Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
April 5, 2005

STATEMENT OF SENATOR PATRICK LEAHY,
RANKING MEMBER, COMMITTEE ON THE JUDICIARY
HEARING ON OVERSIGHT OF THE USA PATRIOT ACT
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On a September morning three and one-half years ago nearly three thousand lives were lost on American soil, and our lives as Americans changed in an instant. In the aftermath of the 9/11 attacks, Congress moved quickly - some have said too quickly -- to give federal authorities substantial new powers to investigate and prosecute terrorism. The USA PATRIOT Act, a landmark and sweeping measure, was signed into law on October 30, 2001, just six weeks after the attacks.

Some of us sitting here today contributed to the PATRIOT Act. We worked together in a bipartisan manner, and with common resolve to craft a bill that we hoped would make us safer as a Nation. Freedom and security are always in tension in our society, but we tried our best to strike the right balance. Now it is time to return to this discussion to assess what aspects we got right and what modifications need to be made.

I negotiated many of the provisions of the PATRIOT Act and am gratified to have been able to add several checks and balances that were not in the initial proposal. The White House reneged on some agreements that we had mutually reached to strike a better balance on some of the PATRIOT Act's provisions. It is also true that additional checks and balances that I and others sought, had the White House agreed to them, would have yielded the same benefits to our law enforcement efforts, but with greater accountability and less opportunity for abuse. In the final negotiating session, former House Majority Leader Dick Armey and I insisted that we add a sunset for certain governmental powers that have great potential to affect the civil liberties of the American people. That sunset provision is the reason we are here today. It ensured that we would revisit the PATRIOT Act and shine some sunlight on how it has been implemented.

As we all know, the vast majority of the provisions of the PATRIOT Act are not subject to sunset. Of the handful that will expire at the end of the year, some are non-controversial and can be renewed with little or no modification. Others require greater scrutiny. For example, many of us have expressed concerns with the business records subpoena power in section 215, and its implications for libraries and booksellers. I have cosponsored legislation, introduced by Senator Feingold, that addresses this provision.

Before we rush to renew any controversial powers created by the PATRIOT Act, we need to understand how these powers have been used, and whether they have been effective. A few weeks ago, we celebrated the first National Sunshine Week with a hearing on open government and bipartisan calls for responsiveness and accountability. We should carry that theme into this process of oversight and legislating.

We should also bear in mind the 9/11 Commission's counsel about the PATRIOT Act. They wrote, "The burden of proof for retaining a particular governmental power should be on the Executive, to explain (a) that the power actually materially enhances security, and (b) that there is adequate supervision of the executive's use of the powers to ensure protection of civil liberties."

We are in a new Congress with a new Chairman of this Committee. Chairman Specter has a distinguished record as a steadfast advocate and practitioner of meaningful oversight. We have before us a new Attorney General who has pledged to work with us on a number of issues, including the PATRIOT Act. The American people deserve to be

represented by a Congress that takes its oversight responsibilities seriously, just as they deserve to see federal agencies cooperate with Congress. The breakdown of cooperation following passage of the PATRIOT Act has fostered distrust. We can change that by working together to achieve the right balance in our anti-terrorism laws, and then by allowing appropriate sunshine to illuminate the ways those laws are being used.

I just said that the new Chairman supports vigorous oversight. I am pleased that he has agreed to hold hearings on a number of important issues that fall under this Committee's jurisdiction. We will hold another hearing on the PATRIOT Act next month, to hear the views of experts from outside the government. Later this month, the Committee will hold a hearing - the first of several, I hope -- to focus attention on the data brokering industry and its implications for individual privacy and government accountability. And finally, our new Chairman has expressed serious interest in holding a hearing that I have been requesting for more than a year, to examine the FBI's foreign language translation program. We are working together to schedule that event.

