

Statement of

The Honorable Russ Feingold

United States Senator
Wisconsin
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Senate Judiciary Committee
Hearing on
"Reauthorizing the USA PATRIOT Act: Ensuring Liberty and Security"
Wednesday, September 23, 2009

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At the end of this year, three provisions of the USA PATRIOT Act will sunset unless Congress acts to reauthorize them. In my view, Congress should take this opportunity to revisit not just those three provisions, but rather a broad range of surveillance laws enacted in recent years to assess what additional safeguards are needed.

That is why I have introduced the JUSTICE Act, S. 1686, along with Senator Durbin and eight other Senators. It takes a comprehensive approach to fixing the USA PATRIOT Act and the FISA Amendments Act, once and for all. It permits the government to conduct necessary surveillance, but within a framework of accountability and oversight. It ensures both that our government has the tools to keep us safe, and that the privacy and civil liberties of innocent Americans will be protected. Because as the title of this hearing suggests, we can and must do both. These are not mutually exclusive goals.

Indeed, the Department of Justice just last week acknowledged as much in a letter setting forth its views on Patriot Act reauthorization. The Department said: "We also are aware that Members of Congress may propose modifications to provide additional protection for the privacy of law abiding Americans. As President Obama said in his speech at the National Archives on May 21, 2009, 'We are indeed at war with al Qaeda and its affiliates. We do need to update our institutions to deal with this threat. But we must do so with an abiding confidence in the rule of law and due process; in checks and balances and accountability.' Therefore, the Administration is willing to consider such ideas, provided that they do not undermine the effectiveness of these important authorities."

I welcome the administration's openness to potential reforms of the Patriot Act and look forward to working together as the reauthorization process moves forward this fall.

But I remain concerned that critical information about the implementation of the Patriot Act has not been made public - information that I believe would have a significant impact on the debate. During the debate on the Protect America Act and the FISA Amendments Acts in 2007 and 2008, critical legal and factual information remained unknown to the public and to most members of Congress - information that was certainly relevant to the debate and might even have made a

difference in votes. And during the last Patriot Act reauthorization debate in 2005, a great deal of implementation information remained classified. This time around, we must find a way to have an open and honest debate about the nature of these government powers, while protecting national security secrets.

As a first step, the Justice Department's letter made public for the first time that the so-called "lone wolf" authority - one of the three expiring provisions - has never been used. That was a good start, since this is a key fact as we consider whether to extend that power. But there also is information about the use of Section 215 orders that I believe Congress and the American people deserve to know. I do not underestimate the importance of protecting our national security secrets. But before we decide whether and in what form to extend these authorities, Congress and the American people deserve to know at least basic information about how they have been used. So I hope that the administration will consider seriously making public some additional basic information, particularly with respect to the use of Section 215 orders.

Mr. Chairman, there can be no question that statutory changes to our surveillance laws are necessary. Since the Patriot Act was first passed in 2001, we have learned important lessons, and perhaps the most important of all is that Congress cannot grant the government overly broad authorities and just keep its fingers crossed that they won't be misused, or interpreted by aggressive executive branch lawyers in as broad a way as possible. Congress has the responsibility to put appropriate limits on government authorities - limits that allow agents to actively pursue criminals, terrorists and spies, but that also protect the privacy of innocent Americans.

This lesson was most clear in the context of National Security Letters. In reports issued in 2007 and 2008, the Department of Justice Inspector General carefully documented rampant misuse and abuse of the National Security Letter (NSL) authority by the FBI. The Inspector General found - as he put it - "widespread and serious misuse of the FBI's national security letter authorities. In many instances, the FBI's misuse of national security letters violated NSL statutes, Attorney General Guidelines, or the FBI's own internal policies." After those Inspector General reports, there can no longer be any doubt that granting overbroad authority leads to abuses. The FBI's apparently lax attitude and in some cases grave misuse of these potentially very intrusive authorities is attributable in no small part to the USA PATRIOT Act. That flawed legislation greatly expanded the NSL authorities, essentially granting the FBI a blank check to obtain some very sensitive records about Americans, including people not under any suspicion of wrongdoing, without judicial approval. Congress gave the FBI very few rules to follow, and should not be all that surprised at the result.

This time around, we have the opportunity to get this right. That is why we should look at a range of issues and not just the three provisions that expire. I look forward to working with every member of this committee to that end.