Office of the Attorney General
Washington, D. C. 20530

January 28, 2004

The Honorable Orrin Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

The Department of Justice strongly objects to S.1709, the Security and Freedom Ensured Act of 2003 ("SAFE Act"), recently introduced by Senators Craig (R-ID) and Durbin (D-IL). If enacted, the SAFE Act would roll back many of the most important and useful anti-terrorism authorities enacted by the USA PATRIOT Act. *In fact, the SAFE Act would make it even more difficult to mount an effective anti-terror campaign than it was before the PATRIOT Act was passed.* In this letter, we highlight some of the legislation's most objectionable features. We urge the Senate to reject the SAFE Act and retain the vital tools that law enforcement needs to safeguard American lives and liberties. If S.1709 is presented in its current form to the President, the President's senior advisers will recommend that it be vetoed.

Section 2 of the SAFE Act would hamper our ability to surveil sophisticated international terrorists by eliminating so-called "John Doe" roving wiretaps under the Foreign Intelligence Surveillance Act ("FISA") (*i.e.*, court-approved wiretap orders that specify neither the identity of the suspect, nor which specific facilities the suspect is using). S.1709, 108th Cong. § 2. First, the moniker "John Doe" is misleading, for even if the government is unsure of a target's actual identity, it still must provide "a description of the target of the electronic surveillance" to the Foreign Intelligence Surveillance Court ("FISA court") in order to obtain a wiretap order. *See* 50 U.S.C. § 1805(c)(1)(A). Thus, a wiretap order is tied to a particular target of surveillance, even if the government does not know exactly who that target is. The government cannot change the target of its surveillance under such a wiretap order; it *must apply to the FISA court* for a new order for the new target. Second, although such wiretaps would be used only infrequently, they occasionally may be a vital technique in bringing terrorists and other criminals to justice. For example, imagine that there is a terrorist whose physical description is known to law enforcement, but whose actual identity is unknown. This terrorist consistently thwarts surveillance by changing his cellular telephone and Internet accounts just prior to important meetings and communications. Before the passage of the PATRIOT Act, each time this would happen, the government would need to return to the FISA court for a new order just to change the

name of the third party needed to assist in the new installation. The PATRIOT Act now permits the court to issue a generic order that can be presented to the new third party directing their assistance to assure that the surveillance may be undertaken as soon as technically feasible. The SAFE Act would roll back this common-sense authority in instances where only a description of the target is known, which would hamper the ability of law enforcement to investigate terrorism and national-security cases, in which the targets are very adept at concealing their identities and methods of communication.

Section 3 of the SAFE Act would run the risk of tipping off terrorists to the fact that they are under investigation by limiting the ability of courts to issue delayed-notice search warrants under 18 U.S.C. § 3103a(b) (enacted by section 213 of the Patriot Act). These warrants – by which courts, in limited circumstances, allow investigators temporarily to delay providing notice that a search has been conducted – had been available for decades before the PATRIOT Act was passed. Section 213 of the PATRIOT Act merely created a nationally uniform process and standard for obtaining them. The SAFE Act would narrow the types of "adverse results" justifying a delayed-notice warrant. A delayed-notice warrant currently can be issued only where immediate notification would have an "adverse result," which currently is defined as: "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). The SAFE Act would allow delayed-notice warrants only under the first three circumstances. S.1709, 108th Cong. § 3(a)(1)(A). Thus, even if a court found that immediate notification would "seriously jeopardiz[e]" an investigation or result in the "intimidation of potential witnesses," the law would prohibit it from approving a temporary delay. This could tip off suspects and thus enable their associates to go into hiding, flee, change their plans, or even accelerate their plots. Again, this limitation would make the law more restrictive than was the case before the PATRIOT Act.

Section 3 also would restrict the ability of courts to extend the period of delay for a delayed-notice warrant. Currently, judges may approve an extension "for good cause shown." 18 U.S.C. § 3103a(b)(3). But under the SAFE Act, additional delay would not be available unless immediate notification "will endanger the life or physical safety of an individual," "result in flight from prosecution," or "result in the destruction of, or tampering with, . . . evidence." S.1709, 108th Cong. § 3(a)(1)(B). If adopted, this provision would prohibit a court from approving additional delay even when immediate notice would result in the intimidation of witnesses or otherwise seriously jeopardize an investigation. Section 3 would be more burdensome than the law prior to the PATRIOT Act, when court-created standards imposed no such artificial restrictions on the circumstances that justify extending the period of delay for a delayed-notice warrant.

