Testimony of

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September 22, 2004

TESTIMONY SUBMITTED TO THE
SENATE JUDICIARY COMMITTEE,
CONCERNING THE USA PATRIOT ACT,
THE SAFE ACT, AND RELATED MATTERS
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September 22, 2004

Chairman Hatch, Ranking Member Leahy, and distinguished committee members, I thank you for your invitation to testify today and vigorously applaud your continued attention to these matters. I believe strongly that the current post-9/11 debate over civil liberties is the most important issue faced by America in a generation. From our earliest days as a republic, the tension between security and freedom has been ever-present. It rarely, however, has been as intense as it is now.

My name is Bob Barr. Until January of last year, I was the Republican United States Congressman from the Seventh District of Georgia. Prior to that, I was appointed by President Reagan to serve as the United States Attorney for the Northern District of Georgia, and worked as an official with the Central Intelligence Agency. I have also served 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. I appear before you today as a conservative, as a former law enforcement and national security official, and as a citizen concerned with unfortunate erosions of personal liberty that have occurred in the aftermath of 9/11.

We are now three years out from those tragic attacks and the catch phrase of the day continues to be: "9/11 changed everything." But, did it? Certainly, it has had significant repercussions for the economy, politics, national defense, domestic security operations, and even our general culture. But it should not change the way in which we, as Americans, want to be governed. And it certainly should not be allowed to amend our Bill of Rights. Though the 9/11 attacks may have made us more fearful of terrorism and more aware of the threats facing us from beyond our shores, they have not created any public or congressional support for changes to the basic institutions of our democratic government, such as the separation of powers or the mutually reinforcing checks and balances that protect against government abuses. I urge you to take this

into account when considering the Security and Freedom Ensured Act ("SAFE" Act). It takes measured steps to constrain the excessive executive branch investigative and surveillance power authorized in 2001's USA Patriot Act (the "Uniting and Strengthening America by Providing Appropriate Tools Required to Interdict and Obstruct Terrorism Act, also known simply as the "Patriot Act").

Before going into detail on the specific provisions of the SAFE Act, it is crucial to note an important recommendation in the 9/11 Commission Report. On page 394 and 395, the commissioners included this finding: "The burden of proof for retaining a particular governmental power should be on the executive, to explain a) that the power actually materially enhances security and b) that there is adequate supervision of the executive's use of the powers to ensure protection of civil liberties. If the power is granted, there must be adequate guidelines and oversight to properly confine its use." The commission's recommendation refers primarily to the Patriot Act, which, because of the speed with which it was passed and the atmosphere surrounding its consideration, contained several unnecessary and potentially abusive expansions of government law enforcement or intelligence-gathering authority. Accordingly, the commission also supported further congressional debate on the Patriot Act, and - importantly -- said nothing about removing the sunsets in the law, a position that bolsters the arguments of those seeking to enact the SAFE Act.

The 9/11 Commission, which recommended some of the most sweeping expansions of the federal government since the end of World War II, included this particular recommendation because of its agreement with the argument above: that 9/11 did not really change core American values, especially the basic constitutional strictures that shape our government. The Commission expressly realized that its suggestions for a radically expanded domestic surveillance infrastructure, and the consolidation of managerial and operational authority over that infrastructure, require concomitant safeguards. One of these key safeguards is ensuring the executive has to explain itself before it asks for or is granted more power. Another is to reform and increase congressional oversight. I believe the SAFE Act is a key component of these renewed safeguards.

Before continuing, it is important to note that I voted for the Patriot Act and continue to support portions of it. I did so for three main reasons. First, much of the Patriot Act is largely non-controversial and simply updates existing laws to reflect the new challenges of 21st century technology. Second, I took the administration at its word when it suggested the more wide-ranging powers in the law would be used exclusively for counter-terrorism, and were only necessary given the extraordinary threat Al Qaeda and like groups represent. Third, I believed that the administration would respect our inclusion of sunset provisions in the bill to force Congress to look anew at these measures with its nerves a little less frayed. Instead, however, the Bush administration has freely used the Patriot Act in cases unrelated to terrorism, and has vigorously campaigned to have the sunset provisions removed, which would make the entire Patriot Act a permanent fixture of our legal landscape.

