2003

America After 9/11: Freedom Preserved Or Freedom Lost: Hearing Before the S. Comm. on the Judiciary, 108th Cong., Nov. 18, 2003 (Statement of Viet D. Dinh, Prof. of Law, Geo. U. L. Center)

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(II)
## CONTENTS

### STATEMENTS OF COMMITTEE MEMBERS

<table>
<thead>
<tr>
<th>Member</th>
<th>Statement</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Craig, Hon. Larry E., a U.S. Senator from the State of Idaho</td>
<td>prepared statement</td>
<td>255</td>
</tr>
<tr>
<td>Hatch, Hon. Orrin G., a U.S. Senator from the State of Utah</td>
<td>prepared statement</td>
<td>1</td>
</tr>
<tr>
<td>Kennedy, Hon. Edward M., a U.S. Senator from the State of Massachusetts</td>
<td>prepared statement</td>
<td>284</td>
</tr>
<tr>
<td>Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont</td>
<td>prepared statement</td>
<td>313</td>
</tr>
</tbody>
</table>

### WITNESSES

<table>
<thead>
<tr>
<th>Witness</th>
<th>Affiliation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Barr, Hon. Bob</td>
<td>a former Representative in Congress from the State of Georgia</td>
</tr>
<tr>
<td>Chishti, Muzaffar</td>
<td>Director, Migration Policy Institute at New York University School of Law, New York, New York</td>
</tr>
<tr>
<td>Cleary, Robert J.</td>
<td>Proskauer Rose, LLP, New York, New York</td>
</tr>
<tr>
<td>Dempsey, James X.</td>
<td>Executive Director, Center for Democracy and Technology, Washington, D.C.</td>
</tr>
<tr>
<td>Dinh, Viet D.</td>
<td>Professor of Law, Georgetown University Law Center, Washington, D.C.</td>
</tr>
<tr>
<td>Stroscio, Nadine</td>
<td>President, American Civil Liberties Union, New York, New York</td>
</tr>
<tr>
<td>Zogby, James J.</td>
<td>President, Arab American Institute, Washington, D.C.</td>
</tr>
</tbody>
</table>

### QUESTIONS AND ANSWERS

<table>
<thead>
<tr>
<th>Questions</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Questions submitted by Senator Leahy to the witnesses</td>
<td>57</td>
</tr>
<tr>
<td>Questions submitted by Senator Kennedy to the witnesses</td>
<td>63</td>
</tr>
<tr>
<td>Questions submitted by Senator Feingold to the witnesses</td>
<td>70</td>
</tr>
<tr>
<td>Questions submitted by Senator Craig to the witnesses</td>
<td>73</td>
</tr>
<tr>
<td>Responses of Bob Barr to questions submitted by Senators Leahy, Kennedy, Feingold, and Craig</td>
<td>74</td>
</tr>
<tr>
<td>Responses of Muzaffar Chishti to questions submitted by Senator Kennedy</td>
<td>80</td>
</tr>
<tr>
<td>Responses of Muzaffar Chishti to questions submitted by Senator Feingold</td>
<td>83</td>
</tr>
<tr>
<td>Responses of Robert J. Cleary to questions submitted by Senators Leahy, Kennedy, Biden, and Craig</td>
<td>84</td>
</tr>
<tr>
<td>Responses of Viet D. Dinh to questions submitted by Senator Craig</td>
<td>110</td>
</tr>
<tr>
<td>Responses of Viet D. Dinh to questions submitted by Senator Biden</td>
<td>115</td>
</tr>
<tr>
<td>Responses of Viet D. Dinh to questions submitted by Senator Kennedy</td>
<td>119</td>
</tr>
<tr>
<td>Responses of Nadine Stroscio to questions submitted by Senators Leahy, Kennedy, Feingold, and Craig</td>
<td>121</td>
</tr>
<tr>
<td>Responses of James J. Zogby to questions submitted by Senators Leahy, Kennedy, Biden, Feingold, and Craig</td>
<td>135</td>
</tr>
</tbody>
</table>