Section 4 of the SAFE Act would deny terrorism investigators access to crucial intelligence information by raising the standard under which the FISA court can order the production of business records. In particular, the FISA court could not request business records from libraries or bookstores unless it found "*specific and articulable facts* to believe that the

person to whom the records pertain is a foreign power or an agent of a foreign power." S.1709, 108th Cong. § 4(a)(2) (emphasis added). This standard is much more rigorous than the simple "relevance" standard under which federal grand juries, in ordinary criminal investigations, can subpoena the same records. The SAFE Act thus would make it more difficult to conduct national-security investigations under FISA than it is to investigate garden-variety crimes such as drug trafficking and health-care fraud.

Section 5 of the SAFE Act would forbid the use of national security letters ("NSLs") to obtain from libraries information about wire or electronic communications. S.1709, 108th Cong. § 5(1). For years, Congress has authorized law enforcement to issue national security letters ("NSLs") in very limited circumstances to obtain specific types of important information from third parties faster than they can with any other available tool. This is an entirely new limitation and would impose on terrorism investigators a restriction that did not exist prior to the PATRIOT Act. The SAFE Act would make it more difficult, in some circumstances, to obtain information about emails sent from public computer terminals at libraries than it would be to obtain the same information about emails sent from home computers. Ironically, it would extend a greater degree of privacy to activities that occur in a public place than to those taking place in a home.

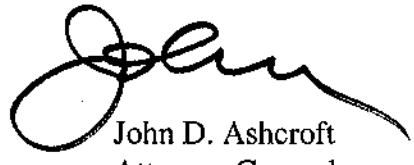
Section 6 would sunset several PATRIOT Act provisions – sections 213, 216, and 219 – that simply either (1) codified existing law enforcement authority or (2) represented modest, incremental changes updating the law to reflect new technologies and threats. S.1709, 108th Cong. § 6(1). As indicated above, section 213 of the PATRIOT Act simply created a nationally uniform method for obtaining delayed-notice search warrants. There is no need to sunset this authority, as the warrants themselves have been available to law enforcement for decades. Section 216 of the PATRIOT Act amended the pen register/trap and trace statute to clarify that it applies to Internet communications. This was a modest and necessary update to federal law, ensuring that investigators are able to collect non-content information about terrorists' communications regardless of the medium they use. It will still be needed by law enforcement after December 31, 2005, as the Internet is in no danger of disappearing. Lastly, section 219, which allows courts to issue search warrants that are valid nationwide in terrorism investigations, has eliminated unnecessary delays and burdens when investigating terrorist networks, which often span a number of districts. Section 219 preserved all of the pre-existing standards governing the availability of search warrants, such as the requirement that probable cause exists that criminal activity is afoot. The usefulness to terrorism investigators of section 219 warrants – which are issued under strict court supervision – will not evaporate any time in the foreseeable future.

In conclusion, the Department of Justice is firmly committed to preserving American liberties as we strive to protect American lives. Testifying before the House Judiciary Committee on September 24, 2001, I emphasized: "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."

The Department of Justice believes that the SAFE Act – which not only would limit or eliminate some of the PATRIOT Act's most critical new tools, but in many respects would make it more difficult to incapacitate terrorists than it was before the PATRIOT Act – would undermine our ongoing campaign to detect and prevent catastrophic terrorist attacks. We urge the Senate to reject this legislation and to keep in place the legal tools that investigators need to protect American lives and liberties. We would also request the opportunity to brief the sponsors of this legislation on the actual facts concerning the authorities at issue before any action is taken on the SAFE Act. If S.1709 is presented in its current form to the President, the President's senior advisers will recommend that it be vetoed.

The Office of Management and Budget advises that enactment of S.1709 would not be in accord with the President's program. If we may be of further assistance in this matter, please do not hesitate to contact us.

Sincerely,



John D. Ashcroft
Attorney General

cc: The Honorable Patrick Leahy
Ranking Member
Committee on the Judiciary

The Honorable Bill Frist
Majority Leader

The Honorable Tom Daschle
Minority Leader