

Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
October 31, 2007

STATEMENT OF CHAIRMAN PATRICK LEAHY,
SENATE JUDICIARY COMMITTEE,
HEARING ON
"FISA AMENDMENTS: HOW TO PROTECT AMERICANS' SECURITY AND PRIVACY
AND PRESERVE THE RULE OF LAW AND GOVERNMENT ACCOUNTABILITY"
OCTOBER 31, 2007

The Foreign Intelligence Surveillance Act - FISA - is intended to protect both our national security and the privacy and civil liberties of Americans.

Changes to that law must be considered carefully and openly - not eviscerated in secret Administration interpretations or compromised through fear or intimidation. The so-called Protect America Act, passed just before the summer recess, was an example of the worst way to consider changes to FISA. It was hurriedly passed under intense, partisan pressure from the Administration. It provides sweeping new powers to the government to engage in surveillance - without warrants - of international calls to and from the United States involving Americans, and it provided no meaningful protection for the privacy and civil liberties of the Americans who are on those calls.

Fortunately, the Protect America Act will expire early next year. This is the Committee's second hearing to inform our consideration of possible legislation to take the place of that flawed Act. Of course we must accommodate legitimate national security concerns and the need for flexibility in surveillance of overseas targets, but Congress should do that in a way that protects the civil liberties of Americans.

I commend the House Committees and the Senate Select Committees on Intelligence for seeking to incorporate the better ideas from our work this summer into their current legislative proposals. The House of Representatives is considering the "RESTORE Act," which appears to take a fair and balanced approach -- allowing flexibility for the Intelligence Community while providing oversight and protection for Americans' privacy. The Senate Select Committee on Intelligence has also reported a bill that makes improvements to the current temporary law. Increasing the role of the FISA Court and oversight by the Inspector General and the Congress are matters we should have incorporated this summer.

At the outset I should acknowledge the grave concern I have with one aspect of S.2248. It seeks to grant immunity - or, as Senator Dodd has called it, "amnesty" -- for telecommunications carriers for their warrantless surveillance activities from 2001 through this summer, which would seem to be contrary to FISA and in violation of the privacy rights of Americans.

Before even considering such a proposal, Senator Specter and I have always been clear with the Administration that we would need the legal justifications, authorizations, and other documents that show the basis for the actions of the government and the carriers. Since the existence of the President's secret wiretapping program became public in December 2005, this Committee has sought that relevant information through oral and written requests and by conducting oversight hearings. After our repeated requests did not yield the information the Committee requested, we authorized and issued subpoenas for documents related to the legal justification for the President's program.

Finally, this week, the Administration has belatedly responded. Senators on the Committee and designated staff have begun to receive access to legal opinions and documents concerning authorization and reauthorization of the program. This is a significant step, though long overdue.

I am considering carefully what we are learning from these materials. The Congress should be careful not to provide an incentive for future unlawful corporate activity by giving the impression that if corporations violate the law and disregard the rights of Americans, they will be given an after-the-fact free pass. If Americans' privacy is to mean anything, and if the rule of law is to be respected, that would be the wrong result.

A retroactive grant of immunity or preemption of state regulators does more than let the carriers off the hook. Immunity is designed to shield this Administration from any accountability for conducting surveillance outside the law. It could make it impossible for Americans whose privacy has been violated illegally to seek meaningful redress.

The lawsuits that would be dismissed as a result of such a grant of immunity are perhaps the only avenue that exists for an outside review of the government's program and honest assessment of its legal arguments. That kind of assessment is critical if our government is to be held accountable. One of my chief inquiries before deciding to support any legislation on this subject is whether it will foster government accountability. Anyone who proposes letting the telecommunications carriers off the hook or preempting state authorities has a responsibility to propose a manner to test the legality of the government's program and to determine whether it did harm to the rights of Americans.

Safeguarding the new powers we are giving to our government is far more than just an academic exercise. The FISA law itself is testament to the fact that unchecked government power leads to abuse. The FISA was enacted in the wake of earlier scandals, when the rights and privacy of Americans were trampled while no one was watching. We in the Senate, and on this Committee, have a solemn responsibility to hundreds of millions of our fellow citizens. Because the American people's rights, freedom and privacy are easily lost; but once lost, they are difficult to win back.

I look forward to the testimony of our witnesses and thank them for appearing.

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