### SUBMISSIONS FOR THE RECORD

<table>
<thead>
<tr>
<th>Submission</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>American-Arab Anti-Discrimination Committee, Mary Rose Oakar, President, Washington, D.C.</td>
<td>145</td>
</tr>
<tr>
<td>American Library Association, Carla Hayden, Washington, D.C., letter and attachments</td>
<td>161</td>
</tr>
</tbody>
</table>
Burr, Hon. Bob, a former Representative in Congress from the State of Georgia ............................................................................................................................. 171
Center for Democracy & Technology, Center for American Progress, Center for National Security Studies, Washington, D.C., joint report .................................................. 180
Chishti, Muzaffar, Director, Migration Policy Institute at New York University School of Law, New York, New York ................................................................. 219
Cleary, Robert J., Partner, Proskauer Rose, LLP, New York, New York .......... 241
Dempsey, James X., Executive Director, Center for Democracy and Technology, Washington, D.C. .................................................................................................................. 258
Dinh, Viet D., Professor of Law, Georgetown University Law Center, Washington, D.C. ......................................................................................................................... 277
Fine, Glenn A., Inspector General, Department of Justice, Washington, D.C., letter ............................................................................................................................................ 280
Lawyers Committee for Human Rights, Washington, D.C., report .................. 293
Mexican American Legal Defense and Educational Fund, Katherine Culliton, Legislative Staff Attorney, Washington, D.C., statement ......................................................... 319
Massimino, Elisa, Director, Lawyers Committee for Human Rights, Washington, D.C., statement ................................................................. 327
New York Times, Clifford Krauss, New York, New York, article ..................... 335
Strossen, Nadine, President, American Civil Liberties Union, and Timothy H. Edgar, Legislative Counsel, New York, New York, statement ......................................................... 338
November 9, 2003, editorial .............................................................................. 357
Philip Allen Lacovar, November 12, 2003, article ............................................. 358
Zogby, James J., President, Arab American Institute, Washington, D.C., statement ........................................................................................................................................ 360
order to pursue the war on terrorism. I also noted from the last hearing that you asked the very pertinent question of the Government officials, law enforcement officials who were testifying, which of the new powers that they had gotten post-9/11 were helpful and important to them. And none of the powers that any of those witnesses listed—as Senator Feingold noted, not a single one of them included Section 215 or the others that we and other critics are objecting to. So I think this, like RFRA, could be very constructively an area where there are common concerns and a meeting of the minds.

Very quickly with respect to Chairman Hatch’s second question, what are we asking for, that is laid out specifically on pages 15 to 16 of my written testimony. High among them is one of the modest reform measures that has been endorsed by broad bipartisan leadership, including on this Committee Senators Craig, Durbin and Feingold.

What these provisions would do is return the law closer to where it was pre-PATRIOT Act, completely consistent with the testimony that you heard from the law enforcement officials at your last hearing. None of these modest reforms—not repeals—would interfere with the powers that they have said are necessary for them in order to protect us all from terrorism.

So I very much appreciate this opportunity and look forward to continuing to work together constructively.

[The prepared statement of Ms. Strossen appears as a submission for the record.]

Chairman Hatch. Thank you.

Professor Dinh.

STATEMENT OF VIET D. DINH, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, D.C.

Mr. Dinh. Thank you very much, Mr. Chairman, Ranking Member Leahy, members of the Committee. Thank you very much for the honor and the pleasure of being here to talk about this very important topic. I have a written statement which I ask to be submitted for the record.

Chairman Hatch. We will submit all written statements as though fully delivered, so you won't have to say that anymore.

Mr. Dinh. Thank you very much, Mr. Chairman. I would like very quickly to go through some of the concerns that the Ranking Member and my colleagues have expressed, as well as some concerns that have been expressed in the public debate.

I first want to echo Congressman Barr's bipartisan statement that we are all in good faith trying to discover the best way to protect the civil liberties and security of America at a time when these things are under threat. I know that no one in the Department of Justice, no one in the administration, no one at this table or other participants in this debate question the patriotism of those who engage in this debate. Governance is not a static process; it is a dynamic process, and I appreciate this Committee taking its time to do this valuable work in light of the threat of terror threatening our civil liberties.

I want to go through my opening statement by converting my prepared statement to track the constitutional amendments that
seem to be of concern. I want to start first with the First Amendment, and then the Fourth Amendment, and then conclude with the Fifth and Sixth Amendment regarding the right to trial by jury.

