Testimony of

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TESTIMONY SUBMITTED TO THE
U.S. SENATE JUDICIARY COMMITTEE ON
"AMERICA POST-9/11:
FREEDOMS PRESERVED OR FREEDOMS LOST"
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Chairman Hatch, Ranking Member Leahy, and distinguished committee members, thank you for inviting me to testify on the state of our freedoms in post-9/11 America. I applaud your oversight and appreciate the chance to speak.

My name is Bob Barr. Until January of this year, I had the honor to serve as a United States Representative from Georgia. Previously, I served as the presidentially appointed United States Attorney for the Northern District of Georgia, as an official with the U.S. Central Intelligence Agency, and as an attorney in private practice. Currently again a practicing attorney, I also now occupy the 21st Century Liberties Chair for Privacy and Freedom at the American Conservative Union, and consult on privacy matters for the American Civil Liberties Union. My testimony today will reflect this background as I speak on behalf of both these organizations, both long-dedicated to protecting constitutional principles cherished by many generations of Americans.
I also speak as a citizen deeply concerned about the erosions of basic constitutional liberties since the tragic and deplorable attacks here and in New York City on September 11, 2001.

The question before us today -- whether the government response to those attacks has adversely affected our individual liberties, including the right to privacy - could not be more important. It is at once complex and simple. In short, the answer is yes.

While every one of us in this room today, and probably every person with whom we come in contact, understands the need for government to succeed in its responsibility to protect our nation and our People against acts of terrorism, as a student and supporter of the Constitution and its component Bill of Rights, I will not concede that meeting this responsibility must sacrifice our Rights given us by God and guaranteed in that great document. Yet, unfortunately, the road down which our nation has been traveling these past two years, with the USA PATRIOT Act and other related government programs and activities, appears to take us in a direction in which our liberties are being diminished in that battle against terrorism. This need not be so, and it ought not to be so.

Traditionally and historically, except for aberrations throughout our history, the three branches of our government - legislative, executive and judicial - acting together if not always in concert, have acted responsibly, within the bounds of law and constitutional understanding. Throughout most of our nation's short but glorious history, our citizens could rest assured that government operated in a way as to balance security needs and civil liberties. When all else failed, our courts would guarantee this result even if one or both of the other two branches "got carried away."

Any law or series of laws or federal programs that weakens the ability of any one of these three branches of government to serve as a check and balance on the other two, is inherently problematic and ought to be viewed with concern if not alarm. This is perhaps the fundamental concern with the manner in which the government has responded to the terrorist attacks of 9/11 - significantly weakening as a matter of law the power and ability of the judiciary to check the exercise of executive power; and weakening as a matter of practice the ability of the legislature to conduct meaningful oversight of the same.

Our view of this problem, and how to address it, must be viewed from a politically neutral perspective; that is, regardless of which party maintains power in the Executive Branch.

Each member of this esteemed Committee understands well the Constitution, federal criminal laws, the USA PATRIOT Act, and the full panoply of other laws, regulations, procedures and activities that comprise the arsenal of the federal government's response to the terror attacks of 9/11. I am respectfully mindful of the Committee's expertise in this area, as I am aware of the constraints on the Committee's time. Even though it would be difficult to treat the entirety of this topic in a year-long law class, let alone five-minute testimony, I will therefore touch upon a few of these post-9/11 policies, laws, initiatives and federal actions that offend traditional conservative values such as individual freedom, federalism and personal privacy.

Some of these, such as the controversial Computer Assisted Passenger Pre-Screening System (CAPPS II), offend conservative values by blindly intruding into the private records of law-abiding Americans in the vain hope of that such privacy intrusions will somehow expose a terrorist. CAPPS II and its ilk are false security on the cheap. Airports and other terrorist targets will only be made safer with better, more solid, advance intelligence (and better coordination, analysis, evaluation and dissemination of same) on who the specific threats are -- not which innocent person looks most suspicious at the gate or in a "black box" database. The arbitrary exercise of power by federal employees now occurring and which would be greatly expanded if CAPPS II goes into effect is of the sort that has never heretofore withstood the test of probable cause or even reasonable suspicion. It ought not to be allowed to do so now.

Other programs, including certain provisions in the USA PATRIOT Act, implicate privacy but also imperil Americans' cherished right to engage in peaceful debate about the issues of the day. Several sections in the USA PATRIOT Act are especially illustrative of this suppressive attitude to security.

However, before I discuss these problem provisions, I first would like to express my sincere gratitude to the Justice Department and Attorney General Ashcroft. Few outside the halls of the Department and its component enforcement agencies, can truly be aware of the stresses and hard decisions required to keep us safe.

As I have repeatedly and publicly stated, my concern with the USA PATRIOT Act and other post-9/11 policies has nothing to do with politics or personalities - it is a matter of constitutional principle.

