Testimony of

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America After 9/11
Freedom Preserved or Freedom Lost?
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Mr. Chairman, Ranking Member, and Members of the Committee,

Thank you very much for the honor of appearing before you today. In answer to the question posed by this hearing, my view is that the current threat to America's freedom comes from Al Qaeda and others who would do harm to America and her people, and not from the men and women of law enforcement who protect us from harm. That said, I think that it is critically important for us to assess the success of the terrorist prevention effort and, where necessary, to consider additional safeguards to the liberties of law-abiding citizens.

That the American homeland has not suffered another terrorist attack in the last 26 months is a testament to the incredible efforts of our law enforcement, intelligence, and homeland security personnel--aided by the tools, resources and guidance that Congress has provided. According to Department of Justice figures, 284 individuals of interest to the 9/11 investigation have been criminally charged, and 149 of them have been convicted or pled guilty. And 515 individuals linked to the 9/11 investigation have been deported for immigration violations. In addition, $133 million in terrorist assets have been frozen around the world, and 70 terrorist financing investigations have been initiated, with 23 convictions or guilty pleas to date.

These successes would not have been possible without the important work of Congress. As the Department of Justice wrote to the House Judiciary Committee on May 13, 2003, the Government's success in preventing another catastrophic attack on the American homeland "would have been much more difficult, if not impossibly so, without the USA Patriot Act." That Act, of course, owes its existence to the important and careful work of this Committee and in particular to the efforts of Chairman Hatch and Ranking Member Leahy.

During the six weeks of deliberations that led to the passage of the Act, you heard from and heeded the advice of a coalition of concerned voices urging caution and care in crafting the blueprint for America's security. That conversation was productive, and the Administration and Congress drew on the coalition's counsel in crafting the USA PATRIOT Act.

The debate has since deteriorated, and the shouting voices ignore questions that are critical to both security and liberty. Lost among fears about what the government could be doing are questions about what it is actually doing and what else it should be doing to protect security and safeguard liberty. And rhetoric over minor alterations has overshadowed profoundly important questions about fundamental changes in law and policy.

For example, consider the debate relating to section 215 of the Act, the so-called library records provision. Critics have rallied against the provision as facilitating a return to J. Edgar Hoover's monitoring of reading habits. The American Civil Liberties Union has sued the government, claiming that the provision, through its mere existence, foments a chilling fear among Muslim organizations and activists.

I do not doubt that these fears are real, but also am confident that they are unfounded. Grand juries for years have issued subpoenas to businesses for records relevant to criminal inquiries. Section 215 gives courts the same power, in national security investigations, to issue similar orders to businesses, from chemical makers to explosives dealers. Like its criminal grand jury equivalent, these judicial orders for business records conceivably could issue to bookstores or libraries, but section 215 does not single them out.

Section 215 is narrow in scope. The FBI cannot use it to investigate garden-variety crimes or even domestic terrorism. Instead, section 215 can be used only to "obtain foreign intelligence information not concerning a United States person," or to "protect against international terrorism or clandestine intelligence activities."

Because section 215 applies only to national security investigations, the orders are confidential. Such secrecy raises legitimate concerns, and thus Congress embedded significant checks in the process. First, they are issued and supervised by a federal judge. By contrast, grand jury subpoenas are routinely issued by the court clerk.

Second, every six months the government has to report to Congress on the number of times and the manner in which the provision has been used. The House Judiciary Committee has stated that its review of that information "has not given rise to any concern that the authority is being misused or abused." Indeed, the Attorney General has recently made public the previously classified information that section 215 has not been used since its passage.

It may well be that the clamor over section 215 reflects a different concern, that government investigators should not be able to use ordinary criminal investigative tools so easily to obtain records from purveyors of First Amendment activities, such as libraries and bookstores. Section 215, with its prohibition that investigations "not be conducted of a United States person solely upon the basis of activities protected by the first amendment of the Constitution of the United States," in this regard is more protective of civil liberties than ordinary criminal procedure. Perhaps this limitation should be extended to other investigative tools. But that is a different debate, one that should fully consider the costs and benefits of such a change in law.

All the sound and fury over politically charged issues such as section 215 has drowned out constructive dialogue about fundamental changes in policy. For instance, section 218 of the USA Patriot Act amended the Foreign Intelligence Surveillance Act to facilitate increased cooperation between agents gathering intelligence about foreign threats and investigators prosecuting foreign terrorists. I doubt that even the most strident of critics would want another terrorist attack to happen because a 30-year-old provision prevented the law enforcement and intelligence communities to communicate with each other about potential terrorist threats.

This change, essential as it is, raises important questions about the nature of law enforcement and domestic intelligence. The drafters grappled with questions such as whether the change comports with the Fourth Amendment protection against unreasonable searches and seizures (yes), whether criminal prosecutors should initiate and direct intelligence operations (no), and whether there is adequate process for defendants to seek exclusion of intelligence evidence from trial (yes). We were confident of the answers. But lawyers are not infallible, and the courts ultimately will decide. Meanwhile, better airing of these weighty issues would help the public understand the government's actions and appreciate their effects.

Some debates focus on the right issues but ask the wrong questions. The Court of Appeals for the Second Circuit yesterday heard arguments on the military detention of Jose Padilla, captured in O'Hare Airport

with an alleged plot to detonate a dirty bomb. Many have decried the President's military authority to detain Padilla. But surely a military commander should have the power to incapacitate enemy combatants, and Supreme Court precedent confirms this common sense proposition. The more difficult question, one that past cases provide less guidance, is whether the executive branch can hold these unlawful combatants without any process, such as military tribunals or other quasi-judicial alternatives. The judiciary is grappling with this question, but I think that Congress also has a significant voice in the constitutional discourse and should express its views. Whatever the answer, the question has nothing to do with the USA Patriot Act, as some have erroneously asserted.

The debate certainly would benefit from clarity. But more significant are the potential costs imposed by the current confusion. Are unobjectionable innovations not being considered that would help further the effort to respond to the continuing terrorist threat? Are unfounded criticisms of potential governmental overreach deterring peace officers from taking necessary actions to prevent terrorism? And, instead of blanket denunciation and repeal of certain law enforcement authorities, are there safeguards that can prevent governmental abuse while preserving important law enforcement tools?

I am heartened that the Committee has convened to consider these and other weighty questions. Karl Llewellyn, the renowned law professor, once observed: 'Ideals without technique are a mess. But technique without ideals is a menace' During these times, when the foundation of liberty is under attack, the important work of this Committee will serve to reaffirm the ideals of our constitutional democracy and also to discern the techniques necessary to secure those ideals against the threat of terror. Thank you.