

Testimony of

# **The Honorable Patrick Leahy**

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STATEMENT OF SENATOR PATRICK LEAHY  
HEARING BEFORE THE SUBCOMMITTEE ON TECHNOLOGY, TERRORISM AND  
GOVERNMENT INFORMATION  
ON  
"GERMS, TOXINS AND TERROR: THE NEW THREAT TO AMERICA"  
NOVEMBER 6, 2001

I commend Senator Feinstein for holding this hearing on the threat of bioterrorism. Today's discussion is important for both symbolic and practical reasons.

It is symbolically important because, as everyone here knows, just a few weeks ago, terrorists unleashed anthrax here in the Senate office buildings. Today we are here to discuss how to overcome this threat. But our very presence here is a testament to the resilience of the Senate, and of the American people whom we are privileged to represent. I would like to thank everyone who is here today, and the security and public health personnel who have made it possible for us to be here today, for all your hard work. By making this hearing possible, you have sent a message loud and clear to the terrorists: no menace, however scientifically sophisticated, will silence our democracy.

Today's hearing is practically important because we need to stay one step ahead of the terrorists. The President has called on all Americans to be on the alert. That means anticipating new dangers that we have yet to encounter as well as improving our response to what we have already seen. We here in the Senate can play our part in that effort by doing what we do best: listening to the experts and then crafting the rules that will enable our government to protect our people and their liberties in the most effective way possible. That process should be swift, but it should also be based on a careful analysis of the facts, and on testimony that, insofar as national security allows, is fully available to the American public. Today's hearing is a key part of that process.

Some people, particularly our witnesses today, have been alert in this area for a long time. I want to commend in particular Senator Biden. Well before September 11 and the subsequent outbreak of anthrax-related incidents, Senator Biden had been working to strengthen our federal laws regarding biological agents and toxins. It was a bill that he introduced in the last Congress - the Dangerous Biological Agent and Toxin Control Act of 2000 - that provided the basis for the bioterrorism provisions in the initial draft of the USA Act of 2001. These provisions filled a gap in the federal criminal code by creating new criminal offenses relating to select biological agents and toxins, and called for more exacting regulation of these substances by the federal government.

Like the USA Act, the Administration's original proposal to Congress included new crimes as well as certain regulatory provisions that would have further strengthened our nation's ability to protect against bioterrorist attacks. Unfortunately, the Administration chose to withdraw its regulatory proposals -- and to oppose the stronger regulatory language that Senator Biden and I had proposed - apparently because of its inability to resolve inter-agency conflicts. Given the grave importance of this issue, I urge the Administration to resolve these disputes and work with the Congress to provide these additional protections.

The other bioterrorism provisions in the Administration's original proposal, with a few modifications that I will describe shortly, passed the Senate on October 11 as part of the USA Act, S.1510. To my surprise, the House dropped these provisions before passing a version of the Senate-passed bill on September 12, but it eventually accepted the Senate's position on the need for such provisions and added them back to the final bill, renamed the USA PATRIOT Act.

As enacted, the USA PATRIOT Act creates two new criminal offenses that address the threat of bioterrorism. The first prohibits certain restricted persons from possessing select biological agents and toxins. The definition of "restricted persons" was taken from the original version of the USA Act, and includes non-resident aliens from countries that support international terrorism. The Senate rejected an early Administration definition of "restricted persons" that would have included any alien admitted to the United States under a non-immigrant visa - an unduly broad definition that was not in the best interest of science and clinical medicine.

The second new offense created by the USA PATRIOT Act, punishable by up to 10 years in prison, prohibits the possession of any biological agent, toxin, or delivery system "of a type or in a quantity that, under the circumstances," is not reasonably justified by a peaceful purpose. As originally proposed by the Administration, this provision specifically stated that knowledge of whether the type or quantity of the agent or toxin was reasonably justified was not an element of the offense. Thus, although the burden of proof in a criminal prosecution is always on the government, every person who possessed a biological agent, toxin, or delivery system was at some level of risk. At my urging, the Administration agreed to drop this portion of the provision.

Nevertheless, I remain troubled by the subjectivity of the substantive standard for violation of this new criminal prohibition, and question whether it provides sufficient notice under the Constitution. As I noted upon passage of the USA PATRIOT Act last month, I also share the concerns of the American Society for Microbiology and the Association of American Universities that this provision will have a chilling effect upon legitimate scientific inquiry that offsets any benefit in protecting against terrorism. While we have tried to prevent against this by creating an explicit exclusion for "bona fide research," this provision may yet prove unworkable, unconstitutional, or both. I urge the Justice Department and the research community to work together on substitute language that would provide prosecutors with a more workable tool.

In addition, I am heartened to see that the Department has been aggressively addressing the serious issue of so-called "hoax" cases. I note that law enforcement authorities have been able to prosecute these cases using existing threat and false statement statutes, and that they have been able to prosecute even "non-credible threats and hoaxes" in this area, as the testimony today will show. I know that we are discussing the need for additional legislation specifically dealing with the area of hoaxes, but we must also be careful that if we act in this area, that we craft any

legislation to deal with the specific problem of serious hoaxes that we are attempting to address. Overall, as I said when we passed the USA PATRIOT Act, I believe it does a good, though imperfect, job of strengthening the American people's protection from bioterrorism. But there is more that we can do. I have identified two areas for improvement - the loss of the original bill's regulatory provisions and the subjectivity of one of the Act's new criminal provisions. I hope we will be able to identify some more today. We must always be on the alert for new threats and new and innovative ways of dealing with them; and we must be prepared to fight the next battle against bioterrorism, not just the last.

The threat of bioterrorism in America is no longer theoretical; it is all too real. I thank the witnesses for coming today to share their expertise on this important issue.

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