With respect to the First Amendment, much noise and much criticism has been directed at Section 215 of the USA PATRIOT Act. As members of this Committee well know, Section 215 translates into the national security context, the Foreign Intelligence Surveillance Act context, powers that preexisted Section 215, powers that the grand jury has always had since time immemorial and indeed can be exercised by prosecutors and investigators with much lesser checks than those that this Committee and Congress have afforded in Section 215.

I do not doubt that individual activists and organizations may well feel a chill to their First Amendment activity. I do not doubt that these fears are sincere. I am also very confident they are not founded because they really should be addressed to preexisting criminal processes that preexisted Section 215. And indeed it is a legitimate question whether or not to extend to other contexts the protections of Section 215 and elsewhere in the Foreign Intelligence Surveillance Act that do not permit Government officials to target First Amendment activities by the use of these powers. That is a legitimate debate.

Indeed, I note here that in the Attorney General’s revisions to the Attorney General guidelines which he published last June, June of 2002, at page 7 he instituted administratively such a restriction that investigations not be targeted solely at First Amendment activities, thereby extending the same protection that Section 215 affords to Foreign Intelligence Surveillance Act authorities to general criminal processes.

I do think that questions regarding confidentiality and secrecy are very weighty ones in our constitutional structure, including in our criminal processes. That is why I welcome the very significant restrictions that Section 215 puts on law enforcement authorities, including the accountability provisions that the Department of Justice is under obligation to report to Congress every 6 months.

With respect to the Fourth Amendment, Congressman Barr has noted that there has been significant concern regarding the USA PATRIOT Act. And much more importantly, preexisting authority in criminal law and foreign intelligence surveillance may have an undue burden on our constitutional protection against unreasonable searches and seizures. These are significant concerns.

One of the commentaries that I have on the current debate is that the focus on what are considered to be politically-charged or sexy issues, like Section 215, like the delayed notice provisions, has drowned out legitimate conversation and debate regarding how we go about protecting the Fourth Amendment even as we use these very important tools in the Foreign Intelligence Surveillance Act.

For example, Section 218 of the USA PATRIOT Act makes a very critical change to the Foreign Intelligence Surveillance Act to allow better communication and coordination between law enforcement and intelligence. I don’t think anybody, including those at this table and other critics, have questioned that underlying change in law.
Many questions, however, are raised by that change in law, including what exclusion procedures would be applicable. Are they Fourth Amendment exclusion procedures, are they FISA exclusion procedures, or are they procedures under the Classified Information Protection Act? These are the questions that the courts, in particular the district court of Florida in the Sami Al-Arian case, are trying to work out and ultimately the courts will answer. But these are the kinds of questions that I think the public debate should focus on and this Committee will focus on in the near future in order to ascertain what, if anything, we can do in order to better protect the Fourth Amendment.

Finally, a note about the Fifth and Sixth Amendments and the right to trial. There has been much talk regarding the detention of Mr. Jose Padilla and also Yasser Hamdi. Focus has been put on the Fifth and Sixth Amendment right to trial and how these rights are not being afforded to these particular individuals.

Also of relevance, of course, is Article II of the Constitution, which grants to the President the commander-in-chief authority. It is under this authority that the President has sought military detention of these individuals, just as Presidents in other times of war have detained battlefield detainees in order to incapacitate them from doing harm to our men and women fighting on the battlefield.

In this war against terror, the terrorist has chosen the battlefield not to be restricted to Afghanistan or Iraq, but indeed expanding to Morocco, Saudi Arabia, Turkey and, of course, on September 11, the World Trade Center and Washington, D.C. In such a circumstance, I think it is an easy question, not particularly an easy question, but I think it is only a small step to extend the President’s authority to detain battlefield detainees outside the traditional battlefield.

A much harder question, one that I think the Supreme Court will ultimately answer—and frankly I do not find much support in the cases to provide the answer—is whether or not the Court will defer to the Executive when there is nothing to defer to; that is where there are no alternative processes, either military, executive or other types of processes, as we have seen in the past with the In Re Quirin or Ex Parte Milligan cases. Those are the questions that the Second Circuit grappled with yesterday. I think ultimately the Supreme Court will answer those questions.

I would note, in conclusion, however, that it is not the Court alone that should be answering these questions, and it certainly should not be the Executive alone. But this body, this Committee, has a very significant voice in the constitutional debate, and I sincerely hope that out of these hearings and out of the increased attention paid to these issues would be a Congressional voice with respect to these very, very important issues.

Thank you very much.

