

Testimony of

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U.S. Senate Judiciary Committee on
"Preventing and Responding to Acts of Terrorism: A Review of Current Law"
by
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Chairman Hatch, distinguished Members of the Committee, I thank you for the opportunity to testify on the state of our freedoms and the USA PATRIOT Act's impact on current law and our natural rights.

My name is Aaron Turpen and I am Secretary of the Libertarian Party of Utah. I am also the webmaster for CivilDisobedience.us and work with several action groups protecting our rights under the Constitution of the United States of America.

I applaud your oversight and dedication to our beloved Constitution. While it is not always easy to preserve our liberties from encroachments, however good their intentions, it is always right to do so.

Mr. Bob Barr stated it correctly when he said, before this same Committee, "The question before us today--whether the government response to those [9/11] attacks has adversely affected our individual liberties, including the right to privacy--could not be more important. It is at once complex and simple."

The threat of terrorist attack on this nation, following the tragedy of September 11, 2001, is considered real and present. While the danger of further attack is ever present, the danger of losing what we most cherish is even more so.

Our nation was founded on the principles of liberty: soon after ratification of the Constitution, the founders of this nation thought it necessary to ensure protection against government encroachment on liberties, and so, in 1791, the first ten amendments to the Constitution--commonly known as the Bill of Rights--were enacted.

The hastily-drafted and hastily-enacted Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (commonly known as the USA PATRIOT Act or the Patriot Act) was an attempt to give federal agencies the powers they needed to combat and prevent future terrorist attacks on our nation. However, most members of Congress have now admitted that they did not read the Act and many have stated that they no longer support the powers given by it.

In response to that, many acts of legislation have been proposed which would amend the USA PATRIOT Act to bring it more in line with the rights of the people. Among these are Senate Bill 436 (the Domestic Surveillance Oversight Act of 2003), Senate Bill 1709 (the SAFE Act), and Senate Bill 1552 (Protecting the Rights of Individuals Act). I and the Libertarian Party of Utah strongly support these bills and ask that the Judiciary Committee move them out of committee and onto the Senate floor for a vote.

Our concerns with the powers given to agencies of the federal government by the Patriot Act are many. Without digressing into a discussion of basic libertarian thought and the state of our nation today, I would like to address provisions of the USA PATRIOT Act specifically and their ramifications--both documented and theoretical.

The Act changes the purview of three major parts of the federal code: Title III, the Electronic Communications Privacy Act (ECPA), and the Foreign Intelligence Surveillance Act (FISA). The latter meant solely for foreign intelligence gathering.

Section 206 of the Act expands FISA to permit what is termed a "roving wiretap" authority from "specified in court-ordered surveillance" to instead include unnamed and unspecified third parties: thus opening the authority up to generic orders that could be

used to infringe on the privacy rights of untold numbers of people, especially those who access the Internet via public libraries, schools, and cyber cafes. Because these are issued in secret, no accountability for the execution of these warrants is given. This is a direct violation of not only the First and Fourth Amendments to the Constitution, but also to the checks and balances therein. Not to mention the intended jurisdiction of FISA itself. Further, Section 212 allows for nearly the same powers to be demanded by the Department of Justice of an Internet Service Provider or telephone company--whether a search warrant is issued or not. To add insult to injury, this power, which was to sunset in 2005, was made permanent by the passage of the Homeland Security Act (Section 225). The often-touted Section 213 of the Act allows for what are commonly known as "sneak and peek" warrants to be used. While the idea of a "sneak and peek" warrant has been heavily debated against the Fourth Amendment protection of "probable cause" and "oath and affirmation," the Act's vague definition of "reasonable period" is often overlooked. This definition is used to describe when such a warrant is to be announced to the searched person or persons. Even the Department of Justice's own Field Guide advises that this is a "flexible standard." In addition, these searches apply to all searches for material that "constitutes evidence of a criminal offense in violation of the laws of the United States." Clearly not just terrorism investigations!

