

Testimony of

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USA PATRIOT Act of 2001 Concerns
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by
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At the beginning of the American Revolution, the great patriot, Patrick Henry stated: "I have but one lamp by which my feet are guided; and that is the lamp of experience. I know of no way of judging the future but by the past." [Patrick Henry, speech to the Virginia Convention, Richmond, Virginia, March 23, 1775.--William Wirt, Sketches of the Life and Character of Patrick Henry, 9th ed., pp. 138-39 (1836, reprinted 1970). Language altered to first person.]

In *The Tempest*, William Shakespeare observed "...what's past is prologue," meaning the experience of the past is but an introduction to that which is to come. [Shakespeare, *The Tempest*, Act 2, Scene 1]

And in volume one of *The Life of Reason* we read: "Those who cannot remember the past are condemned to repeat it.... This is the condition of children and barbarians, in whom instinct has learned nothing from experience." [George Santayana, *The Life of Reason*, vol. 1, chapter 12, p. 284 (1905).]

It is from this perspective, and that of the original foundation principles upon which this great Nation was established, that I express concerns about the so-called USA PATRIOT Act.

The Founding Fathers of this Nation were painfully aware that government which exceeds the proper bounds can be an onerous burden upon those who are called to bear its yoke. They eloquently captured in the Declaration of Independence the purpose of government--

"We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness--that to secure these Rights, Governments are instituted among Men,..."

Their bloody revolution was fought upon that premise, and the Constitution they created in 1787 sought to assure that the scope and power of the national government was so defined as to assure that they and their posterity would enjoy the blessings of liberty for at least a thousand generations.

The United States Constitution and the marvelous Bill of Rights were designed to define the role of government to its specific purpose, and to keep government from encroaching into forbidden areas, thereby preventing the destruction of the liberty of the people of the Nation.

In contrast, history is filled with gross examples of how the temptation of power which is inherent in government has led to widespread oppression, death, and tyranny. Lenin, Stalin, Hitler, Mao Zedong, Pol Pot, and Saddam Hussein are vile archetypes of government power run amuck. They painfully demonstrated that by wielding unbridled government power, they could turn the state into an instrument of terror, death, and devastation.

Due to their first-hand personal experiences, the Founders of this Nation sought to forestall the tendency of government to overreach its proper bounds. By studying their words, we are able to understand that the Founders of this Nation were careful to craft a government which had a clearly defined scope and bounds.

For example, the Fourth Amendment was a direct outgrowth of search and seizure abuses experienced under the British rule in the 1760's and 70's. During that period of time, Writs of Assistance were general warrants carried by officials of the British government which allowed them to enter a premise, to search for anything they felt might be against the law, to seize any unlawful material they discovered, and to arrest anyone they suspected might have some connection to the matter. To counter and protect against this form of tyranny, the Fourth Amendment states:

"The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularity describing the place to be searched, and the persons or things to be seized."

The Founders wished to prevent any future violation such as that to which they had been subject, so they required extreme specificity in such warrants as might be issued by government officials. Unfortunately, it would seem that there are parallels between the Writs of the 1700's and the powers inherent in the PATRIOT Act of today. In both spirit and letter it may be argued that the PATRIOT Act has stepped away from the exact requirements and specificity called for in the Fourth Amendment, and seems to retrace the path which could lead America back to a circumstance in which modern-day Writs of Assistance become common instruments of investigation, and potentially lead to the destruction of the God-given rights which were won and defended so painfully.

While it may be argued that during times of great risk and trial it is necessary to set aside long held values in favor of expediency, the danger is that encroachments such as this generally lead to permanent reductions in individual liberty.

By their first-hand experience with the life-and-death risks which they encountered in their day, the Nation's founders were aware of the foolish natural tendency of frightened populations to jettison freedom for security when threatened. They warned of the risks associated with this response. Most have heard Benjamin Franklin's well-known perspective: "They who can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety." [Smyth 6:382. (1775.)] That perspective must be considered as we strike the proper balance between safety and the individual liberties vouched safe in the Nation's "enabling documents."

Again, if we examine the historical record, we discover that the world's history is filled with examples of peoples who have foolishly followed the path of security over liberty, and have suffered the consequences. In fact, this natural tendency of mankind is so widely known that it appears that Osama bin Laden anticipated that this would be the American response to his organization's dastardly attacks on 11 September 2001. In a BBC taped video interview several weeks after the attacks, bin Laden reportedly expressed his hope that the United States would enter the liberty-destroying path in response to his cowardly attacks on the Nation. In that translated interview bin Laden said:

"[T]he battle has moved to inside America.... I tell you, freedom and human rights in America are doomed. The U.S. Government will lead the American people--and the West in general--into an unbearable hell and a choking life."

