide important new tools to national security investigators. Over the course of the last seven weeks, the Department of Justice has made its case for why each one of the sixteen USA PATRIOT Act provisions scheduled to sunset at the end of 2005 must be made permanent. In numerous hearings as well as classified and unclassified briefings for Members of Congress, we have explained how the Department has used those authorities contained in the USA PATRIOT Act to safeguard the safety and security of the American people. Thanks to the Act, we have been able to identify terrorist operatives, dismantle terrorist cells, disrupt terrorist plots, and capture terrorists before they have been able to strike. Moreover, the record demonstrates that we have done this while protecting the privacy rights and civil liberties of the American people.

Many of the most important provisions of the USA PATRIOT Act, however, are scheduled to sunset at the end of this year, and the Department therefore applauds this Committee for taking up legislation that would make permanent those provisions of the Act falling under this Committee's jurisdiction. We are also heartened that this Committee has come forward with novel and worthwhile ideas for strengthening the Department's counterterrorism capabilities. Prior to this Committee's April 27, 2005, oversight hearing on the USA PATRIOT Act, Attorney General Gonzales and Director

Mueller submitted detailed written testimony on utility of the provisions of the Act that are scheduled to expire at the end of the year, and I will not repeat that testimony today.

Rather, I will simply reiterate the Department's strong support for making permanent those USA PATRIOT Act provisions covered by section 101 of this Committee's draft legislation: sections 203(b), 203(d), and 218, which toppled the wall separating intelligence investigators from law enforcement investigators and have allowed vital information sharing of immeasurable value in the war against terrorism; section 206, which provided national security investigators with the ability to obtain certain court-approved roving surveillance orders that had previously been available exclusively to criminal investigators; section 207, which has increased the efficiency of the Foreign Intelligence Surveillance Act (FISA) application process by lengthening the maximum duration of FISA electronic surveillance and physical search orders targeting certain non-United States persons; section 214, which allows national security investigators to utilize court-approved pen register or trap and trace devices to obtain information relevant to international terrorism or espionage investigations; section 215, which allows national security investigators to obtain court orders requesting the production of records relevant to international terrorism or espionage investigations; and section 225, which provides those individuals and companies assisting in the implementations of FISA surveillance orders the same legal immunity granted to those assisting in the implementation of criminal investigative wiretaps.¹

The Department also supports making permanent section 6001(a) of the Intelligence Reform and Terrorism Prevention Act of 2004. This provision, which has

¹ As called for in section 101 of the Committee's draft legislation, the Department also supports making permanent section 204, which is essentially a technical amendment.

come to be known as the “lone wolf” provision, allows the government to gain court approval for FISA surveillance of a non-United States person when there is probable cause to believe that he or she is engaged in or preparing to engage in international terrorism, whether or not he or she is known to be affiliated with a larger terrorist group. While this provision is currently scheduled to sunset at the end of this year, unfortunately, the threat to the United States posed by known or apparent lone wolf terrorists will not similarly cease on December 31, 2005. Therefore, the Department strongly endorses the enactment of section 102 of the Committee’s draft legislation, which would remove the sunset on the lone wolf provision.

Besides reauthorizing important counterterrorism authorities that are scheduled to expire at the end of this year, the Committee’s draft legislation also contains other vital provisions that will enhance the Department’s ability to safeguard the American people from our Nation’s terrorist enemies. Section 216, for example, would extend the maximum duration for certain FISA surveillance, search, and pen register orders targeting non-United States persons, thus allowing the Department to take resources currently devoted to the mechanics of repeatedly renewing FISA applications in certain cases – which are considerable – and instead allow them to be focused on other investigative activities as well as conducting additional oversight of the use of intelligence collection authorities by the FBI. Indeed, as the Attorney General testified before the Committee, the Department estimates that, had these amendments been included in the USA PATRIOT Act, 25,000 attorney hours that were devoted by personnel in the Department’s Office of Intelligence Policy and Review to processing FISA applications would already have been saved. That figure, moreover, does not

include the time that would have been saved by agents and attorneys at the FBI. The bipartisan WMD Commission recently agreed that many of the changes contained in section 216 would allow the Department to focus its attention where it is most needed, and to ensure that adequate attention is given to cases implicating the civil liberties of Americans. The Department therefore commends the Committee for including this important provision in its draft legislation.

The Department also supports section 212 of the Committee's draft legislation, which relates the availability of mail covers in national security investigations. Mail covers are concerned with recording information appearing on the outside of mail and thus do not implicate the reasonable expectation of privacy that exists with respect to the contents of sealed mail. Notwithstanding the relatively non-intrusive nature of mail covers, however, the ability to obtain the type of information they provide promptly and effectively can be of great importance in the national security context. For example, if there is information indicating that a person may be involved in terrorist or terrorism-support activities, information showing that he has been in contact by mail with other persons who are known to be involved in international terrorism can be critical to advancing and determining the priority of the investigation.