Section 215 of the act, also often mentioned, allows for FBI access to "any tangible things." In the popular press, this has been touted as the direct attack on libraries and book stores. Not quite as well known is the scope of the authority given, which applies to any record relevant to the individual and held by a third party. This could include hospitals, places of worship, schools, civic clubs, and more. All without showing "probable cause," but with only the claim that the records may be related to an ongoing investigation "related" to terrorism! Worse yet, those served with the warrants must comply and divulge these records and are under a federal gag order (with criminal penalties) to not disclose that the records were requested and given! This provision allows for potential wholesale record-gathering and database building on persons for literally any reason the Justice Department may deem needful now and in the future. It is important to note that the powers listed above (Section 215) were available to the FISA Court before the USA PATRIOT Act was enacted. It is equally important, however, to understand that there were two major safeguards countering this power which were removed by Section 215. These checks included a definition of specific records that were available under this provision and the requirement that the FBI present the FISA Court with "articulable facts giving reason to believe" that the person being investigated was a spy or terrorist. Both of these protections, again, were removed by Section 215.

Moving into Title III of the Patriot Act, we come to Section 315, which authorizes extended powers for foreign corruption offenses and money laundering crimes. With the designations of these crimes and the definitions thereof, it should be well noted that these basic laws have been in effect for years now under prevue of the Department of the Treasury. Money launderers and multi-national fraudsters have been flouting these same laws since their inception with relative impunity. There is little chance that foreign terrorists would not use the same techniques in their actions.

I could write volumes on the various aspects of the forfeiture clauses of Section 806 and its corresponding attacks on personal and private property rights. Property forfeiture without due process is, itself, a fundamental attack on the rights of the People and cannot be lambasted enough. The discussion of it, while bearing mention here, is somewhat out of the scope of this testimony.

Beyond the technical aspects of the Patriot Act itself, one with a libertarian mind is forced to consider the further Constitutional ramifications of the Act's consequences. In our nation's constitutional framework exist three separate and distinct branches: the executive, the legislative, and the judiciary. The balance of powers between these three branches is what we term "checks and balances." These checks and balances assume a certain amount of visibility and accountability for each branch.

One of the heaviest of the erosions to this balance is the general loss of accountability for the Executive Branch. In 2002, the House Judiciary Committee demanded that the

Department of Justice answer questions about how it was using the new authorities given by the USA PATRIOT Act. Touting "national security issues," the Justice Department refused to give anything more than the letter of the law required. It was only after intense public pressure that the Executive acquiesced and produced more information.

This erosion of accountability resulted in a heavy mistrust of the Executive branch and illustrated the relative weakness the legislative branch now holds in weighing its side of the checks and balance sea-saw.

Related to the issue of accountability and the checks and balances of our government the overall issue of new attitudes and regulations within various government agencies regarding Freedom of Information Act (FOIA) requests has also been disconcerting. A general "closing of the doors" has been witnessed and recounted by many journalists, lobbyists, activists, and others who have come to rely on the general availability and openness of information available from, about, and thanks to our government agencies. Many records which were previously openly available have become closed under the guise of "national security." This circling of the wagons by agencies of the government appears to have done little to safeguard our nation and much to undermine trust in our nation's government.

Ultimately, in our representative republic, those chosen to serve in the name of the People are accountable to those who asked them to serve. Consequently, those laws which are enacted by those called to serve are also accountable to the People for which they were written. Therefore, the laws with which the People are not content may be revised or removed to suit the Will of the People.

The USA PATRIOT Act has shown its ability to galvanize the Will of the People against its draconian provisions. Regardless of political ideology, religious belief, or lifestyle choice; people around the nation have come together to voice their opposition to the tyrannies they perceive coming from the Patriot Act.

That you are holding this hearing today shows that you, as servants of the People, have heard our collective voices and are willing to listen to our requests for change. We the People are asking that you, as our elected representatives, reconsider the actions taken in 2001 and revise the USA PATRIOT Act to restore the natural rights bestowed upon us and enumerated in the first ten amendments to the Constitution of the United States of America.

Thank you for this opportunity to speak with you today in support of the principles of freedom upon which our nation was founded.