Consequently, I believe, as do Senators Larry Craig, Richard Durbin, and committee members Edward Kennedy, Arlen Specter and Russell Feingold, that some refinement of the Patriot Act is necessary. They have proposed the SAFE Act, which I think is an excellent first step in any move

to rein in the Patriot Act. It amends certain Patriot Act provisions to add safeguards against abuse, such as some judicial review, and expands the sunset provisions to include other problematic sections that escaped notice in the original bill. Unfortunately, given the extreme politicization of the current election cycle, it appears unlikely the SAFE Act will pass until after November 2nd. I would certainly hope, however, that additional legislation to expand the Patriot Act will likewise not be rushed through before the November election. Given the recriminations and distortions that have surfaced during the presidential campaign, I do not believe a reasonable and well-informed conversation can be had in Congress about these issues. Along these lines, I have included a short discussion of the newly introduced "Tools to Fight Terrorism Act," sponsored by Senator Jon Kyl. Though I applaud Senator Kyl's enthusiasm for giving the law enforcement and intelligence communities the proper tools to fight terrorism, I fear that certain provisions in the new bill resemble too closely a "Son of Patriot Act" or "Patriot II." For instance, I do not believe we should give the administration extended administrative subpoena power, allow the secret use of secret evidence in immigration proceedings, until the administration makes a compelling public case for the powers it has already received. I will discuss the Kyl bill in more detail below.

The SAFE Act is actually quite a modest piece of legislation. The Senate version has only six sections, compared with the 158 sections in the Patriot Act, and would only make changes to a handful of statutes. Crucially, it does not repeal any provision of the Patriot Act and, despite the protestations of some opponents, it would not do anything to rebuild the so-called "wall" between domestic law enforcement and counter-intelligence. Rather, its six sections simply restore some judicial review to enhanced law enforcement access to records and things under the Foreign Intelligence Surveillance Act ("FISA"). The SAFE Act would also remove a catch-all justification for delayed-notification (or "sneak and peek") search warrants, require additional reporting by the Justice Department on its use of certain Patriot Act powers, and expand the sunsets to include four other provisions. As you can see, compared to the breadth and complexity of the Patriot Act, the SAFE Act is quite modest.

The most needed provision of the SAFE Act deals with delayed-notification, or "sneak and peek," search warrants. The Patriot Act is the only criminal statute Congress has ever passed that authorizes law enforcement agents to get a warrant to secretly search a person's home for evidence of crime. "Sneak and peek" warrants authorized law enforcement agents to break into someone's house or office, search their possessions, download the documents on their computer, seize items secretly when they can show "reasonable necessity," and not tell the target for an indeterminate amount of time afterward. The Patriot Act, however, applied the definition of "adverse result" under 18 U.S.C. § 2705(a)(2), which applies to the accessing of stored electronic communications, as the justification needed for a court to grant a sneak and peek search and seizure. Section 2705(a)(2) is quite broad. Prior to the Patriot Act, the courts upheld delayed-notification search warrants as constitutional, and they were available in terrorism investigations, in cases when notice would threaten a person's life or physical safety, prompt evidence or witness tampering or incite flight from prosecution. Additionally, some courts applied a presumptive seven-day limit on delay, with extensions possible after a new showing of necessity. These extraordinary powers thus we allowed to be exercised when the government could demonstrate a need to use them, and the process worked quite well. The Patriot Act, by using the definition of adverse result under Section 2705, created a new catch-all grounds for delay: if notice would,

"jeopardiz[e] an investigation or unduly [delay] a trial." As a former prosecutor, I can assert from experience that such a vague definition could apply in a myriad of cases where it would be highly inappropriate. The United States Supreme Court, additionally, has ruled on the constitutional implications of the "knock and announce" convention for the execution of search warrants, which is violated here. In Wilson v. Arkansas, 514 U.S. 927 (1995), in a decision written by Justice Thomas, the court declared the knock and announce convention to be rooted in the Constitution, not just the common law.

