

Testimony of

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Testimony at a Field Hearing on

"Preventing and Responding to Acts of Terrorism:
A Review of Current Law"

Before the

United States Senate
Committee on the Judiciary

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Chairman Hatch and Members of the Committee:

On behalf of the American Civil Liberties Union of Utah and its several thousand members, dedicated to preserving the Constitution and Bill of Rights especially in times of national crisis, I am pleased to be here today to explain our opposition to sections of the USA PATRIOT Act that infringe on basic freedoms and civil liberties.

Perhaps more important, I will outline some solutions to these civil liberties problems that are strongly supported by an array of civil libertarians of the right, left and center - some of whom I am privileged to share the witness table with today. These solutions will enhance judicial review, open government, and accountability while preserving the government's ability to use its anti-terrorism powers wisely in order to deter, disrupt and prevent terrorist activities.

Mr. Chairman, your decision to hold this field hearing, open to honest discussion about these issues, shows respect for your constituents and for our democracy. The issue of preserving and protecting American civil liberties while

keeping America safe from terrorism is not only extremely important as a national discussion, but has become a focal point, across the political spectrum, among Utahns.

As a former high school civics teacher in Utah, political science graduate of BYU, graduate of J. Reuben Clark Law School, member of the Utah State Bar, and citizen of Utah, I have a deep and abiding sense of respect for our unique system of limited government that divides and balances government power by giving each branch - executive, legislative, and judicial - a role in protecting our liberty and security. The founders of our state understood from personal experience that such a system was fragile and could well break under the strain of fear and hysteria.

Terrorism represents a deliberate effort by those who would attack our freedoms to frighten us into changing the character of our society. It is in such a moment when the risk to our way of life is greatest.

Restoring Checks and Balances to the USA PATRIOT Act

The USA PATRIOT Act has become a symbol for many Americans of a disturbing trend in our government's response to terrorism that involves sidelining judges, Congress and the public in exercising new powers that are said to be required for terrorism cases, but actually can be used widely in all types of government investigations. While much of the Act includes needed, incremental changes that may enhance security and are not controversial for mainstream civil libertarians including the ACLU, a few of its more radical expansions of government power do give us real pause.

The USA PATRIOT Act was the product of an extraordinary time, just after September 11, in which Congress and the Administration were working quickly, under extreme pressure, to give law enforcement and intelligence agencies new surveillance powers. The United States Capitol, and many Congressional offices, were closed as a result of the anthrax mailings. Many members candidly acknowledge they did not find it possible under the circumstances to closely scrutinize the Act. No public hearings were held in which civil libertarians could explain their concerns about the bill.

Given that context, it is not surprising that some of its provisions need adjustment to restore critical checks and balances. An excellent, bipartisan first step would be to pass the Security and Freedom Enhanced (SAFE) Act of 2003, sponsored by Republican Senator Larry Craig from our neighboring state of Idaho and by Democratic Senator Dick Durbin of Illinois.

Mr. Chairman, one of your constituents who wrote to support the SAFE Act received a letter from your office, that she shared with me, that said you do not support the SAFE Act because, according to the letter, the SAFE Act "seeks to repeal parts of the USA PATRIOT Act." That information is not accurate.

Some members of Congress and public figures, such as Rep. Dennis Kucinich (D-OH), and former Vice President Al Gore, have called for repeal of all or part of the USA PATRIOT Act. However, Senators Craig and Durbin have not done so. In fact, their legislation does not repeal any provision of the USA PATRIOT Act. Rather, it modifies a few key surveillance powers of the USA PATRIOT Act to restore necessary checks and balances while specifically preserving those powers for use in terrorism and other cases.

Far from repealing the USA PATRIOT Act, the SAFE Act modifies three of its surveillance provisions and broadens the Act's "sunset clause" - amending four out of 158 provisions of the Act, or less than 3% of the entire Act. The attached memorandum to interested persons explains in detail how even with respect to those provisions, passage of the SAFE Act would still leave the government with substantially more power than it had before the USA PATRIOT Act was passed.