[The prepared statement of Mr. Dinh appears as a submission for the record.]

Chairman HATCH. Thank you, Professor.

Mr. Zogby.
115

Hearing Before the Senate Judiciary Committee
"America After 9/11: Freedom Preserved Or Freedom Lost?"
November 18, 2003

QUESTIONS SUBMITTED BY SENATOR JOSEPH R. BIDEN, JR.

QUESTIONS FOR PROFESSOR VIET DINH

I have been deeply troubled by the Administration's recent action with respect to so-called "enemy combatants." I can imagine no greater modern-day threat to civil liberties and to our historic understanding of due process than the Administration's insistence that it has unfettered power to detain indefinitely any individual (including U.S. citizens seized on U.S. soil) - without charging them with any crime, without trial, and without providing them with access to an attorney. It strikes me that, at the very least, these individuals should be afforded a meaningful opportunity to contest their status.

Question: I was intrigued by your testimony on this subject and especially appreciative of your willingness to concede that many of the questions on this topic are both difficult and without precedent. In your testimony, you suggested that Congress has an important role to play in helping the Administration develop a coherent policy with respect to enemy combatants. Please describe in greater detail the role that you believe Congress can and should play? What, if any, statutory improvements would you suggest?

ANSWER:

I am grateful for your question and your genuine desire to assist the executive branch in this most difficult of decisions in these most difficult of times. It is my strong belief that the Constitution commits the whole of executive power in the President of the United States. Compare U.S. Const. Art. I, sec. 1, cl. 1, with id. Art. II, sec. 1, cl. 1. Perhaps in no other area is executive duty higher--and, correspondingly, executive authority greater--than the defense of our nation and the conduct of armed conflict against enemy belligerents.

That said, Congress has a significant voice in the conduct of executive branch activities. As Justice Jackson famously articulated in his concurring opinion in the Steel Seizure Cases, executive authority in areas of shared power ebbs with congressional disapproval and rises with congressional acquiescence. In matters of core executive authority such as war, however, it is important that Congress does not act in a manner that unduly intrudes in executive prerogatives and creates unnecessary constitutional conflicts with a coordinate branch of government. Such care is counseled as much by the reality that our enemies not be able to question our country's resolve as by concern for the constitutional separation of powers.

The Administration recently announced that it would permit lawyers access to Yasser Hamdi and Jose Padilla. This is an important development because the government has always maintained that the courthouse doors are open to the detainees to challenge the legality of their detention through habeas corpus. Access to counsel makes access to the courts meaningful.
The determination as to when and under what circumstances to grant access to counsel disruptive to the interrogation process necessarily rests with the executive in the first instance. Few would doubt that, if Al Qaeda leaders like Khalid Sheik Mohammed were held in U.S. territory, they would have continuing intelligence value and government efforts to extract information should not be disrupted. On the other hand, when access would not disrupt the intelligence flow, as the government has decided for Hamdi, the government has no reason to bar detainees from speaking with their lawyers.

There is room for the Administration to move into even safer legal harbor by providing, after a reasonable period, some procedure for Padilla and Hamdi to contest the underlying facts of their detention. It need not be full-dress judicial process. A military hearing to evaluate the information underlying the detention would suffice. The Supreme Court is more likely to defer to an executive judgment when the process by which it is arrived at is capable of inspection.

The developments in the Hamdi and Padilla cases should comfort those who distrust executive authority because they demonstrate that the Administration is exercising its discretion responsibly to accommodate changed circumstances. Likewise, those who support executive prerogative should commend the Administration for not pushing the envelope and risk a judicial backlash that would erode presidential authority.

The Administration's action is especially noteworthy given Congress' silence. Two years after the horror of 9/11 and recognizing that the Administration's efforts have successfully protected the American homeland from another catastrophic terrorist attack, it is time for Congress to contribute its voice, either to affirm the President's authority or to suggest refinements to Administration policy. I agree with Judge Michael Chertoff that the country collectively needs think more systematically about a sustainable architecture for determining when, why, and for how long someone may be detained as an enemy combatant.

