Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
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This hearing today is yet another example of the skewed priorities of those leading this Committee. Instead of focusing our limited time and resources on pressing issues such as this Administration's justification for invading Iraq or its policies on torture that appear to set the stage for the abuse of prisoners in U.S. custody, the Republican leaders on the Judiciary Committee have unilaterally chosen to hold a hearing on bail reform and administrative subpoenas, and at a time when the Ranking Democratic Member of the Subcommittee cannot be present.

Just last Thursday every Republican Member of the Judiciary Committee refused to join in a bipartisan effort to try to get to the bottom of the prisoner abuse scandal that has led to criticism of the United States around the world and that has magnified the risks for the women and men serving in America's Armed Forces and our citizens in other parts of the world. We were told last week that the Administration did not need a subpoena but would cooperate and produce the materials needed by the Senate Judiciary Committee to conduct effective oversight of the role of lawyers at the Justice Department and the White House in redefining our international obligations under the Torture Convention and the Geneva Conventions. To date, nothing has been produced - not the memoranda, copies of which the press has placed on the Internet, and not even an index of materials being withheld from this Committee, which is the Justice Department's oversight committee.

Further, while we await the Supreme Court's ruling on Executive Branch powers as they pertain to the President's authority to indefinitely detain U.S. citizens as enemy combatants, and as some in the Senate seek a serious consideration of how the USA PATRIOT Act powers have been used, the Administration continues to press for more. This administration's modus operandi is to demand additional executive authority whenever anyone starts to inquire how it has acted improperly and without justifying the misuse of the power it already has.

Based on the title of today's hearing, government witnesses today will presumably talk about the Administration's "need" for subpoena authority in criminal terrorism cases for the sole reason that there are other administrative subpoenas in the U.S. Code and despite the fact that grand jury subpoenas are available in every terrorism case opened. In fact, the FBI already has far-reaching compulsory powers to obtain documents and witness testimony when it is investigating terrorism, under both its criminal and intelligence authority by way of search warrants, grand jury subpoenas, secret court orders and National Security Letters (or NSLs). More traditional investigative techniques are also available, including mail covers, trash runs, ex parte orders, and writs, just to name a few.

I hope the Administration's witnesses will explain why grand jury subpoenas, which are available in terrorism cases, are not adequate government power and individual agents need to wield administrative authority without supervision.

The Attorney General has pointed out several times that there are many administrative subpoena statutes in the U.S. Code. Of course he avoids clarifying that these provisions are in the context of administrative and regulatory programs such as occupational safety, mine safety, and the Securities and Exchange Commission. And each of these powers are subject to various checks and balances. They tend to be civil settings where a grand jury it not utilized. These other administrative subpoenas often issue directly to the subjects of investigations and are generally not subject to secrecy rules.

There are a handful of administrative subpoena powers that are in the criminal code. Because criminal proceedings are unique, and the ability to do harm to the target of a criminal investigation simply for being investigated is great, these existing powers are carefully crafted, limited and statute specific. It is often noted by those who press for these expanded powers that they are already available in health care fraud cases. It is important to remember that this is already a highly regulated area where civil and criminal proceedings are simultaneous and grand jury secrecy can impede an efficient parallel investigation.
There are good reasons why we should not, at this time, go even further down the path of unchecked, essentially unreviewable authority for this Administration to issue demands for documents and testimony.

I do not believe there is a Senate bill yet introduced on this matter. The one bill pending in Congress for expanding subpoena authorities to terrorism investigations was introduced in the House but has not been considered there. Why a Senate Committee must consider it today, in light of House inaction, is not clear to me when there are so many other matters on which we could and should be focused. Moreover, there are key differences between the House bill and these existing authorities. That bill was introduced by a Republican Congressman and is designed to allow the Government to obtain information, in secret, from entities that are not under investigation themselves but have customers whose records the Government is seeking. It would compel any recipient to give testimony, essentially forcing anyone to provide any requested information to the FBI. The persons under investigation would never know that their records have been sought or obtained in secret by the Government. It would be executed in complete secrecy for an unlimited period of time. With no other external check like a court or grand jury, there would be almost limitless power to collect sensitive personal information. Current administrative subpoenas in Title 18 do not grant such powers.

Recently, FBI Director Mueller testified before the Senate Judiciary Committee, and I do not recall him telling us that he has not been able to do his job effectively. To the contrary, this administration places a great deal of emphasis on press conferences announcing the latest indictments or arrests in grand gestures of their effectiveness on the terrorism front.

My views are also colored by the lack of accountability and openness of this administration. Many on the Judiciary Committee have been seeking information about the implementation of FBI authorities after enactment of the USA PATRIOT Act. But it is like pulling teeth. One of

these powers was the Section 215 subpoena - which gave the FBI the ability to seek a secret order from the Foreign Intelligence Surveillance Act (FISA) court to require the production of tangible items and documents. A simple question was asked by many in Congress: How often had the FBI sought to exercise this power? A direct answer could not be obtained. After months and much public outcry, the Attorney General selectively "declassified" some data and announced that these Section 215 subpoenas had never been sought to obtain evidence. Ironically, he made this announcement amidst the Administration's hard-court press for more authorities, despite having never used this particular law enforcement power.

More recently, a one-paragraph memo the Justice Department disclosed under court order last week revealed that the FBI did, in fact, ask the Department to seek permission from the FISA court to use this controversial power a month after the Attorney General said that power had never been used to obtain library records and business records without notifying the persons being investigated. This information was never provided, as far as I know, to the very Committee responsible for the oversight of these law enforcement powers, at the very time specific questions were being asked about their implementation. Instead, the Administration sought to perpetuate the impression that the opposite impression.

In recognizing the complexity in granting administrative subpoena power in any area, the Department of Justice issued, as required by law, an extensive report to Congress in 2002 on the Use of Administrative Subpoenas Authorities by Executive Branch and Entities. In it, the Department noted it would be neither "prudent nor practicable" to make recommendations peculiar to any particular administrative subpoena authority because there are differing purposes and contents for each. The Department concluded its report that it would "look forward to working with Congress and other agencies in the future to evaluate" potential changes. In this most important of contexts, there has been no such cooperation.

I recently made a joint appearance with Senator Hatch before the newspaper editors and publishers. Senator Hatch unreservedly reiterated his opposition to administrative subpoena authority. I share his skepticism of the need for granting more unfettered Government authority. We need accountability. With more oversight and accountability we may have averted the prisoner torture and abuse that America's enemies are using to recruit terrorists. With better oversight we might be getting a better handle on what has gone wrong and what needs fixing in the authorities already provided in the USA PATRIOT Act.