In sum, the SAFE Act merely:

? Restores key judicial safeguards in order to delay notice of the execution of an ordinary criminal search warrant - including a seven-day limit (which can be renewed) and a requirement to give specific reasons for delayed notice;

? Requires "articulable suspicion" of a connection to a spy, terrorist or other foreign agent (a standard far lower than probable cause, but more than nothing) before a secret foreign intelligence court may approve demands for library, bookstore, medical or other sensitive records, and clarifies that libraries are not "communications service providers" subject to FBI "national security letter" records demands that require no court order at all;

? Requires that a "roving wiretap" in intelligence cases have the same standards to guard against interception of innocent conversations as roving wiretaps in criminal cases - i.e., the roving wiretap order must specify either the identity of the target or the "facility" (telephone or other device) being used, and the government must "ascertain" that the target is using the facility; and

? Expands the USA PATRIOT Act's "sunset clause" to require Congressional review, by 2005, of three new surveillance provisions - nationwide search warrants, broad "sneak and peek" searches, and expanded "national security letters."

These additional safeguards would not prevent the government from using "sneak and peek" searches, secret court orders for library or other sensitive records, or roving wiretaps - even in non-terrorism cases. Instead, these safeguards simply require more meaningful judicial scrutiny of these powers. Likewise, the inclusion of a few more provisions in the USA PATRIOT Act's "sunset clause" does not mean those provisions will necessarily expire in 2005 - rather, it encourages Congressional oversight by giving the Congress additional leverage to question the Administration about its use of those powers.

Have Civil Liberties Been Eroded?

For better or for worse, in the public mind the issue of the USA PATRIOT Act has also grown to include the entire array of new government policies adopted after September 11, 2001. As you know, these include many policies - military tribunals and detentions (including of United States citizens), monitoring of attorney-client conversations without prior judicial review, changes to the FBI's investigative guidelines to allow monitoring of political and religious meetings, and new immigration detention policies that sideline immigration judges - that Congress did not authorize in the USA PATRIOT Act. Many of the policies were adopted not only without legislation but also without even meaningful consultation with members of the House or Senate judiciary committees.

One of the more alarming new proposals has been the formulation for widespread data surveillance that could track every American's private life through combining public and private sector computer databases without any safeguards or court oversight. Utahns have a strong tradition of skepticism towards government power, particularly surveillance power unchecked by judicial or other authority. For that reason, Utah has now joined the growing chorus of states rejecting the MATRIX - the Multistate Anti-Terrorism Information Exchange. The MATRIX is a surveillance system that combines more than 20 billion records about individuals from government databases and private-sector data companies. Those dossiers are available for search by government officials and combs through the millions of files in a search for "anomalies" that may be indicative of suspicious activity - even though many computer experts argue such searches simply cannot work. These notions of intrusive surveillance offended Utahns across the board.

Defenders of the government's anti-terrorism policies have argued that the public's concern about the PATRIOT Act is misplaced because much of what is criticized is not actually found within the USA PATRIOT Act. I disagree. The public associates these policies with the USA PATRIOT Act's problem provisions because, like those provisions, they sideline judicial, Congressional, or public oversight of anti-terrorism, intelligence or law enforcement powers. That these policies were not approved by the Congress makes them more, not less, problematic from a civil liberties standpoint.

Defenders of the government's policies have also argued that the actual abuses of civil liberties that have occurred since September 11, 2001, alarming so many Americans, have often involved these other government policies. For example, the Inspector General of the Department of Justice has reported the results of an investigation in which he found widespread disregard of the constitutional rights of the hundreds of individuals detained after September 11 who were labeled "of interest" to the investigation but were never connected to the attacks. The Inspector General has also reported examples of physical abuse of these detainees. The Inspector General has not investigated the use of the USA PATRIOT Act, although the Act (at section 1001) set up a process for the Inspector General to receive

reports about civil liberties abuses and report to Congress. The Inspector General has received many reports of civil liberties abuses, but has not received reports involving the USA PATRIOT Act.

Mr. Chairman, there is a straightforward reason why the Inspector General's reports have not involved the USA PATRIOT Act but instead involve abuses of the government's detention power. Detainees know they are being detained and have, despite serious impediments, been able to communicate with lawyers, family members, and civil liberties organizations about their detention. But the section of the USA PATRIOT Act that involves detention (section 412) has never been used - instead, the government has rewritten its detention procedures in a way that effectively sidesteps section 412's safeguards, such as a seven-day time limit on detention without charge.

Most of the other contentious provisions of the USA PATRIOT Act involve secret surveillance. For the most part, whether and to what extent those provisions have been used remains secret. Indeed, in many cases, the law specifically imposes gag orders on those who receive surveillance orders. As a result, persons under surveillance will not know they are under the government's watchful eye. Americans are fearful, however - and with good reason - that their reading habits, their homes and businesses, and other deeply private aspects of their lives - can be searched more easily without their knowledge and without any ability to challenge such surveillance.