We have heard over and over again that there have been no abuses as a result of the PATRIOT Act. But it is difficult, if not impossible, to verify that claim when some of the most controversial surveillance powers in the PATRIOT Act operate under a cloak of secrecy. We know the government is using its surveillance powers under the Foreign Intelligence Surveillance Act more than ever, but everything else about FISA is secret. This difficulty in assessing PATRIOT's impact on civil liberties has been exacerbated greatly by the Administration's obstruction of legitimate oversight efforts.

Whether or not there have been abuses under the PATRIOT Act, the unchecked growth of secret surveillance powers and technologies with no real oversight by the Congress or the courts has resulted in clear abuses by the Executive Branch. We have seen secret arrests and secret hearings of hundreds of people for the first time in U.S. history; detentions without charges and denial of access to counsel; misapplication of the material witness statute as a sort of general preventive detention law; discriminatory targeting of Arabs and Muslims; selective enforcement of the immigration laws; and the documented mistreatment of aliens held on immigration charges. Such abuses harm our national security as well as civil liberties because they serve as recruiting posters for terrorists, intimidate American communities from cooperating with law enforcement agencies and, by misusing limited anti-terrorism resources, make it more likely that real terrorists will escape detection.

Beyond this, the Administration has used brutal and degrading interrogation techniques against detainees in Afghanistan, Iraq, and Guantanamo Bay that run counter to past American military traditions, practices and ideals. Information about these disgraceful acts continues to trickle out in large part because of a persistent press and the results of a lawsuit filed under the Freedom of Information Act, or FOIA. Meanwhile, the Administration continues to stonewall, releasing information only when it is self-serving to do so, or when ordered to do so by the courts.

The Department of Justice has been particularly obstinate in its refusal to release information. Justice Louis Brandeis said, "Sunshine is the best disinfectant." But despite its claims that the Department of Justice redacts information only to protect national security and privacy, DOJ held back a considerable amount of potentially embarrassing information when it released FBI email traffic last December in response to the FOIA lawsuit. Some of these documents are several pages in length, yet are entirely redacted.

Two weeks ago, Senator Levin released a more complete version of one of these documents. What DOJ had originally refused to release were conclusions by federal agents at Guantanamo that the military interrogations were producing intelligence information that was "suspect as best." DOJ also redacted an assertion that the interrogation practices could undermine future military trials. Finally, DOJ blacked out a segment of the memo describing how its own Criminal Division lawyers took their concerns about the harsh interrogation techniques at Guantanamo to the Pentagon's General Counsel. Why would this piece of information be redacted? Perhaps because the Pentagon's General Counsel, William J. Haynes, is currently a nominee to the Fourth Circuit Court of Appeals. Mr. Haynes's nomination has become embroiled over concerns that he was deeply involved in developing the military's interrogation policies.

Finally, in yet another example of abuse, recent press reports provide disturbing details about how the Administration embraced the use of extraordinary rendition after the 9/11 attacks. Several press reports detail the CIA's use of jets to secretly transfer detainees to countries around the world, where it is likely that they will be tortured.

In defending the Administration's rendition policy, the President said in his March 17 press conference that, "we seek assurances that nobody will be tortured when we render a person back to their home country." This statement came only 10 days after Attorney General Gonzales acknowledged that we "can't fully control" what happens to detainees transferred to other nations, and added that he does not know whether countries have always complied with their promises.

I have introduced legislation that would end this abhorrent practice without expanding our obligations under the Convention Against Torture. It simply closes the loopholes in the Convention's implementing legislation, thus ensuring that we honor our commitment not to outsource torture to other countries.

These cases of overreaching and abuse trickled down from policy decisions that were made at the top. There will always be scandals and tragedies in a nation's history. What makes America special is that we do not hide from our mistakes; we investigate them, learn from them, and make sure they do not happen again. When necessary, we change our laws to reflect the lessons we have learned. The spirit of openness and accountability are what bring us here today to reconsider portions the PATRIOT Act. I welcome our witnesses and look forward to a fruitful discussion.