I firmly believe that the United States is stronger and braver than that, but we need the help of our elected leadership in the effort to assure our continued liberty. We must make absolutely certain that the rush for security does not extinguish the great purpose of the Nation, nor destroy the beacon of hope offered by our foundation principles and our Nation's charter to freedom-loving peoples throughout the world. We must make absolutely certain that by usurpation and encroachment we do not, in any means, destroy what we really cherish about this great Nation.

James Madison's warning in this matter bears repeating. In 1788 he said: "Since the general civilization of mankind, I believe there are more instances of the abridgement of the freedom of the people by gradual and silent encroachment of those in power than by violent and sudden usurpations."

In his monumental Farewell Address, George Washington pled with the Nation to avoid seductive reasons for straying from the path of freedom which had been outlined in the Constitution and Bill of Rights, regardless of the perceived need or immediate value of the variance:

"Toward the preservation of your Government and the permanency of your present happy state, it is requisite not only that you steadily discountenance irregular oppositions to its acknowledged authority, but also that you resist with care the spirit of innovation upon its principles, however specious the pretexts. One method of assault may be to effect in the forms of the Constitution alterations which will impair the energy of the system, and thus to undermine what can not be directly overthrown....

"If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield."

Changes were to come only through the deliberative process outlined in Article 5 of the United States Constitution, not by legislative enactment which subverts the spirit of the Nation's charter.

I have read the PATRIOT Act in its entirety which, unfortunately, is more than can be said of the vast majority of the members of both houses of Congress when it came before them and they voted in favor of it. The act is of substantial size and complexity. Its complexity is magnified by the almost countless instances in which it modifies other current law.

We are told that Congress is a deliberative body which carefully weighs and measures decisions before acting. In this case, it seems that passing a bill took precedence over the deliberative process. It has been reported that haste and precipitancy characterized the procedure throughout the entire legislative process. The passage of the act was reminiscent of the heady days of FDR when he virtually ordered Congress to pass bills which had not yet been written, but which would later be composed under the whim of bureaucrats who rarely recognized the constraints under which the national government was designed to operate.

I do not know which should be of greater concern: the fact that the USA PATRIOT bill was passed without it even being available for wide review and debate, or that rumors persist that the substantive elements of the document were already well on their way to inclusion in other legislation prior to the attacks of 11 September 2001, and that the attacks were simply the excuse for quick passage of provisions which under other circumstances would have elicited strong debate and resistance. It would be enlightening to hear a full review of these concerns.

At any rate, the PATRIOT Act is laden with clauses which are apt to be abused at some point by over-zealous government.

It may be argued that, to date, the abuses that could have been have not been rampant. It is difficult to ascertain the validity of this argument since many of the areas which could be abused are kept secret by the provisions of the act. However, given the examples found in history, perhaps they are simply not yet fulfilled. It may be remembered that Hitler "lawfully" became Germany's Chancellor in 1933, but he found many of the repressive enactments of the Weimar Republic to be sufficient for his needs for several years as he consolidated power and wove his web of destruction. In fact, he did not find it necessary to create additional restraints on ownership of firearms until 1938--when his tyranny was nearly absolute. Is it wise to leave to chance the possibility that at some future date an individual or individuals may come to power in this Nation who will take advantage of opportunities presented within the PATRIOT Act?

In regards to such risks, Thomas Jefferson wisely counseled:

"In questions of power, then, let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution." [Kentucky Resolution of 1798]

...and...

"When an instrument admits two constructions, the one safe, the other dangerous, the one precise, the other indefinite, I prefer that which is safe and precise. I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a construction which would make our powers boundless. Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction." [Bergh 10:418-419. (1803.)]

The previously quoted wisdom of Washington about altering sound principles for specious reasons should be adequate warning to us in regards to the risks we take when we modify our foundation principles for the sake of expediency.

A full review of concerns with the PATRIOT Act would require a document which would exceed the size of the act itself. Perhaps a few examples will suffice to demonstrate how it is at odds with the foundation principles of the Nation, and how the seeds of tyranny are perceived by many to be found within its pages.

A few general concerns about the PATRIOT Act would have to include the following broad statements:

? The Act dramatically expands federal government powers of surveillance, search, and arrest, and sets potentially harmful precedents for future encroachments on personal liberty. In spite of protestations to the contrary, some of these expanded powers may be unconstitutional, and would likely have been found so in a day and time when the foundation principles of the Nation were better understood, and a bold love of liberty was more widely held within America.

? The Act greatly expands the legal use of so-called "black-bag" searches--in that there are broad powers granted to police agencies to conduct secret searches without notifying the subject of the search until after the search has been conducted. This power appears to extend to all suspected criminal circumstances, not only to potential acts of terrorism or war.