Indeed, much of the USA PATRIOT Act is non-controversial, and some of it quite welcome. The Act's problems lie in a relatively few provisions, squirreled away in the bill during the negotiations before its passage. While they may be few in number, they are major in their impact on civil liberties in America. Contrary to how some characterize these problem provisions, they represent anything but "tinkering" or "fine tuning" of pre-existing law and procedure.

Not only do these provisions undercut basic conceptions of due process and privacy, their effectiveness is questionable. As a former CIA official, I witnessed first-hand how much of our national security apparatus -- even our counter-terrorism and international intelligence work -- is built on very basic policing methods. From your local grifters to the Bin Ladens of the world, bad guys are generally found and punished using a system that includes basic checks and balances on government power and which militates against dragnet investigative fishing expeditions.

As an example of what not to do in national security, take Section 213 of the PATRIOT Act, the so-called "sneak and peek" provision. In addition to ignoring fundamental Fourth Amendment privacy rights, it also greases the slippery slope that was clearly anticipated, but specifically addressed and avoided by the drafters of our Constitution in the threefold separation-of-powers system of government they crafted so magnificently.

Specifically, Section 213 of the PATRIOT Act statutorily codifies delayed-notification search warrants, making them easier to obtain. This provision (not subject to a "sunset" expiration) takes what had been the exception to the rule of search and seizure notice, and has made it the rule.

Prior to the passage of the PATRIOT Act, this authority - which permits federal investigators to break into Americans' homes and businesses and then search their belongings, peruse the contents of their computer hard drives, and not tell them about it until weeks or months afterward - was allowed by courts, but only in extreme circumstances when lives or evidence could be lost by observing the traditional Fourth Amendment "knock and announce" convention.

By lessening the burden on prosecutors seeking to obtain these warrants, thus giving the executive branch a leg up on the judiciary, the fear, especially among conservatives, is that this extraordinary power will become ordinary. My former colleague in the House, Rep. Butch Otter from Idaho, reportedly took up the fight to narrow sneak and peek power after hearing from pro-life groups who worry the warrants would be misused, like the RICO statute, to advance the pro-abortion agenda. This is hardly the only scenario wherein these powers could be abused; it is frighteningly illustrative.

The problems with another controversial new power, laid out in Section 215 of the 2001 Act, sounds similar themes as the sneak and peek issue. Under Section 215, FBI agents can obtain court orders for the release of, among other things, business information, reading histories, Internet surfing data, medical records and even lawful firearm purchase receipts, under a standard of evidence that equates to a "rubber stamp."

Known primarily for its effect on access to library records -- it could be used to monitor Americans' book borrowing habits -- 215 is legally wide-ranging; extending, frighteningly, even to medical and genetic information. While much has - appropriately - been written about this provision's chilling effect on library users (a result that is very real regardless of how many times the government says it has or hasn't employed the power), the dangers in its broad reach cannot be over emphasized.

A companion provision, found in Section 505 of the USA PATRIOT Act, raises concerns similar to those raised by Section 215. Section 505 is, in some respects even more troubling; it expands the government's ability to use so-called "national security letters," which are essentially administrative subpoenas, to secure access to a wide range of data and information on U.S. citizens. As this Committee knows, administrative subpoenas can be issued without probable cause, and without even the "rubber stamp" judicial review of a Section 215 search.

Of great concern to conservatives and liberals alike, is Section 802 of the Act. This section defines a new crime of "domestic terrorism." Direct action conservative advocates, such as those advocating anti-abortion principles, fear use of this provision just as do direct action liberals, such as those protesting certain government policies (for example, military use of Vieques), because it could very easily be employed as the justification to target such groups. This abuse of the Act could very easily prevail, even though no reasonable person would equate the activities of such groups or advocates with "terrorism" -- such as gave rise to consideration of the USA PATRIOT Act in the first place.

Under 802, terrorism is defined sufficiently broad such that if this, or indeed any future administration were so inclined, it could use the USA PATRIOT Act to prosecute protesters as terrorists when any reasonable person would view that as excessive. Section 802 has a suppressive, Orwellian effect on speech and

political advocacy, especially direct action advocacy, arguably the most effective grassroots technique to influence political change.

Furthermore, Section 802's over-breadth implicates other sections of the USA PATRIOT Act and even other laws. If the contemplated, so-called "Son of PATRIOT" were ever to be enacted, its further expansion of terrorism offenses, and its further reductions of due process in those prosecutions, could all be extended to political advocacy under 802's overly ambitious language. Sections 803 and 805 build on 802 and expand the crime of "material support," which now could result in those who harbor or conceal political protesters being hit with a terrorism prosecution.

802 should be narrowed so that terrorism offenses target terrorism, not political protest.

My fellow witnesses have addressed, and will touch on other parts of the USA PATRIOT Act. I need not belabor the specifics of the law but I do hope its flaws will be corrected, and soon, before they harden into a concrete barrier surrounding the Bill of Rights. The SAFE Act, introduced and supported by an impressively bipartisan group of Senators, is one commendable and responsible such effort.