I offer additional comments from a local perspective on Section 215 of the USA PATRIOT Act. These specific remarks are also based upon my associations and background as an independent bookstore owner and bookseller in the relatively conservative Utah County, and as past president of the multi-state Intermountain Booksellers Association.

Because I enjoy a comfortable relationship with booksellers and librarians in Utah many of them have felt free to express specific concerns related to the message Section 215 carries to library patrons and bookstore customers.

The Committee may not be aware of the extremely sensitive relationship that exists between booksellers or librarians and their customers. For a variety of reasons people who walk into a bookstore or library carry a burden of insecurity: they worry they are not smart enough, that they might be choosing a book that somehow labels them, that the content of the book might be suspect to someone else, or that "someone is watching." It is the task and duty of librarians and booksellers to calm these fears and create an atmosphere of inclusion and lack of suspicion.

This is the living, breathing manifestation of our basic American concepts of freedom of the press, freedom of expression and freedom from government intrusion and personal information gathering, or privacy. Library and bookstore patrons must expect to be able to obtain written material without additional concerns about their basic civil liberties.

If in fact the government has not utilized Section 215 to obtain personal records, then it makes no sense to further alienate people with threats of intrusion into these areas that are so instinctively protected. These concerns should prompt further review of Section 215 to find the balance between its efficacy and the problems of perception that it creates, which could at least be ameliorated by a restriction of its use to those for whom there is individualized suspicion.

At the end of 2005, a few sections of one title of the USA PATRIOT Act - representing 14 of 158 sections or less than 10% of the total - will expire if not reauthorized by the Congress. Congress should be using that opportunity to thoroughly review the use of those provisions of the USA PATRIOT Act, and ask tough questions of the Administration. If a power such as section 215 was never used, why not? If the government can obtain the records or other items it needs in other ways, involving traditional powers, what is the benefit of the new power? If the power was used discretely, why not include greater safeguards? Were there abuses, or warning signs that show a future Administration could be tempted to abuse the power? These vital questions require searching oversight, not merely a few hearings at which members can hear arguments on both sides.

Congress should also use the leverage that the sunset clause represents to review other parts of the USA PATRIOT Act which pose real problems for civil liberties. Further, Congress should take the opportunity presented by the sunset clause to review anti-terrorism policies that are not part of the Act itself, but have become inextricably linked with the Act in the public mind.

The standard for addressing the serious flaws of the USA PATRIOT Act should not be whether any particular provision has resulted in widespread abuses. Safeguards, including meaningful judicial review, are designed to prevent such abuses from ever taking place. The founders of our nation did not wait to see if the new federal government abused its powers before ratifying the Bill of Rights, and we should not wait for abuses of the USA PATRIOT Act before adopting meaningful checks and balances on its new authorities.

Conclusion

Mr. Chairman, I wish again to commend you for holding this hearing to discuss the USA PATRIOT Act in an open and straightforward way. You have asked critics of the Act, and other government policies adopted since September 11, to make their criticisms concrete, and to suggest changes to the law that could improve accountability. The SAFE Act represents just such an effort. It does not repeal any part of the USA PATRIOT Act, but instead brings some of its more troubling provisions back into line with Constitutional principles of judicial review and Congressional accountability. I hope you will examine it carefully.

Congress plays a crucial role in assuring the public that its civil liberties are protected. A public that is afraid that the government is seeking to obtain unchecked power will become suspicious even of legitimate anti-terrorism efforts. Congress must preserve and expand the sunset provision that will guarantee real oversight. Abandoning the leverage of the sunset provision this year would be a serious mistake.

Again, I thank you for the opportunity to testify and sincerely appreciate the fact that you have noted that your constituency is worried. And I agree, it is noteworthy in this state known for its patriotism that its two leading newspapers, the Salt Lake Tribune and the Deseret Morning News, often ideologically opposed, have both published several editorials expressing criticism of the USA PATRIOT Act. It is also remarkable, as has been commented upon elsewhere, that the ACLU of Utah joins not only the League of Women voters, but also the Eagle Forum, Grassroots, the Conservative Caucus, and the Libertarian Party in expressing concern related to the Patriot Act. That is a combination we do not often see here in Utah.

I thank you for the opportunity to testify on behalf of the ACLU of Utah. I hope we can continue to work together to keep Utah - and America - safe and free.