

Testimony of

# Frank Mylar

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United States Senate Judiciary Testimony

Frank D. Mylar, J.D., M.B.A.

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Chairman Hatch and honorable members of the Judiciary Committee, thank you for allowing me to submit testimony on these crucial issues facing our Constitutional Republic.

My name is Frank D. Mylar. I am an attorney in private practice. My firm, Mylar and Associates, specializes in law enforcement civil rights, employment claims, parental rights issues, religious freedom claims, business disputes and general litigation. I am a member of the Utah State Bar, the Tenth Circuit Court of Appeals and the U.S. Supreme Court Bar.

I further served as an Assistant and Special Assistant Utah Attorney General for over 12 years and I am very familiar with the increasing challenges facing law enforcement officers in the 21st Century.

I have extensive personal involvement in several local and national conservative and Republican groups. I am not here as a paid lobbyist, but out of personal conviction and was asked by Utah Grassroots to speak for them because they share these beliefs. It should give this Committee pause that I am joined by the ACLU and Libertarians in objecting to portions of the USA Patriot Act.

I was a National Delegate for President George W. Bush and I unequivocally support him in his re-election campaign. Our President and Congress, however, are not immune from tunnel vision in their efforts to fight terrorism. I would be doing our President, this Committee, our Country, and my children a dis-service if I remained silent on the critical constitutional issues raised by the USA Patriot Act.

I have the utmost respect for Chairman Hatch and I have no doubt that all members of this committee feel the weight of responsibility to protect this great country from sequels to 9/11. I applaud the work this committee does on an ongoing basis. However, none of us are perfect and our zeal to do what seems right can lead us astray if the actions we take are not anchored in constitutional principles. Simply put, the "ends never justify the means" for the means we employ necessarily will alter our course to a "Brave New World" of unintended consequences.

We all know that even if Congress passes the most restrictive laws imaginable, we will not prevent future acts of terrorism, but we will have changed forever who we are as a nation and a people beyond recognition. It is for this reason that we must proceed with caution and courage in fighting terrorism and avoid being led by our emotions and fears down a path of certain tyranny in the name of fighting this war.

Already we fear that the moral imperative of fighting terrorism has and will result in unintended consequences that abrogate the personal liberties of all Americans, which is incompatible in a free society like ours. Too quickly we have willingly surrendered constitutional principles out of outrage and fear over 9/11. Ironically, the most significant danger resulting from 9/11 is the temptation to accept the "Faustian bargain" to trade liberty for assurances of peace and safety and order.

In 1775, Benjamin Franklin in response to similar fears stated "They who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety."

I submit to you that if we bargain away our liberties we will have neither safety nor liberty and the terrorists will have won.

One of the most critical problems with the USA Patriot Act lies in its disregard of the Fourth Amendment of our U.S. Constitution, which protects all Americans from unreasonable searches and seizures of our property and person. The importance of this unalienable right was largely born out of the events leading up to the American Revolution.

In 1761, the Boston lawyer James Otis resigned his post in service of the crown to attack the British issuance of so-called "writs of assistance" to imperial customs inspectors. Granted without any specific mandate or showing of wrongdoing, these writs justified the unfettered search of any home or building and the seizure of any property.

During his impassioned closing argument against these writs, another young lawyer in the audience by the name of John Adams wrote, "Then and there, the child Independence was born."

Created also was the seed of the Fourth Amendment to the Constitution, which immunizes Americans against "unreasonable search and seizure," and demands that warrants only be issued upon "probable cause, supported by Oath or affirmation," and that they "particularly" describe the location to be searched, and the person or things to be seized.

The birth of our country was sparked by British disregard for these natural liberties and right to personal privacy - codified in the Fourth Amendment. However, in our understandable rush to protect our way of life from foreign threat, we have too quickly overlooked what our founding fathers called, "unalienable" God-given rights. If you as a committee and we as a country truly believe these rights to be "unalienable" we cannot compromise or abrogate these rights no matter how "good" the cause or how compelling the justification, for to do so mocks our belief that we are made in the image of God and that these rights are endowed by our Creator. The "good" we would seek to achieve in compromising these rights will be swallowed by the tyrant we will have created.

The Fourth Amendment is arguably the heart of the Bill of Rights. It permits the government to issue warrants, seize property and arrest criminals - which protects society and empowers the people to govern - and protects individuals from undue search and seizure, or overly broad warrants.

The Fourth Amendment helps law enforcement focus their investigations on seeking truth and justice. We seek justice in America, and justice requires truth. Police officers who have to meet certain procedural standards are both less likely to abuse law-abiding citizens and more likely to actually bring criminals to justice. It strikes a delicate balanced based upon the Biblical concept that it is equally detestable to punish the innocent as it is to acquit the guilty as found in Proverbs 17:15.