In line with the reflective approach of this hearing, I think it is important to note several encouraging victories for constitutional freedoms in a post-9/11 America. The looming specter of giant, voracious super-databases -- tasked with assessing our threat levels through the monitoring, cross-referencing and analyzing of minute details in the daily lives of law-abiding citizens - has to some degree abated. But only sufficiently to allow us to catch our breath; not nearly to the extent we can breath easy.

Around this time last year, the controversy surrounding the citizen-spy program known as Operation TIPS (Terrorism Information Prevention System) reached its boiling point. Thankfully, the program was then shelved. The program, which would have recruited postal workers, utility workers, and many others with vocational or simply occasional access to private residences, as government informants encouraged to report any "suspicious" activity to a central government hotline.

In what has been one of the most unexpected "strange bed fellows" moves of recent years, but emblematic of how fundamental these issues are in our democracy, then-majority leader Richard Armey from Texas and minority leader Nancy Pelosi inserted an amendment in the Homeland Security Bill barring all funding for Operation TIPS and like programs.

Regrettably, programs expanding federal powers - programs such as TIPS or the similarly discredited TIA (Total Information Awareness) - rarely die a final death, even if Congress directs their demise. However, that at least some action is being taken is a heartening development. Hopefully, it will continue, especially through both the oversight and legislative work of this Committee and its counterpart in the House.

We must remain vigilant. TIPS and TIA are being resurrected in part under other names in other departments. For instance, some proponents of blanket surveillance technologies are attempting to circumvent Congress, the agencies or even federal law (such as the Privacy Act) by providing federal taxpayer funds to states or local governments to establish or implement the programs themselves.

The MATRIX Program (Multi-state Anti-Terrorism Information Exchange) developed in Florida with federal dollars, by a private company, to do what Congress has already indicated it did not want done directly through TIA, is an example of this approach.

The Justice Department is presumably taking similar steps with future PATRIOT-style legislation, including the Domestic Security Enhancement Act of 2003, also known as "Son of PATRIOT Act," or "PATRIOT II." While it hasn't been formally introduced in Congress, pieces of it are appearing piecemeal in other seemingly innocuous or non-germane legislation.

Not least of Son of PATRIOT's problems, is a proposed section that would permit the federal government to strip Americans of their citizenship (whether natural-born or naturalized), if they are convicted of "material support" for terrorism (a charge that could apply to actions that citizens of common sense would be hard-pressed to see as terrorism). The framers of our Constitution deliberately omitted mention of such power, because they realized the authority to strip our citizenship is the ability to tailor the electorate to one's advantage - a truly terrifying state of affairs.

In sum, the Constitution and its Bill of Rights have taken some hits in the two years since 9/11; hits that must be fixed via the SAFE Act, for example. The simple fact that we appear here seeking to identify and address these problems demonstrates Americans' reticence to allow understandable concern over terrorism to mutate into the crippling of our most cherished rights and freedoms.

That should give us some encouragement. There is a great deal of work to be done, and further hard decisions to be made, but there remains time to turn back the constitutional clock and roll back excessive post-9/11 powers before we turn the corner into another Japanese internment or, closer to our own experiences, before we witness a legally sanctioned Ruby Ridge or Waco scenario.

In many other countries, it is neither acceptable nor lawful to reflect openly on and refine past action. In America, it is not only allowable, it is our obligation, to go back and reexamine the decisions made by the federal government during the panic of an event like September 11th.

Of course, a country suffering through the immediate fallout from the worst terrorist attack on American soil ever is going to make some mistakes. To err isn't just human, it's a direct result of representative democracy.

Case in point: myself. I voted for the USA PATRIOT Act. I did so with the understanding the Justice Department would use it as a limited, if extraordinary power, needed to meet a specific, extraordinary threat. Little did I, or many of my colleagues, know it would shortly be used in contexts other than terrorism, and in conjunction with a wide array of other, privacy-invasive programs and activities.

According to a growing number of reports, as well as a GAO survey, the Justice Department is actively seeking to permit USA PATRIOT Act-aided investigations and prosecutions in cases wholly unrelated to national security, let alone terrorism.

This should not be allowed to continue. As my esteemed colleague in the House, former Speaker Newt Gingrich wrote recently, "in no case should prosecutors of domestic crimes seek to use tools intended for national security purposes." When we voted for the bill, we did so only because we understood it to be essential to protect Americans from additional, impending terrorist attacks.

That I can stand before you and urge the Act's correction should serve as a lesson to lawmakers who voted for the PATRIOT Act, and supported similar initiatives, that you can go back again. It's okay to revisit past decisions. Indeed, it's an obligation.

Conservative or liberal, Republican or Democrat, all Americans should stand behind the Constitution; for it is the one thing - when all is said and done - that will keep us a free people and a signal light of true liberty for the world. Thank you again for allowing me to testify in support of this principle.