With respect to specific procedures, one must distinguish between preliminary processes to determine whether a person is an enemy combatant (which are akin to the military or executive version of a probable cause hearing) and military tribunals to determine a combatant's unlawful conduct (which are akin to the military or executive version of a trial). One should also keep in mind that any person under U.S. detention has a right to file a habeas petition to challenge the legality of his detention. Whether the courts would intervene depends on a host of questions—whether the person is being held in U.S. territory, whether the person is a U.S. citizen, to what extent would the courts defer to executive fact-finding and decisionmaking processes, etc.—which the Supreme Court is currently considering in several cases.

Question: It appears that the Administration is making somewhat arbitrary and ad hoc decisions regarding designation of individuals as enemy combatants. There appear to be no uniform principles that guide the decision-making process—evidenced by the fact that seemingly similar defendants are treated very differently. For example, both Yasser Hamdi and John Walker Lindh are both U.S. citizens supposedly captured on the battlefield in Afghanistan and then shipped to the U.S. Naval Station in Guantanamo Bay, Cuba—yet, Hamdi has been designated an enemy combatant, and Walker Lindh's case was settled.
within the context of the civilian criminal system. How would you suggest that the designation policy be modified to make the process more uniform and coherent?

As an initial matter, one must distinguish between preliminary processes to determine whether a person is an enemy combatant (which are akin to the military or executive version of a probable cause hearing) and military tribunals to determine a combatant's unlawful conduct (which are akin to the military or executive version of a trial). One should also keep in mind that any person under U.S. detention has a right to file a habeas petition to challenge the legality of his detention. Whether the courts would intervene depends on a host of questions—whether the person is being held in U.S. territory, whether the person is a U.S. citizen, to what extent would the courts defer to executive fact-finding and decisionmaking processes, etc.—which the Supreme Court is currently considering in several cases.

The initial decisions by the executive whether to designate a person as an enemy combatant subject to military detention or to bring a criminal indictment, whether to achieve justice through a military tribunal or through civilian criminal courts, and under what circumstances to grant access to counsel or other procedures of necessity depend on the circumstances of particular cases. That is why, I believe, that the Constitution commits these decisions to the Executive in the first instance, subject as always to judicial review under habeas proceedings.

Question: Assuming that the President under certain limited circumstances should be able to designate individuals as enemy combatants, what basic criteria should inform designation decisions? What factors should the executive branch consider when designating an individual as an enemy combatant as opposed to a prisoner-of-war or criminal defendant?

The general considerations include whether a person has continuing intelligence value, whether sources and methods of intelligence would be compromised if revealed in a public trial, and the timing of any eventual adjudication. The civilian criminal system operates under very strict legal and constitutional mandates with respect to these considerations. At the same time, a military process I believe could accommodate the military interest in these areas while affording basic protections against mistake or abuse. The exact parameters of this process depend on a host of questions—whether the person is being held in U.S. territory, whether the person is a U.S. citizen, to what extent would the courts defer to executive fact-finding and decisionmaking processes, etc.—which the Supreme Court is currently considering in several cases.

I should be happy to provide comments on the constitutionality and wisdom of specific proposals that Congress may consider to assist the Executive and the Courts in these important matters.

Question: Once an individual is designated as an enemy combatant, what types of procedural and substantive safeguards should be afforded to accused individuals, without sacrificing our national security interests?
As an initial matter, one must distinguish between preliminary processes to determine whether a person is an enemy combatant (which are akin to the military or executive version of a probable cause hearing) and military tribunals to determine a combatant's unlawful conduct (which are akin to the military or executive version of a trial). One should also keep in mind that any person under U.S. detention has a right to file a habeas petition to challenge the legality of his detention. Whether the courts would intervene depends on a host of questions—whether the person is being held in U.S. territory, whether the person is a U.S. citizen, to what extent would the courts defer to executive fact-finding and decisionmaking processes, etc.—which the Supreme Court is currently considering in several cases.

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QUESTIONS SUBMITTED BY SENATOR EDWARD KENNEDY

1. Questions to witnesses: Professor Dinh

"Extraordinary Rendition" and Torture / Maher Arar Case: I would like to ask all the witnesses for their views on the Maher Arar case. Mr. Arar runs a consulting company in Ottawa. He previously worked as an engineer for a high-tech company in Natick, Massachusetts. He has dual Canadian and Syrian citizenship, but has not lived in Syria for sixteen years.

