Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
June 21, 2007

STATEMENT OF SENATOR PATRICK LEAHY,
CHAIRMAN, SENATE JUDICIARY COMMITTEE,
ON AUTHORIZATION FOR SUBPOENAS
IN CONNECTION WITH INVESTIGATION OF THE LEGAL BASIS
FOR THE WARRANTLESS ELECTRONIC SURVEILLANCE PROGRAM
EXECUTIVE BUSINESS MEETING
JUNE 21, 2007

Today I will ask the Committee to provide the authorization to issue subpoenas for documents relating to the National Security Agency's warrantless domestic electronic surveillance program. This is an authorization I first circulated two weeks ago and that was formally held over by Senator Kyl last week.

For more than five years this Administration intercepted conversations of Americans in the United States without obtaining court orders under the Foreign Intelligence Surveillance Act (FISA). This program became public in December 2005 and, soon after, the President confirmed its existence. Since then, this Committee has sought information about the authorization of and legal justification for this program time and again - in letters, at hearings, and in written questions. Yet, this Administration has rebuffed all requests. Last month, Senator Specter and I wrote again to Attorney General Gonzales requesting these documents. We have still received no documents and no explanation.

This stonewalling is unacceptable and it must end. If the Administration will not carry out its responsibility to provide information to this Committee without a subpoena, we will issue one. If we do not, we are letting this Administration decide whether and how the Congress will do its job. The Judiciary Committee is charged with overseeing and legislating on constitutional protections and the civil liberties of Americans, and the warrantless electronic surveillance program directly impacts these responsibilities.

Instead of responses, our attempts to get straight answers from the Administration have met with stubborn refusals of our legitimate oversight requests. This is information we need, we should have, and whose production is long overdue. We are asking not for intimate operational details but for the legal justifications and analysis underlying these programs that affect the rights of every American.

When we held our first hearing with Attorney General Gonzales about this program, on February 6, 2006, he refused to answer simple questions or discuss anything more than "those facts the

President has publicly confirmed." He defended the program as "necessary" and "very narrowly tailored," but he refused to back up these self-serving conclusions. He asserted that the Authorization for the Use of Military Force passed after September 11 authorized this warrantless wiretapping of Americans, yet would not even tell me when the Justice Department had come up with this particular legal justification. This pattern of evasion has continued with every hearing, every letter, and every written response.

Last month, we heard deeply troubling testimony from former Deputy Attorney General James Comey about a dispute over the legality of the warrantless electronic surveillance program. When the senior Department of Justice leadership refused to certify the legality of the program, the White House - including the then-Counsel to the President, Mr. Gonzales - attempted to strong-arm an ailing Attorney General Ashcroft in his hospital bed. When that did not work, they decided simply to ignore the law and authorize the program anyway. Only the prospect of a mass resignation of virtually every senior officer in the Department of Justice, including the FBI Director, caused the President to relent.

Yet, when Attorney General Gonzales was asked at that February 6, 2006, hearing before this Committee whether senior Justice Department officials expressed reservations about the NSA warrantless surveillance program, he responded, "I do not believe that these DOJ officials . . . had concerns about this program." The Committee and the American people deserve better.

There is no legitimate argument for withholding these materials from this Committee. There is abundant precedent for providing Executive Branch legal analysis to the Congress, particularly to this Committee. Indeed, volumes upon volumes of Attorney General and Office of Legal Counsel legal opinions have even been made public. Sometimes in previous Administrations a particularly sensitive subject has resulted in an accommodation between branches on the manner in which it was shared. But this Administration has no policy of accommodation. Its policy is to deny and to stonewall. Neither is the fact that the matters involve classified information a reason to withhold these legal documents. Congress receives sensitive classified information regularly.

Why has this Administration been so steadfast in its refusal? Deputy Attorney General Comey's account suggests that some of these documents would reveal an Administration perfectly willing to ignore the law. Is that what they are hiding?

When the Department of Justice's own Office of Professional Responsibility (OPR) began an internal investigation into the conduct of Department of Justice attorneys who approved this program, Attorney General Gonzales and the White House shut them down by denying them the necessary clearances. The head of OPR noted when he was forced to stand down that in its 31-year history OPR had never before been prevented from pursuing an investigation. Senators Durbin, Kennedy, Feingold, and Whitehouse have diligently sought documents on this series of events many times, but, again, have received no response.

Finally, I will note that this Administration is now asking Congress to make sweeping changes to FISA - a crucial national security authority over which this Committee has jurisdiction. The White House wants us to agree to far-reaching changes to that authority, but the Administration stubbornly refuses to let us know how it interprets the current law and the perceived flaws that led it to operate a program outside of the process established by FISA for more than five years.

This legal analysis is information the Committee must have in order to make informed legislative decisions. As the Supreme Court said in McGrain v. Daugherty, "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change."

Whatever the reason for the stonewalling, this Committee has stumbled in the dark for too long, attempting to do its job without the information it needs. We need this information to carry out our responsibilities under the Constitution. Unfortunately, it has become clear that we will not get it without a subpoena. I urge the adoption of the subpoena authorization.

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Statement of Senator Patrick Leahy
Chairman, Committee on the Judiciary
On the Patent Reform Act of 2007, S. 1145
Executive Business Meeting
June 21, 2007

The Committee considers today a bill that Senator Hatch and I, along with other Members of this panel have worked on for several years now - S. 1145, the Patent Reform Act. This bill, which Senator Hatch and I introduced in April, along with Senators Schumer, Cornyn and Whitehouse, incorporates many of the suggestions that we have heard since we introduced a similar version, S. 3818, last Congress.

It has been more than 50 years since Congress last significantly updated the patent system, and in the intervening decades, our economy has changed dramatically. Our economy is no longer defined by assembly lines and brick-and-mortar production; we are living in the Information Age, and the products and processes that are being patented are changing as quickly as the times themselves.

The Senate Judiciary Committee held four hearings on patent reform in the 109th Congress, and we have held two more this year. I thank the Members of the Committee who participated in those hearings, as we delved into the many issues that we must address in reforming our patent system. I know that the hearings themselves have been dwarfed by our many formal meetings and informal conversations with the myriad participants in the patent system. We have all had the opportunity - indeed, we could scarcely avoid it - to hear from major industry players, universities and research institutions, the Patent and Trademark Office itself, the life sciences community, and the small inventors. That input has been invaluable in helping me to understand how the patent system really works - and how it does not.

At the June 6th hearing, I said that it was time to focus the debate on the specifics as we moved closer to the finish line. Since then, I have heard many suggestions for specific changes from Members, some of which are included in the Substitute Amendment we will consider today. There are more changes to come as we continue to work through this bill; I would highlight the progress we are making on both damages and post grant review, and I am confident those issues can be resolved in ways that should make everyone comfortable.

Given the depth and complexity of the subject, and the number of amendments filed, I do not expect the Committee will complete its work on this bill today. I am also keenly aware of the absence of several of the Members of the Committee, and of the value that they will bring to the process when they return. It is imperative, however, that we build on the good progress we have made and move to complete legislation that will create the landscape necessary so that American innovators can flourish. I look forward to beginning the process of working together on this important legislation until it is a product we can endorse collectively.

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