That said, Congress need not do away with delayed notification search warrants completely, and the SAFE Act recognizes these competing interests; it seeks only to balance them by removing the catch-all link to Section 2705, and by specifying that notice can be delayed only when it would a) threaten life or physical safety, b) result in flight from prosecution, or c) lead to the destruction of or tampering with evidence.

Conservatives, especially, should be supportive of this modest, but crucial, change. And all Americans, including Republicans, Democrats and Independents, should not forget that extraordinary powers granted to any one administration, can and will be used by subsequent administrations, including those with which we may disagree. Who knows how such powers might be employed in the future? As with the RICO statute, will the Patriot Act or a Patriot II be co-opted to surveil and harass abortion protesters or Second Amendment supporters? Given recent reports that the FBI has used a heavy hand in interviewing real and potential left-wing protesters before the Republican National Convention, this is clearly far from beyond the realm of possibility. Political activists, of any ideological stripe, are prime targets for excesses by law enforcement because of their gadfly nature. Any intimation of potential disruptiveness, especially in the post-9/11 environment, immediately draws extensive law enforcement attention. If the investigative power is overly broad, as it largely is with the current sneak and peak statute, it cannot help but be overused. I strongly support the limiting provision in the SAFE Act.

The SAFE Act also includes a new check on the expansion of the FISA business records provision in the Patriot Act. Section 215 of the Patriot Act allows federal agents to seek a FISA court order for the production of any document or "tangible thing" that they assert is "sought for" an ongoing terrorism or espionage investigation, so long as it is not "solely" based on the First Amendment activities of United States citizens or permanent residents. (A Section 215 order can, therefore, be based exclusively on First Amendment activities for all other persons in the United States). The FISA judge has no discretion in the statute, codified at 50 U.S.C. § 1861, to deny the request, and the recipient of the court order is barred from telling anyone save those necessary for its execution. The change was a significant expansion of the scope of the business records provision. Prior to the Patriot Act, the authority to order the production of such documents required "specific and articulable facts" that the target was a foreign power or agent thereof. The pre-Patriot power applied to a limited subset of records, namely those held by common carriers, rental car agencies, self-storage businesses, and the like. The Patriot Act vastly expanded this section of FISA. Under a plain reading of the statute, it could easily sweep in the personal, medical, travel, firearms-purchase, library or even genetic records of Americans who may have nothing to do with an intelligence or terrorism investigation. Again, conservatives have ample reason to be concerned about Section 215 of the Patriot Act, especially given that we now know the FBI has sought court orders pursuant to its authority. Consider the damage a provision like

215 could do if used for political advantage. Also, I think that as we discuss the SAFE Act, and particularly its impact on Section 215 of the Patriot Act, we should look back at that test posed by the 9-11 Commission for new government powers. The first part of that test says that the burden is on the government to explain how, "[T]he power actually materially enhances security." Although the Department of Justice is reluctant to give out much information on this section, it did testify last year that, at that time, it had never been used. If true, then this power fails the test off the bat, before we even begin to look at its constitutional impact. On the other hand, if the government is using it, which seems clear today, then it still fails part two of the commission test, because its use is being inadequately supervised. I know members of this committee have tried for a long time to get answers about its use, to no avail.

The SAFE Act, again, takes a middle of the road approach to fixing the overbreadth of the Patriot Act's provision. Instead of returning the code to status quo ante, which covered only certain records, it leaves the scope of Section 215 untouched to include any "tangible things," but reinstalls the "specific and articulable facts" standard for obtaining one of these orders. By doing so, the SAFE Act would prevent the misuse of Section 215 against political dissidents, and would serve to insulate innocent third parties from having their personal information seized secretly by the FBI. It would also expand reporting requirements on the use of Section 215 court orders to the House and Senate judiciary and intelligence committees.

