

Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
May 10, 2005

STATEMENT OF SENATOR PATRICK LEAHY,
RANKING MEMBER, COMMITTEE ON THE JUDICIARY
HEARING ON CONTINUED OVERSIGHT OF THE USA PATRIOT ACT
MAY 10, 2005

Today's hearing continues this Committee's oversight and review of the USA PATRIOT Act. We heard from Attorney General Gonzales and FBI Director Mueller at our hearing on April 5th. We heard further from the Department of Justice at a classified briefing on April 12th. This morning, we will hear from several non-government witnesses about their views of the PATRIOT Act.

It is interesting to note that our counterparts in the other body are also holding another hearing this morning on the PATRIOT Act. In addition, the Senate Select Committee on Intelligence has held a series of hearings on the PATRIOT Act. All told, the enhanced surveillance provisions of the PATRIOT Act have been the focus of more than a dozen hearings this year alone, and more during the last Congress.

It is no mystery why the Republican-controlled Congress, which has all but abdicated its oversight responsibilities in many other areas, has devoted so much attention to the PATRIOT Act. In the final negotiating session on the PATRIOT Act, former House Majority Leader Dick Armey and I insisted on adding a sunset provisions for certain governmental powers that have great potential to affect the civil liberties of the American people. These sunset conditions are the reason we are here today. It is the reason our colleagues on other committees are revisiting the PATRIOT Act. And it explains why we are finally getting some answers from the Department of Justice, although the fact that Chairman Specter takes his oversight responsibilities as seriously as he does has also helped a great deal.

The PATRIOT Act is not a perfect piece of legislation, if such a thing even exists. I said as much when we passed it, just six weeks after the 9/11 attacks. In negotiations with the Administration, I did my best to strike a reasonable balance between the urgent need to address the threat of terrorism, and the need to protect our constitutional freedoms. I was able to add many checks and balances that were absent from the Administration's draft, along with provisions to address such other concerns as border security and the FBI's translator problem. Other members of this Committee and in Congress were able to include improvements as well. I made clear that congressional oversight would be especially important for these new government powers. I always knew, and noted at the time, that we in Congress would have to revisit these issues when the immediate crisis, and the emotional aftermath of the crisis, had receded a bit.

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.

At our hearing in April, Attorney General Gonzales said he was open to any ideas that may be offered for improving these provisions. This was a refreshing departure from the combative stance of his predecessor, who spent hundreds of thousands of dollars of taxpayer money on a public relations campaign to stem criticism of the PATRIOT Act. Now, with the impending sunset less than eight months away, we need to move beyond the positioning rhetoric and focus on what really matters for the country and for the American people.

Legitimate concerns have been raised about various powers granted by the PATRIOT Act, not so much for how they have been used, but for how they could be used, and for cloak of secrecy under which they operate. Since September 11th, Americans have been asked to accept restrictions on their liberties; they deserve to know what they are getting in return. Until then, this Senator will not ask the American people to give up anything more.

Many of us on the Committee have been working on ways to improve the PATRIOT Act, and a number of proposals are already on the table. For example, Senator Durbin, Senator Craig, and Senator Feingold have proposed corrective legislation, and I commend them for their leadership and hard work.

One thing that I hope we can all agree upon is the need to clarify the procedures for compelling the production of records from third parties in terrorism and intelligence investigations. Last September, Judge Victor Marrero in the Southern District of New York enjoined the FBI from issuing certain "national security letters," both because they bar or substantially deter judicial review, and because their permanent ban on disclosure operates as a prior restraint on speech in violation of the First Amendment.

The invalidated provision first passed Congress nearly 20 years ago, as part of the Electronic Communications Privacy Act, or ECPA. I was proud to be the primary Senate sponsor of that law, although the national security letter provision was added by a Republican member of the Intelligence Committee. Since then the provision has been amended, or relevant definitions within it have been amended, at least three times since 1986 -- most drastically by the PATRIOT Act. It was only after these amendments to the law that Judge Marrero raised issues about its expanded use by the FBI and the Department of Justice. These are legitimate issues, in my view, but whatever we may think of Judge Marrero's decision, we need to address it promptly, before the constitutional defects he identified jeopardize the FBI's anti-terrorism mission. At the same time, it may make sense to require approval at the highest levels of the Department before a national security demand may be made for certain highly confidential materials such as library, bookseller, and medical records.

I also hope we can reach consensus to modify section 206 of the PATRIOT Act, which authorized the use of "roving wiretaps" in foreign intelligence investigations. I supported the inclusion of this authority in the PATRIOT Act in order to bring FISA into line with criminal procedures. As I said at the time, "This is the kind of change that has a compelling justification, because it recognizes the ease with which targets of investigations can evade surveillance by changing phones." In fact, the original roving wiretap authority for use in criminal investigations was enacted as part of ECPA. But while the need for roving wiretap authority is undisputed, the language of section 206, as amended by later legislation, is troubling in its ambiguity and clearly could be improved.

Much has been written about the pen register provisions of the PATRIOT Act. Long before September 11, 2001, I supported modifying the pen register and trap and trace device laws in three respects: first, to give nationwide effect to pen register and trap and trace orders; second, to clarify that such orders can cover computer transmissions and not just telephone lines; and third, to update the judicial review procedure which, unlike any other area in criminal procedure, bars the exercise of judicial discretion in reviewing the justification for the order. The PATRIOT Act modified the pen register and trap and trace laws in the first two respects, but did not allow for meaningful judicial review. The impending sunset of section 214 of the PATRIOT Act gives us another opportunity to consider this essential guard against abuse.

These are just some of the matters before us as we revisit the PATRIOT Act. We will also hear today from David Cole, an authority on the immigration provisions that were included in the PATRIOT Act. It is regrettable that at the same time our committee is conducting this careful review of the PATRIOT Act, the Republican conferees on the supplemental appropriations bill agreed to include the REAL ID Act's expansion of the terrorism-related grounds for inadmissibility and deportability that we negotiated in the PATRIOT Act. This committee never had the opportunity to consider those expansions, and none of the Democratic conferees on the supplemental bill were even included in conference negotiations.

Earlier this year, 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.

The sunset provisions of the PATRIOT Act ensured that we would revisit that law and shine some sunlight on how it has been implemented. Dick Armey and I were afraid that the Administration would not tell the American people what was going on, as it turned out, we were right.

I believe that many of us would consider reauthorizing the expiring PATRIOT Act powers, with some modifications, but there must be mechanisms in place to guarantee that the government remains accountable for the use of those powers. Judicial review, public reporting, congressional oversight and sunsets -- all offer a window into the government's use of its powers, and all provide essential protection against abuse.

I welcome all our witnesses and look forward to making progress on these important issues.