

TESTIMONY

Of

**Ed Mullins
President
Sergeants Benevolent Association of New York City**

On

“The USA PATRIOT Act: Dispelling the Myths”

Before the

**Subcommittee on Crime Terrorism and Homeland Security
Committee on the Judiciary
U.S. House of Representatives**

May 11, 2011

Mr. Chairman, Ranking Member Scott, and Members of the Subcommittee:

Thank you for having me here today to provide the perspective of local law enforcement concerning whether Congress should reauthorize the three Patriot Act authorities scheduled to sunset at the end of this month.

I am here as the head of a police labor organization representing my members and their families. I also speak with the perspective of a sworn law enforcement officer with almost 30 years of experience. I responded to the scene of the terrorist attacks on September 11, 2001. I also responded in 1993 to the terrorists' first attempt to topple the Twin Towers. I am a third generation New Yorker whose life was forever changed by the terrorists attacks of 9/11. These unprovoked attacks devastated New York City and the ranks of its Fire and Police Departments. To put these attacks in historical perspective, the 2,973 innocent men, women and children killed in less than two hours on 9/11 surpassed the death toll America suffered in the surprise attack on Pearl Harbor¹ that triggered our entry into World War II. It is almost equivalent to the total number of American troops killed in Iraq and Afghanistan over the last decade.²

Among the dead on 9/11 were 343 firefighters and seventy-two federal, state and local law enforcement officers, including, thirty-seven members of the Port Authority Police Department and twenty-three members of the NYPD. According to the 9/11 Commission the FDNY's losses were "the largest loss of life of any emergency response agency in history."³ The losses of the Port Authority Police and the NYPD on 9/11 constitute the first and second "largest loss of life of any police force in history."⁴

Let us also not forget that the final casualty figures from 9/11 are not yet known. Those terrorist acts continue right up to the present day to claim the lives of more firefighters, police officers, construction workers, and ordinary citizens who were caught in the events of that fateful day. These are the people who in the years after 9/11 have developed debilitating illnesses and died from their exposure to the toxins released when the World Trade Center Towers collapsed. The James Zadroga 9/11 Health and Compensation Act passed late last year to help this continuing tide of victims is a stark reminder that while Seal Team Six has visited justice upon bin-Laden, innocent Americans continue to die and suffer as a result of his evil. Let us also not forget the many parents, children, sisters and brothers who have struggled for the last decade to live their lives without a child, a parent or a sibling lost on that tragic day.

These heart-wrenching statistics are appropriate to dwell upon as we commemorate National Police Week. They remind us that our countrymen have died in large numbers and continue to die as a result of a very real war that terrorists declared upon America. They also

¹According to the National Park Service 2,388 military personnel and civilians were killed in the attack on Pearl Harbor December 7, 1941. <http://www.nps.gov/nr/twhp/wwwlps/lessons/18arizona/18charts1.htm>

² According to the non-profit organization icasualties.org, to date a total of 3,063 U.S. troops have been killed in Iraq and "in and around" Afghanistan (1,572 in Iraq and 1,491 "in and around Afghanistan"). <http://icasualties.org/OEF/Index.aspx>

³ Report of the National Commission on Terrorist Attacks Upon the United States at 311 www.9-11Commission.gov/report/index.htm

⁴ *Id.*

remind us that although the three expiring Patriot Act authorities are tools reserved for federal agents, it is state and local first responders and the citizens we are sworn to protect and serve who will suffer most of the consequences that may be realized if these authorities expire before the War on Terror is won.