Returning to Montreal from a family visit in Tunisia, Mr. Arar made a stopover at Kennedy Airport in New York City on September 26, 2002. Immigration officials detained him at the airport and told him he had no right to a lawyer because he was not an American citizen. He was taken to the Metropolitan Detention Center in Brooklyn, where FBI, New York police, and INS officials interrogated him for several days. Arar repeatedly asked to be sent home to Canada. He pleaded not to be sent to Syria, for fear he would be tortured.

Nevertheless, on October 8th, U.S. officials flew Mr. Arar on a small jet to Washington, where a new team of officials got on the plane. They flew to Amman, where the American officials handed Arar over to Jordanian authorities, who chained, blindfolded, and beat Arar while transporting him in a van to the Syrian border. In Syria, Mr. Arar was placed in a small, dark cell - three feet by six feet, much like a grave - and was confined there for almost a full year. He was slapped, beaten, and whipped on his palms, wrists, and back with an electric cable. He lost 40 pounds during his confinement. On October 5, 2003, the Syrian government released him; Syrian officials have told reporters that their investigators found no link between Mr. Arar and Al Qaeda. Mr. Arar is now back home in Canada.

Question (1): I assume that all agree with the proposition that U.S. officials should never engage in torture. Official acts of torture unequivocally violate the U.S. Constitution, the Convention Against Torture, which the U.S. has ratified, and customary international law. Do you believe it is appropriate for U.S. officials to turn over individuals like Maher Arar to countries such as Syria with the expectation that they will be tortured?

ANSWER:

I agree that the United States and all civilized nations should reject torture unequivocally. I have neither first-hand knowledge nor adequate understanding of the facts surrounding the Arar case to venture an opinion on its handling.

Question (2): According to news reports, CIA officials have repeatedly engaged in what it calls "extraordinary renditions": handing over captives to foreign security services known for their brutal treatment of prisoners and use of torture - sometimes with a list of questions the agency wants answered. Article 3 of the Convention Against Torture provides, "No State Party shall expel, return or extradite a person to another State where there are..."
substantial grounds for believing he would be in danger of being subjected to torture. " Do you believe that the current Administration is complying with this provision?

ANSWER:

I do not have any first-hand knowledge concerning extraordinary renditions. Likewise, I have no information or basis to believe that the United States is contravening its obligations under Article 3 of the Convention Against Torture.

Question (3): In a November 6 speech to the National Endowment for Democracy, President Bush condemned the government of Syria for leaving its people "a legacy of torture, oppression, misery, and ruin." Syria's use of torture is widely known and has been criticized by the State Department in its annual human rights reports. Are you concerned that the Administration is undermining its message about human rights and the need for change in the Middle East, through its policy of rendering suspects to Syria and other countries for torture-based interrogations?

ANSWER:

I agree that the United States and all civilized nations should reject torture unequivocally. I do not have any first-hand knowledge or any basis to believe that the United States has a policy of rendering suspects to other countries for torture-based interrogations.
QUESTION BY SENATOR PATRICK LEAHY FOR PROFESSOR VIET DINH

1. To date, the Administration has refused to establish any criteria for who may qualify as an "enemy combatant." On November 14, the Washington Post quoted Judge Michael Chertoff -- formerly head of the Criminal Division -- as stating "it may be time to develop a system by which enemy combatants could contest such designations." Do you agree with Judge Chertoff's suggestion for a system to allow enemy combatants to contest their designation?

ANSWER:

The Administration recently announced that it would permit lawyers access to Yasser Hamdi and Jose Padilla. This is an important development because the government has always maintained that the courthouse doors are open to the detainees to challenge the legality of their detention through habeas corpus. Access to counsel makes access to the courts meaningful.

The determination as to when and under what circumstances to grant access to counsel disruptive to the interrogation process necessarily rests with the executive in the first instance. Few would doubt that, if Al Qaeda leaders like Khalid Sheik Mohammed were held in U.S. territory, they would have continuing intelligence value and government efforts to extract information should not be disrupted. On the other hand, when access would not disrupt the intelligence flow, as the government has decided for Hamdi, the government has no reason to bar detainees from speaking with their lawyers.

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Prepared Testimony of
Viet D. Dinh
Professor of Law
Georgetown University Law Center

America After 9/11
Freedom Preserved or Freedom Lost?
Committee on the Judiciary
United States Senate
November 18, 2003

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.

1 Karl N. Llewellyn, On What is Wrong with So-Called Legal Education, 35 Colum. L. Rev. 651, 662 (1935).