

Statement of

# The Honorable Patrick Leahy

United States Senator  
Vermont  
September 25, 2007

STATEMENT OF SEN. PATRICK LEAHY,  
CHAIRMAN, SENATE JUDICIARY COMMITTEE  
HEARING ON "STRENGTHENING FISA: DOES THE PROTECT AMERICA ACT  
PROTECT AMERICANS' CIVIL LIBERTIES AND ENHANCE SECURITY?"  
SEPTEMBER 25, 2007

The Committee holds this hearing today to consider the Protect America Act, passed in haste in early August.

Congressional leaders went to extraordinary lengths earlier this summer to provide the flexibility Director McConnell said was needed to fix a legal problem with surveillance of targets overseas. I supported a change to FISA, as I have done several times since 9/11. The Rockefeller-Levin legislative proposal that many of us voted for would have eliminated the need to get individual probable cause determinations for surveillance of overseas targets. That bill addressed the concern that had been raised by an opinion of the FISA Court, and it satisfied what the Administration said was needed in that time of heightened concern. Yet, Director McConnell and the Administration rejected that legislation. We need to find out why.

I do not know who Director McConnell is referring to in his written testimony when he says that he has "heard a number of individuals . . . assert that there really was no substantial threat to our nation." I trust that he is not referring to any Senator serving on this Committee. Let me be clear: Every single Senator understands the grave threats to our Nation. Every Senator wants us to be able to conduct surveillance effectively. Every Senator on this Committee voted to give him the flexibility he said he needed. I hope we will not hear anymore irresponsible rhetoric about congressional inquiries risking Americans' safety. We all want Americans to be safe. Our job is to protect Americans' security and Americans' rights.

The Protect American Act provides sweeping new powers to the Government to engage in surveillance, without a warrant, of international calls to and from the United States and potentially much more. It does this, in the view of many, without providing any meaningful check or protection for the privacy and civil liberties of the Americans who are on those calls. We are asked to trust that the Government will not misuse its authority. When the issue is giving muscular new powers to government, "just trust us" is not enough.

Fortunately, those temporary provisions contain a sunset. We meet today to consider real issues and concerns with this legislation. Let us not engage in the high-pitched rhetoric that plays on people's fears and prevents real progress.

The FISA Court has played an important role ever since the Foreign Intelligence Surveillance Act was passed to provide a meaningful check on the actions of our Government as it engaged in surveillance of Americans. Unfortunately, the FISA Court was cut out of any meaningful role in overseeing surveillance of Americans in the Protect America Act.

The Rockefeller-Levin measure by contrast would have allowed the "basket" surveillance orders that the Administration says are needed, with no individual probable cause determinations, but it had the FISA Court issuing those orders to communications carriers after reviewing the Administration's procedures. The Protect America Act requires U.S. telecommunications carriers to assist with surveillance just on the say-so of the Attorney General and the Director of National Intelligence. That is a mistake; it is an invitation to abuse.

I look forward to hearing from Director McConnell on what he believes the problems are with a role for the FISA Court in issuing orders, and how we can create the necessary authority to include the appropriate checks and balances.

The problem facing our intelligence agencies is targeting communications overseas. We want them to be able to intercept calls between two people overseas with a minimum of difficulty. What changes the equation and raises the stakes is that the people may be innocent Americans, or they may be talking to innocent people here in the United States. International communications include those of businesspeople, tourists, and even the families of our troops overseas. We can give the Government flexibility it needs to conduct surveillance of foreign targets, while doing a better job protecting the privacy of innocent Americans.

The Protect America Act provides no meaningful check by the FISA Court or the Congress. It does not even require the Government to have its own internal procedures for protecting the privacy of these Americans. The alternative bill would have required internal procedures and an Inspector General audit. I would like to know why Director McConnell rejected that check.

In addition, the Protect America Act contains language that appears to go far beyond what the Administration said it needed. It redefines "electronic surveillance" in a way that has expansive implications, but was not necessary to accomplish the Administration's stated objectives. It has language in many places that, at the very least, is inscrutable and could be read to allow much broader surveillance than the Administration has acknowledged or, I hope, intends. If this was unintentional, let us fix it. If it was not, then we need to evaluate what was really intended and why.

I know the skilled and dedicated employees of our intelligence agencies want to protect our country. But if our history has taught us anything, it is that the Government can not and should not be left to police itself when it comes to the secret surveillance of Americans. The Founders knew it. The Congress that passed the Foreign Intelligence Surveillance Act knew it. I hope this hearing will help us institute the proper protections to safeguard our security and our valued freedoms.

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