The USA PATRIOT Act was enacted in direct response to the 9/11 terrorist attacks and to prevent their repetition. I have been dismayed to hear people avoid the serious and complex questions involved in the discussion of whether to reauthorize the expiring authorities by reverting to generalizations such as Benjamin Franklin's statement that "[t]hose who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety." Reasonable minds can differ as to whether the expiring authorities, one of which cannot even be used against U.S. citizens, implicate what Ben Franklin and the Founding Fathers would have deemed "essential liberty." No one, however, should trivialize the tragedy of 9/11 by describing efforts to prevent its repetition as a quest for "a *little temporary* safety." To those content to revert to sound bites divorced from the context of experience I counter with Abraham Lincoln's admonitions that "the dogmas of the quiet past are inadequate to the stormy present" and that:

*If there ever could be a proper time for catch arguments, that time surely is not now. In times like the present, men should utter nothing for which they would not willingly be responsible through time and eternity.*⁵

Let us set aside the false clarity and simplicity that some seek to impose on these deliberations. My members and I are not timid souls begging some tyrant to take our liberties from us if only he would guarantee our physical safety from an imagined threat. Reauthorizing these expiring authorities is not a stark choice between whether some people place a greater value on our civil liberties than on our security. It is not a choice between freedom and a police state. Let us not lose sight of how much alike every one of us in this room today really is. We share the same values. We are all Americans who love our country and the liberties upon which it is founded. We all abhor seeing our fellow citizens slaughtered by bin-Laden's demented disciples. None of us desire or intend to extinguish liberty in the pursuit of security. We differ as to how, not if, our elected representatives should strike a balance between the universal value of protecting innocent lives from murderers and our uniquely American notions of individual liberty.

As a citizen who values his liberty as much as any other, and as a police officer who has witnessed the awful cost of letting one pitch from the terrorists get past us, it is my opinion that reauthorizing the three provisions set to expire later this month strikes the right balance. By any historical yardstick, these authorities are a measured response to an unprecedented and undeniably real threat to our nation. Our generation learned from struggles the heroes of our past encountered in balancing liberty with security at home in the face of unprecedented threats. We did not respond by rounding up and committing to internment camps all members of the ethnic or religious minorities from which the perpetrators of 9/11 were descended. We did not grant law enforcement wholly unprecedented powers never before entrusted to police on our shores. What we did was to extend to federal agents hunting terrorists powers analogous to those that

⁵ Lincoln's Second Annual Message to Congress December 1, 1862.

state and local law enforcement have long used to investigate drug dealers, burglars and other common criminals who pose far less of a threat to society than bin-Laden's followers.

You do not have to be a constitutional law scholar to make some observations about the expiring specific Patriot Act authorities that ordinary people find pretty compelling:

There is no record of a pattern of abuse by federal law enforcement of these three specific authorities.

The expiring authorities do not relate to National Security Letters, for which Congress did have to tighten procedures and controls.

If abuses materialize, Congress can always make adjustments after reauthorization.

All three of the expiring authorities require the prior approval of a federal judge experienced in criminal matters whose integrity, wisdom, and impartiality have been scrutinized by your Senate colleagues during the confirmation process.

Under the Patriot Act it is *more difficult* for federal agents to get authority to use the investigative tools the three expiring provisions extended to federal law enforcement involved in terrorist cases than it is for local police officers to use similar techniques when looking into drug dealers or mobsters.

Over the last decade none of the three authorities has been found unconstitutional.⁶

People like Mr. Barr and Mr. Fein play a valuable role in our society by ensuring that Congress does not pass laws that are on their face unconstitutional or that are used in a manner that violates constitutionally protected rights. For this I thank them. They keep us mindful of how these authorities *may* be abused to deprive people of their rights. But let's be clear that concerns about systemic abuses of the three expiring Patriot Act authorities are a risk that has not yet been realized. I wish I could say the same about terrorism on American soil.

Since 9/11 the United States has foiled no less than 32 terrorist plots to murder innocent Americans.⁷ While it's been estimated that post-9//11 PATRIOT Act authorities were instrumental in about one-sixth of these efforts,⁸ the nature of diligent police work makes that a hard thing to quantify. By its nature good police work is a mixture of the lucky-breaks that often accompany hard work combined with facts gathered in myriad ways that come into clear focus only with the application of experience and a seasoned intuition. It is tough to say just what ingredient in this recipe makes it work. It may differ in each case. But even if the expiring

⁶ In *Mayfield v. U.S.*, a federal district court in Oregon did rule that the aspects of roving wiretaps under section 206 may infringe on 4th amendment rights, but this decision was vacated by the United States 9th Circuit Court of Appeals in *Mayfield v. U.S.*, 599 F.3d 964, 970 (9th Cir. 2010) *cert. denied*, 131 S. Ct. 503, 178 L. Ed. 2d 369 (U.S. 2010).