As part of reforms made by Congress following the attacks of September 11, 2001, Congress has already acted to strengthen the legal procedures for obtaining comparable sender/receiver information in relation to electronic mail and telephone communications. Specifically, 18 U.S.C. § 2709 provides access to electronic communication transactional records and telephone toll billing records information, on certification by FBI officials at appropriately high supervisory levels that the information

is relevant to an authorized investigation to protect against international terrorism or espionage. But there is no comparable statutory specification concerning national security mail covers. The current standards governing their availability are defined by United States Postal Service regulations, and the determination whether they will be conducted in particular cases ultimately depends on decisions by Postal Service personnel.

The FBI is, however, in the best position to assess whether investigative activity is needed in particular circumstances to protect against international terrorism or espionage, and whether the use of a mail cover is warranted in the context of such an investigation. As noted, Congress has recognized this point in relation to the corresponding information for electronic mail in existing statutory provisions. Section 212 would simply extend the same principle and similar procedures to information observable on the outside of physical mail and would thus enable the FBI to carry out more effectively its central mission of protecting Americans from terrorist attacks.

The Department also welcomes section 213 of the Committee's draft legislation, which responds to the President's call to provide for administrative subpoena authority in terrorism investigations. In combating terrorism, prevention is key: we cannot wait to disrupt terrorist acts or to prosecute terrorist crimes after they occur. To stay a step ahead of the terrorists, investigators need tools allowing them to obtain relevant information as quickly as possible.

An administrative subpoena is one such tool. An administrative subpoena is a request from a government official instructing the recipient to provide information relevant to the investigation. This type of subpoena authority would allow investigators

to obtain relevant information quickly in terrorism investigations, where time is often of the essence.

Like any subpoena, administrative subpoenas are subject to judicial review. If a recipient refuses to comply with a request for the production of records, investigators may not simply seize those records; rather, they are required to ask a court to enforce it. Furthermore, recipients of administrative subpoenas need not wait for investigators to go to court. Instead, they may file their own challenges to the legality of the subpoena. But for those recipients who wish to assist investigators, administrative subpoenas provide a mechanism allowing them to quickly turn over relevant records while at the same time shielding themselves from civil liability.

The constitutionality of such subpoenas is well established, and executive branch agencies now have the authority to issue administrative subpoenas in more than 300 other areas. Such subpoenas, for example, may be issued by the Appalachian Regional Commission, Chemical Standard and Hazard Investigation Board, Commodity Futures Trading Commission, Consumer Product Safety Commission, and Corporation for National Community Service, just to name those departments and agencies whose names begin with a letter from A to C. These subpoenas are not, however, currently available in terrorism investigations, even though the consequences of a terrorist attack could be far more severe than those of the many other areas in which Congress has permitted the use of administrative subpoenas. mply put, the Department believes that terrorism investigators should have at least the same investigative tools currently available to the Department in investigations ranging from health care fraud to child abuse. In 2001, for example, the Department issued 2,102 administrative subpoenas in federal health care

investigations and 1,783 in child abuse and exploitation investigations. Administrative subpoenas are a time-tested tool, and the Department looks forward to working with the Members of the Committee on this important proposal.

Before concluding my testimony, three other provisions in the Committee's draft legislation deserve mention. First, as the Attorney General recently disclosed, the Department has recently obtained section 215 orders from the FISA Court to obtain subscriber information related to phone numbers captured through court-approved FISA pen register devices, just as such information is routinely obtained in criminal investigations through 18 U.S.C. § 2703(d) or a grand jury subpoena. Section 215 of the Committee's draft legislation, however, would allow the Department to instead obtain this information simply through a pen register order issued by the FISA Court. The Department believes that this proposal would reduce unnecessary paperwork and increase the efficiency of the FISA application process without impacting the privacy or civil liberties of the American people, and the Department is eager to work with the Committee on this initiative.

Second, the Department supports section 214 of the Committee's draft legislation, which would simplify reporting requirements under section 108 of FISA. And third, the Department backs the amendment to FISA's definition of the term "agent of a foreign power" contained in section 201 of the draft legislation.

In closing, the Department welcomes the Committee's effort to reauthorize critical intelligence tools contained in the USA PATRIOT Act and to provide terrorism investigators with additional tools necessary to protect the safety and security of the American people. We look forward to working with you closely as this bill makes its

way through legislative process, and I would be happy to answer any questions you may have.