The second provision in the Senate version of the SAFE Act deals with a post-9/11 change to wiretapping law that has been little noticed by the media and public, but is extraordinarily significant in its scope and potential misuse. Section 206 of the Patriot Act created roving wiretap authority under FISA. It did so, however, without including the "ascertainment" requirement included in the criminal roving wiretap statute. So, instead of just "following the person, not the phone," the new roving wiretap statute allows secret intelligence wiretaps presumably of multiple devices without any formal requirement that agents "ascertain" that their target is at the location or using the device. Although this is bad in and of itself, the Intelligence Authorization Act that year expanded the authority even further, creating an entirely new creature: the "John Doe" roving wiretap. The post-Patriot specification procedures in the FISA wiretapping statute require the FBI applicant to specify the identity of the target, "if known," and the nature and location of the places or facilities to be wiretapped, again "if known." This is an extreme amount of discretion. It allows FBI agents to engage in investigative fishing expeditions against anyone who meets the general physical description in the surveillance order, the only real requirement for specificity. The SAFE Act, again, does nothing to remove the roving wiretap authority under FISA; it simply would require agents to specify either the identity of the target or the location where the wiretap will be installed. Authorities could provide an alias under the SAFE Act if the target's real name is unknown. The SAFE Act would also reinstall the ascertainment requirement; preventing agents, for instance, from randomly wiretapping apartments in an apartment complex because they have a hunch that a single suspect fitting their general description might be in one of them. If the SAFE Act is enacted, roving intelligence wiretaps would have precisely the same safeguards as criminal roving wiretaps.

Finally, Sections 5 and 6 of the SAFE Act provide greater privacy protections for library users and expand the sunset provisions in the Patriot Act, respectively. Section 505 of the Patriot Act lowered the standard that the FBI has to meet to issue "national security letters" ("NSLs"), which

are effectively administrative subpoenas, issued at the sole discretion of a Justice Department official. Some continue to insist that libraries which provide public access to the Internet can be treated as an Internet Service Provider (ISP), for the purposes of NSLs. This opens the records of any library patron up to FBI scrutiny without any court review. Section 5 of the SAFE Act would clarify that libraries do not meet the definition of a traditional communications service provider. Authorities would still be absolutely free to seek orders for the production of records about Internet activity in libraries, but would have to go through the library's actual Internet Service Provider, just as they do when they seek records about an individual's home Internet use - hardly a burdensome requirement.

Section 6 expands the sunset provision in Title II of the Patriot Act to include the sneak and peek section, the provision expanding pen register and trap and trace authority to Internet communications (which fails to clarify what constitutes "content" in electronic mail headers and Internet surfing logs), the section providing for single jurisdiction national search warrants in terrorism investigations, and the national security letter expansion. The sunset expansion is necessary to ensure that poorly drafted or potentially abusive provisions in the Patriot Act are given a re-airing in front of Congress before public interest in the Patriot Act disappears.

In sum, I applaud Senators Craig and Durbin, as well as the 18 other Republican and Democratic Senate sponsors of the SAFE Act, for their attention to civil liberties. I have long argued that the appropriate way to maximize the effectiveness of both intelligence and law enforcement requires two things, neither of which involve fostering investigative fishing expeditions. First, the intelligence and law enforcement community should be properly resourced. The FBI should not have to wait until 2004 (or 2005) before entering the digital age. The fact that the "Trilogy" information technology project at the FBI has taken so long to implement is inexcusable. Such infrastructure investments are absolutely essential to let rank-and-file special agents do their jobs. Second, the government should encourage old-fashioned policing techniques. All of the legal shortcuts in the world cannot replace the human ability to deduce and intuit the facts of a case from traditional shoe-leather policing. The same evidence-based, agent-level approach should obtain in counter-terrorism efforts. The SAFE Act maintains the Patriot Act powers that foster these two approaches, and does away with the constitutionally suspect dead weight in the bill like John Doe intelligence wiretaps. It deserves this committee's support.

