

Statement of
The Honorable Patrick Leahy

United States Senator
Vermont
September 23, 2009

Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
On "Reauthorizing The USA PATRIOT Act: Ensuring Liberty And Security"
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After September 11, I worked to ensure that the USA PATRIOT Act ("Patriot Act") included oversight to make certain that the increased information-gathering powers of the Government, which could sweep in U.S. citizens, would be implemented appropriately. Working with then House Majority Leader, Republican Dick Armey, we included sunsets for some of the provisions with the greatest potential to directly affect Americans.

We debated the reauthorization of the Patriot Act for several months in 2005 and 2006. I again worked to protect the civil liberties and constitutional rights of Americans while providing the Government with the tools it needs to aggressively pursue those who would do us harm. Unfortunately, the reauthorization bill of 2006 lacked sufficient constitutional protections against the vast authorities it granted to the Government. I worked with Senator Specter to expand public transparency and congressional oversight, and included new sunsets in that bill. In the end, however, several important checks and balances were not included in the final version, and so I voted against it.

With three provisions expiring on December 31, 2009, we have an opportunity to consider the Patriot Act once again. We have another chance to get it right. The provisions slated to expire at the end of this year include the authorization for roving wiretaps, the "lone wolf" measure, and orders for tangible things, commonly referred to as Section 215 of the 2001 Patriot Act, or the "library records" provision.

In March, I sent a letter to Attorney General Holder requesting the administration's views on these expiring provisions. I reiterated that request at a Judiciary Committee oversight hearing in June. I recently received a letter from the Department of Justice urging Congress to extend the expiring authorities, but also noting the President's and the Attorney General's emphasis on accountability and checks and balances, and their willingness to consider additional ideas. That openness is a welcome change from the previous administration, and I look forward to exploring it today.

Yesterday, I introduced a bill with Senators Cardin and Kaufman that aims to strike the kind of balance the administration urges. It will extend the authorization of the three expiring provisions with new sunsets. It adds checks and balances by increasing judicial review of Government powers that capture information on U.S. citizens. It expands congressional oversight and public

reporting on the use of intrusive surveillance measures. The Leahy-Cardin-Kaufman bill mandates new audits by the Department of Justice Office of Inspector General on the use of Section 215 orders and NSLs. We all appreciate the earlier audits conducted by Inspector General Glenn Fine and the improvements to which they have led. In developing our proposal, I have consulted with Senators Feingold and Durbin, who introduced a more expansive bill last week, and, with their encouragement, borrowed a few accountability provisions from their proposal. I have also shared early drafts of our proposal with Senator Feinstein, the chair of the Select Committee on Intelligence.

I have long been concerned over the issuance and oversight of National Security Letters (NSLs). They do not require approval by a court, grand jury, or prosecutor. They are issued in secret, with recipients silenced, under penalty of law. Yet NSLs allow the Government to collect sensitive information, such as personal financial records. As Congress expanded the NSL authority in recent years, I raised concerns about how the FBI handles the information it collects on Americans with no real limits imposed by Congress. We now know that the NSL authority was significantly misused. In 2008 Inspector General Fine issued a report on the FBI's use of NSLs revealing serious over-collection of information and abuse of the NSL authority.

In response to these concerns, our bill would impose higher standards on the issuance of NSLs and improve judicial oversight of their use. The bill also addresses the constitutional deficiency recently identified by the Second Circuit Court of Appeals, which found that the nondisclosure, or "gag orders," issued under NSLs infringe constitutional rights, as I have long maintained. The bill establishes a procedure giving the recipient of an NSL greater ability to challenge a gag order, eliminates presumptions that allow the Government to ensure itself of victory in defending such orders, and imposes a renewable one-year time limit on these orders.

The Leahy-Cardin-Kaufman bill also adds a sunset on NSLs, to guarantee that Congress will continue to examine the use of this authority. I introduced a bill in 2006, after the most recent Patriot Act reauthorization, to impose a sunset on NSLs. This sunset provision, combined with comprehensive audits, will help to hold the FBI accountable in its use of this authority.

The power of the Government to collect records for tangible things under Section 215 of the original Patriot Act, commonly referred to as the "library records" provision, is another authority that I fought hard to reform during the last reauthorization. The Leahy-Cardin-Kaufman bill adopts the appropriate constitutional standard that I supported in 2006. The standard we propose eliminates the presumption in favor of the Government and, instead, requires the Government to show the connection between the items sought and a suspected terrorist or spy.

This bill would also establish more meaningful judicial review of Section 215 orders and the gag orders covering them. It repeals the requirement in current law that requires a recipient of a Section 215 nondisclosure order to wait for a full year before challenging that gag order. It also repeals the conclusive presumption in favor of the Government for such gag orders any time a high-level official certifies that disclosure of the order would endanger national security or interfere with diplomatic relations. These restraints on meaningful judicial review are unfair, unjustified, and completely unacceptable. I fought hard to keep these two provisions out of the 2006 reauthorization, but the Republican majority at that time insisted they be included.

The Leahy-Cardin-Kaufman bill also improves Government accountability through more transparent public reporting of the use of surveillance, and by requiring audits of how these vast authorities have been used since they were last reauthorized. At the insistence of several of us in the Senate, the 2006 reauthorization bill required reviews by the Justice Department's Inspector General of the use of Section 215 orders and NSLs. The Inspector General audits produced vital

information about misuse, weak data collection, and a host of other problems associated with the implementation of surveillance laws. FBI Director Mueller agreed with me at our oversight hearing last week that the Inspector General audits helped the FBI to improve procedures and curb abuses and that outside oversight was essential. I look forward to hearing from Inspector General Glenn Fine about the lessons he has learned from those reviews and about the importance of continued oversight.

This bill will strengthen court oversight of Section 215 orders by requiring court oversight of minimization procedures when information concerning a U.S. person is acquired, retained, or disseminated. Requiring FISA Court approval of minimization procedures would simply bring Section 215 orders in line with other FISA authorities -- such as wiretaps, physical searches, and pen register and trap and trace devices -- that already require FISA court approval of minimization procedures. This is another common sense modification to the law that was drafted in consultation with Senators Feingold and Durbin. If we are to allow personal information to be collected in secret, the court must be more involved in making sure the authorities are used responsibly and that Americans' information and personal privacy are protected.

Finally, this bill addresses concerns over the use of pen register or trap and trace devices ("pen/trap"). The bill raises the standard for pen/trap in the same manner as it raises the standard for Section 215 orders. The Government would be required to show that the information it seeks is both relevant to an investigation and connected to a suspected terrorist or spy. This section also requires court review of minimization procedures, which are not required under current law, and adds an Inspector General audit of the use of pen/trap that is modeled on the audits of Section 215 orders and NSLs.

I look forward to hearing from this distinguished panel of witnesses, and to working with the members of this Committee as we consider the important issues this reauthorization raises. We have no time to delay. I hope to turn to the issue at our Committee meeting on October 1, a week from tomorrow.

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