? Roving wiretaps which allow investigators to tap multiple telephones used by a single "suspect" may now be carried out nationally on a single court order. Previously, such wiretap orders were generally only allowed within the jurisdiction of the judge issuing the order, and were subject to constraints which reduced the potential that abuses would occur.

? As previously mentioned, the broad latitude granted for secret searches, and national search warrants that hold extra-jurisdictional force begin to look suspiciously like Writs of Assistance, and may be unconstitutional because the Fourth Amendment requires warrants to be issued "upon probable cause...particularly describing the place to be searched, and the persons or things to be seized."

? The Act also allows the CIA to access foreign intelligence information obtained by domestic grand juries, as well as other information obtained in investigations and by law enforcement agencies--effectively creating an environment in which the CIA could spy on American citizens--in violation of long-standing U.S. policy.

? Overall, the PATRIOT Act limits and reduces judicial oversight in the gathering of evidence, diminishes the distinction between the gathering of foreign intelligence and domestic law enforcement, and allows many of these provisions to be applied, not just against agents of foreign governments or against terrorists (which are defined under a very broad definition which may someday be abused), but against citizens of the Nation who may, under some construction of the law, be deemed a threat.

While the expanded powers inherent in the PATRIOT Act are ostensibly aimed at thwarting terrorist organizations bent on destroying all that we hold dear in this Nation, recent U.S. history demonstrates a willingness on the part of some who have held power to skew the original purposes of a law to attack those whom they deem as worthy targets. An example may be found in the application of RICO laws, which were supposedly created to give police agencies tools to fight organized crime. Numerous instances may be cited in which those who seek to protect the lives of unborn children were harassed under the umbrella of RICO--in clear violation of the legislative intent of these laws. Who is to say that some future official zealot may not someday turn the onerous powers bestowed by the PATRIOT

Act upon individuals, or some class or group of Americans, who become targets because of some future political agenda? If history is as valuable as Patrick Henry, Shakespeare, and Santayana seemed to believe it is, then we may be virtually assured that such abuses will occur.

It would seem that other, better ways are available to the Nation to deal with the threats which face us in this dangerous world. Those ways would almost certainly include more diligent protection of our borders from potential threats, and those who would enter (or who have entered) illegally. It is tragic that the Nation's criminally lax immigration and visa policies gave the terrorists who attacked the Nation on 11 September free access to target our citizens. It appears that at least 15 of the 19 hijackers should never have been issued visas to the United States and would not have been given visas if consular officials had diligently followed the law. It is incomprehensible that a nation which is at war with terrorism, and has been victim to a vicious and brutal attack, has not taken the most simple and logical steps at our borders to preclude future potential attacks. And, it would appear that the argument could be made that we are taking steps to make our borders even less secure--even making overtures which will likely encourage the tide of illegal entry into the nation. The solution to terror as it has been thrust upon us is not to destroy the liberty of loyal Americans, but to interdict those who bring that threat upon us. Perhaps this issue may be reviewed in greater detail in a future hearing of the Senate Judiciary Committee.

The patriotism of those of us who have concerns about the PATRIOT Act should not be automatically called into question. Many of us love this great Nation and are devoted to those immortal principles upon which it is founded. In his timeless Farewell Address, Washington warned of a time when devoted love of country may become unpopular, saying:

"Real Patriots, who resist the intrigues of the favorite, are liable to become suspected and odious; while its tools and dupes usurp the applause and confidence of the people, to surrender their interests."

It is imperative that the Nation speedily return to the foundation principles upon which our great liberties lie, else those who hate the cause of freedom and seek to destroy it be successful--not by any overt act of violence, but by our own foolish actions.

Those who hold the reins of government, and those of us who love this Nation must forever be watchful and vigilant that corruption not overtake the soundness of our foundation. If we are wise, we will diligently apply this counsel:

"You must remember, my fellow citizens, that eternal vigilance by the people is the price of liberty, and that you must pay the price if you wish to secure the blessing." (President Andrew Jackson, Farewell Address, 04 March 1837) {While Jackson did say this in his farewell address, the original phrase has been attributed to both Thomas Jefferson and Patrick Henry; but it appears to have been adapted from a statement by John Philpot Curran, Lord Mayor of Dublin, in a speech before the Privy Council, 10 July 1790: "The condition upon which God hath given liberty to man is eternal vigilance." (in *Speeches of the Right Honorable John Philpot Curran*, ed. Thomas Davis [1847], pp.94-95)}

Let us hope that wisdom will prevail as the USA PATRIOT Act is reconsidered.