⁷ *Ordinary Measures, Extraordinary Results: An Assessment of Foiled Plots Since 9/11*.

<http://americansecurityproject.org>

⁸ *Id.*

Patriot Act authorities have been the key ingredient in stopping just one or two more 9/11s, or one or two more Pearl Harbors, that is significant.

The argument that since one of these authorities, the “Lone Wolf” provision, may never have been used and therefore should be repealed does not make sense to me. We arm police officers in this country because experience and common sense show it is necessary. We do not take away a cop’s gun if he has failed to fire it after ten years. We rejoice that he has never had to do so, but require him to remain proficient and able to use his weapon if he must.

With disclosure of plans for new plots and tactics found in bin-Laden’s lair we are reminded that the terrorists are still intent on replicating the nightmare of 9/11. We are all relieved that bin-Laden is dead, but many who subscribe to his hateful, anti-American ideology remain. The Pakistani Taliban, which was behind last year’s attempt to bomb Times Square, has vowed revenge. They’ve bragged “[w]e already have our people in America, and we are sending more there.”⁹ We should not dismiss these threats. In my experience when a crime family or a street gang loses its leader, there is often a competition among his surviving followers to become the new boss. The hallmark of such contests often takes the form of novel displays of brutality and cruelty that gain the perpetrator the obedience of the group. I do not see any reason to expect anything different from Al-Qaeda, except that instead of perpetrating their brutality on each other or a rival gang, they will direct it at us. As they seek to do so, I would argue that federal agents will need more and not less flexibility to adjust and respond. Do not allow our recent success to obscure the fact that ten years ago in less than two hours, we lost more Americans at the hands of bin-Laden’s henchmen than we did almost seventy years ago at Guadalcanal.¹⁰ Our enemies are more desperate than ever to replicate this horror. Do not punish law enforcement for the success it has had in pitching a shutout every day for the last ten years by assuming that this success is the result of a half-hearted effort by a foe that has given up.

Our generation faces an unprecedented threat from a new kind of foe. We have tough fighting ahead. Still, we are very fortunate. Responding to the great crisis of our age has not required drafting citizens to fight. It has not necessitated the conversion of our economy to a war-time footing. There is no rationing of fuel, food, and other resources. Citizens are not even asked to buy war bonds. It is a testament to America’s strength that most citizens can go about their lives much as they did before 9-11 and delegate defeating the terrorists who declared war on us to a relatively small group of volunteers. But this strength poses a risk. This is the risk that the vast majority of Americans are so far removed from the exertions and exactions of this war that they do not fully appreciate the danger it presents or the commitment it requires.

As cops, my members are among those volunteers who understand the risk and what must be done. We ask that as you debate the tools available to our federal counterparts to play their critical role in this mission that you will be pragmatic in balancing the defense of our nation with the preservation of the freedoms we cherish. We hope you will not be seduced by rigid ideologies that demand the sacrifice of one of these fundamental values for the other. As you

⁹ *Threat of Revenge Emerges After bin Laden Killed* (May 3, 2011) www.kpax.com/news/threat-of-revenge-emerges-after-bin-laden-killed/

¹⁰ According to the National Park Service the battle for Guadalcanal resulted in the death of “1,598 officers and men killed.” www.nps.gov/archive/wapa/indepth/extcontent/usmc/pcn-190-003117-00/sec6.htm

commemorate National Police Week and the sacrifices law enforcement makes to protect America, we beg that you do not disarm those sworn to protect you just as our enemies are bringing a renewed fervor and new tactics to their efforts to murder Americans.

Thank you again for considering my views.

Respectfully,

Edward D. Mullins