However, key parts of the USA Patriot Act and other post-9/11 counter-terrorism initiatives such as the Total Information Awareness program disregard basic Fourth Amendment requirements, thus disrupting this important balance. They ignore that while the government must have search and seizure powers to protect its citizens, it also must convince an impartial judge and provide specific and particular details about what government agents seek.

Section 215 of the Patriot Act violates these Fourth Amendment requirements by allowing federal agents to monitor what we are reading in the library and could require any person or business to produce any books, records, or items, including mental health, financial, and employment records. Section 215 threatens our liberty because it allows agents to seize our records without evidence that we have committed a crime. For decades, law enforcement has been able to look into what we read and obtain other private records, but they always had to obtain warrants or court orders based on a particularized suspicion that our activities were actually connected to crimes or terrorism.

Incidentally, we should note that the "tangible things" description of items and records that can be seized using Section 215 court orders encompasses basically anything from a diary to records of firearms purchases to actual firearms themselves.

Another problem in the Patriot Act, Section 213, is "authorizing" or "allowing" secret searches of peoples' homes and workplaces. These so-called "sneak and peek" searches, are contrary to well-established Fourth Amendment requirements that government agents must "knock and announce" prior to conducting a search to allow those who

have been served with a warrant to challenge things like mistaken identity or an incorrect address. Under Section 213 you may never have an opportunity to challenge an illegal search because he may never receive notice that a search was conducted at all.

"Sneak and peek" searches allow agents to enter your home, search your belongings, seize certain items and download information from your computer, all without telling you for a indefinite period of time. In fact you may never be informed of an illegal search of your home or business. The fact that some of these searches may have been performed in certain contexts before 9/11 does not justify their broad application as codified in the Patriot Act.

In particular, prosecutors previously had to show probable cause first and then meet one of several exigent or emergency requirements to justify the search, including whether notice would endanger evidence, life, or could result in flight from prosecution.

The Patriot Act, by enshrining this power in statute, adds an additional justification that allows prosecutors to argue that if notice "would otherwise seriously [jeopardize] an investigation or unduly [delay] a trial" they should be allowed the warrant. Obviously, this is a catch-all provision for which any prosecutor could make an argument. This will make the use of sneak and peek warrants routine, rather than an extraordinary step taken only when absolutely necessary.

No doubt "sneak and peek" searches authorized under the Patriot Act are efficient tools. However, I would rather be hampered by the burdens of freedom than shackled by the efficiencies of tyranny.

Of crucial importance among conservatives, is not how the Patriot Act powers might be employed by President Bush, but how it could be co-opted to stifle conservative voices in this country under a liberal administration. In the past it is believed that Attorney General Janet Reno's office may have targeted Pro-life groups under the RICO laws even though no evidence or criminal wrong-doing was known. The Patriot Act goes much further in allowing unbridled discretion in the name of fighting terrorism. It is quite conceivable that a future Attorney General, like Janet Reno, would target conservative groups such as Second Amendment supporters, pro-life organizations, and defense of marriage proponents with these extraordinary powers.

Of course our constitution will not be completely discarded and shredded merely by one law such as the Patriot Act. Instead, it will be the constant chipping away, piece by piece, act by act over time in the name of the public "good" until we are no longer free people. Certain provisions of the Patriot Act constitute an unacceptable erosion of our unalienable rights that have been recognized in this country before its birth.

## Conclusion

The same specter of the "writs of assistance" fought by Otis in 1761 haunt us today in the subtle guise of the USA Patriot Act. For the same reasons we must oppose such writs to protect the country that was conceived in fighting for such rights.

For over two-hundred years the Fourth Amendment requirements that searches and seizures be reasonable, that warrants be particular and specific, and that reasonable suspicion of an individual nature of criminal activity be present before the government intrudes upon a citizen have served us well and have caused us to be the envy of free people and those who wish to be free around the world. Vile acts of terrorism, such as 9/11, cannot justify compromising these constitutional principles.

As patriotic Americans we cannot bargain away our liberty in the name of stamping out terrorism, for if we do, we will cease to be American, the land of the Free and the terrorists will have won. I for one, would not trade my liberty today even if you could tell the American people that by doing so we could avoid all future terrorist attacks.

The most dangerous and formidable foe to tyrants and terrorists throughout the ages has always been those people who are truly free because they have something to lose, something worth fighting for to the death. Such courage caused Patrick Henry to state, "Give me liberty or give me death."

We, as a nation, have been entrusted by those before us to preserve freedom. Let us not forget the words and actions of our founding fathers, by setting aside the principles for which they paid the ultimate price. For our country and our children's sake, let us boldly wage the war on terrorism as free people with our liberty in tact.

Thank you again Chairman Hatch and honorable members of this committee for allowing me the opportunity to submit testimony.

Respectfully Submitted,

Frank D. Mylar  
Frank D. Mylar, J.D., M.B.A.  
Speaking for Utah Grassroots