Before I conclude, some comments are in order about the "Tools to Fight Terrorism Act," sponsored by Senator Kyl. As I said before, Senator Kyl should be applauded for his vigilance. However, S. 2679 bears far too much resemblance to the "Son of Patriot" legislation leaked from the Justice Department in February 2003 to leave me and many other conservatives and liberals with a sense of comfort. It contains a number of provisions that track parts of that draft legislation, as well as a number of other Patriot-style powers that have failed to win congressional passage over the past three years. For instance, S. 2679 includes the administrative subpoena, pre-trial detention and expanded death penalty powers requested by President Bush in September 2003, as well as provisions encouraging the increased use of secret evidence and allowing the government to target individuals for highly attenuated connections to organizations secretly designated as "terrorist groups" by the government.

Two points should be made about S. 2679. First, it is clearly a sequel to the Patriot Act and, as such, Congress should defer consideration of the measure until after the election; it must not become a political prop. Right now, the incomplete and inaccurate information that is flying around about the Patriot Act and other similar government powers would be lethal to considered and reasonable policy making. Second, S. 2679, as it stands, fails to meet the standard put forward by the 9/11 Commission for expansions of executive branch authority, laid out in the recommendation on pages 394 and 395. It does not meet the burden set forward for the expansion of government power, mentioned above, and fails to include proper safeguards. Instead, S. 2679 proceeds on the same "trust us" view of the executive branch implicit in the Patriot Act and its progeny. The most recent field report by the Justice Department provides just another example of the lack of a basis for this trust. Though it paints a nice picture of the administration's use of the non-controversial provisions in the law, it says nothing about the administration's use of the provisions that have drawn criticism from Washington watchers and the public. This record is hardly something deserving of reward by the Congress. In another example, as mentioned earlier, the Attorney General declassified a memo in September 2003 disclosing that Section 215 of the Patriot Act had never been used, raising questions about why his department lobbied so hard for the new power after 9/11. But then, to make matters worse, a recent FOIA request by the ACLU shows that, in fact, the FBI's National Security Law Branch asked the Office of Intelligence Policy and Review to submit a 215 request less than a month after the Ashcroft memo. Such unhappy coincidences do not inspire the trust needed to grant extraordinary additional national security authority that would be exercised with even more insulation from judicial review.

In the final analysis, the greatest issue implicated in the current debate is the separation of powers doctrine and how it will withstand the stresses of the post-9/11 era. I submit that the basic principles and national values should remain unchanged. The mutual checks and balances on executive, legislative and judicial authority in the United States should remain, even in the context of national security and counter-terrorism. Although Congress should actively be seeking to provide for the most effective policies and powers in these areas, it should not be expanding the executive's general authority at its own expense or that of the courts. The SAFE Act strikes this particular balance. It says, for instance, that it is okay for authorities to have broad access to business records beyond those of just common carriers or rental car companies, but that agents should show a judge, in an ex parte proceeding, specific and articulable facts that show a reason to believe the target is a member of a terrorist organization or is engaged in terrorist activity. That, to me, is a reasonable counter-terrorism policy. It is flexible enough to meet changing circumstances and cunning foes, but is internally limiting, the natural enemy of potential abuse.

As a conservative, I try and apply a simple test to all government policies, from firearms laws to the Patriot Act. Will they preserve personal freedoms, will they work, and are they narrowly constructed? Applied to the SAFE Act, the answers are yes, yes, and yes -- a passing grade. Applied to the new Tools to Fight Terrorism Act, the answers are no, perhaps, and no, which is not the best score. As a final word, note that when applied to the Patriot Act, the results are similar: no, yes and no, and emphatically no. I urge you to consider that as you deliberate further on these vitally important matters.

Thank you again Chairman Hatch and Ranking Member Leahy for your vigorous oversight of our constitutional liberties.